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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD RAMIREZ,

Defendant and Appellant.

C069700

(Super. Ct. No. 09F04168)

A jury convicted defendant Richard Ramirez of second degree murder and found he personally used a firearm as a previously convicted felon. (Pen. Code, §§ 187, subd. (a), former 12021, subd. (a)(1) (now 29800, Stats. 2010, ch. 711, § 6), and 12022.53, subds. (a), (b), (c), & (d).)¹ On appeal, defendant argues: (1) his second degree murder conviction should be reduced to voluntary manslaughter because the

¹ Undesignated statutory references are to the Penal Code.

evidence conclusively establishes he killed in heat of passion and in imperfect self-defense, (2) the prosecutor engaged in prejudicial misconduct by misstating the law regarding the order of deliberations for the jury and the definition of voluntary manslaughter, (3) the trial court erred in failing to instruct on defense of others, (4) the cumulative effect of the errors he alleges resulted in an unfair trial, (5) section 12022.53 - which imposes a 25-year-to-life prison term enhancement for personal use of a firearm in committing murder -- is facially unconstitutional under the Eighth Amendment's prohibition on cruel and unusual punishment, and (6) the abstract of judgment misstates the number of presentence custody credits to which he is entitled. After completion of the original briefing, we granted defendant's request to file a supplemental brief that (7) asserted CALCRIM No. 3472 misled the jury by stating a defendant who provokes a non-deadly fistfight is prevented from claiming self defense, (8) added to his original argument that the prosecutor's closing arguments confused the jury with a distorted definition of voluntary manslaughter, (9) added to his original argument that the trial court erred by refusing to instruct the jury on defense of others, and (10) reiterated the cumulative effect of the errors he alleges undermined his right to a fair trial.

We conclude the evidence did not compel a conviction for voluntary manslaughter based on heat of passion or imperfect self-defense. Any claim of misstatement by the prosecutor regarding the order of deliberations was forfeited for lack of a timely objection, and defendant did not receive ineffective assistance of counsel in this respect. Any misstatement by the People during closing argument regarding the definition of voluntary manslaughter was cured by the jury instructions given by the trial court. We also conclude any error in the trial court's refusal to instruct the jury on defense of others was harmless. We join with other courts in rejecting a challenge to the facial validity of section 12022.53. And we accept defendant's acknowledgment the abstract of judgment

has been corrected by the trial court. We conclude the jury instructions did not allow the jury to conclude a defendant who provokes a non-deadly fight thereby surrenders any claim of self-defense or imperfect self-defense. Finally, we reject defendant's assertion of cumulative prejudice.

Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Prosecution Evidence

On the afternoon of May 24, 2009, Monica Casas hosted a birthday party for her nephew Jeremiah Uribe. At least 30 guests — including defendant — attended the party at Casas's house on 18th Avenue in Sacramento. Defendant was known to the group as "Boxer" or "Box."

While the party was going on, Christopher Montejano arrived. Montejano, known as "Criminal," was angry and looking to fight defendant. Montejano called for defendant to come outside, but a few men at the party told Montejano there were children present and it was "not the time or the place" for a fight. Montejano got into a car and left.

Montejano returned and repeated his call for defendant to come outside to fight. Again, some men at the party told Montejano to resolve it at a later time, "old school style" with a fistfight. At some point, in the backyard, Daniel Uribe handed defendant a gun. Montejano left again.

Montejano returned a second time. This time he was wearing a child-size backpack. Montejano appeared to be "really aggravated" and was screaming. One of the party attendees, Marissa Almanza, was outside and observed Montejano pacing back and forth in front of the house, saying, "I will just . . . shoot you bitches and kids. I don't care." Montejano, however, did not display a gun, and eventually Almanza went

inside the house. Defendant came outside and told Montejano, “You want to talk, let’s talk.”

Defendant and Montejano walked together to a driveway approximately four houses from the birthday party. Several witnesses saw defendant and Montejano argue loudly. Michelle Griffin heard Montejano exclaim, “[G]o ahead shoot me, if you’re gonna shoot me, shoot me.” The men argued for 10 minutes, during which Montejano began to “try to unzip his backpack.” However, he “never got a chance to” do so because defendant pulled a gun out of his pants pocket and shot Montejano. Almanza looked over when she heard shots. She saw Montejano lying on his side in a fetal position, and then heard four more shots.

Defendant took the backpack off of Montejano and ran away. Eddie Sabala was able to see inside the backpack, which was unzipped. Inside, he saw a semi-automatic handgun.

A white Cadillac pulled up in front of where Montejano lay, and its occupants dragged his limp body into the car and drove Montejano to the University of California, Davis Medical Center’s emergency room. Montejano received several operations in an attempt to repair the damage caused by six gunshot wounds. Five days after the shooting, Montejano died due to gunshot wounds and the secondary effects of shock and pneumonia.

Three weeks after the shooting, defendant was arrested in Russellville, Arkansas. Arkansas State Police Officer Chris Goodman was on patrol when he observed a black sport-utility vehicle “jerked from the right lane to the left” in a way that “cut off” the car in front of the patrol vehicle. Officer Goodman initiated a traffic stop, looked at the three occupants of the vehicle, and recognized defendant from a photograph in a bulletin issued by the United States Marshall’s office. When the officer told defendant he was wanted

for murder, defendant answered that his name was Jose Manuel. After he was handcuffed and placed in Officer Goodman's vehicle, defendant said: "You got me. I'm Richard Ramirez."

Defense Evidence

The defense presented evidence that Angella Sandoval, Montejano's former girlfriend and mother of his child, got into a fight with Monica Cassas about a week before the shooting. The two women ended up hitting and pulling each other's hair. Defendant intervened by pulling Sandoval away by her hair. Sandoval retorted that she was going to tell Montejano about the incident. Defendant responded, "[F]uck you. Get out of my face." Although Sandoval did not inform Montejano, he nonetheless learned about the incident "[b]y word of mouth."

During the party, defendant told Almanza he would later box with Montejano at a park and that would "handle" the situation.

During a June 14, 2011, interview with Detective Derrick Greenwood, Sabala stated Montejano "was trying to, like reach and grab his gun, it was zipped up [inside the backpack], and, um, [defendant] pulled out his gun and shot him." However, Sabala also stated he saw the gun in the backpack only after defendant took it from Montejano as he lay on the ground.

DISCUSSION

I

Sufficiency of the Evidence for Second Degree Murder

Defendant challenges his conviction for second degree murder on grounds the "evidence presented at trial, at most, showed that Christopher Montejano was killed in the heat of passion or in imperfect self-defense." He argues the insufficiency of the

evidence for second degree murder requires his conviction to be reduced to voluntary manslaughter. We are not persuaded.

A.

Standard of Review

Ordinarily in reviewing a claim of evidentiary insufficiency, our “task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence — that is, evidence that is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317–320, 61 L.Ed.2d 560.) The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) ‘ “Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant’s guilt beyond a reasonable doubt. ‘ “If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.” ’ [Citations.]” ’ (*Id.* at pp. 792–793.)” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

Defendant's argument, however, differs significantly from the usual insufficiency of the evidence claim. In contrast to most insufficiency of the evidence claims in which defendants claim a lack of solid, credible evidence in support of their convictions, the claim in this case is based on the jury's failure to accept additional evidence that would have reduced defendant's second degree murder conviction to voluntary manslaughter. In other words, defendant's argument does not attempt to undermine the evidentiary value of testimony upon which his conviction is founded but to cast evidence not relied upon as so persuasive and uncontradicted the jury was required to accept it. In effect, defendant asks us to consider the evidentiary value of the testimony regarding circumstances that might have amounted to heat of passion or imperfect self-defense to conclude no jury could have failed to accept the evidence.

On this point, we find instructive the California Supreme Court's decision in *Jackson v. Superior Court* (1965) 62 Cal.2d 521, 529 (*Jackson*). In *Jackson*, the Supreme Court noted there *might* be a case in which evidence of heat of passion or self-defense is uncontradicted and subject to only one interpretation so that it precludes a murder conviction. (*Id.* at p. 528.) *Jackson* involved a petition for a writ to prevent the superior court from taking further action on an indictment for murder after a grand jury was presented with evidence the defendant shot the victim after the victim spent two hours denigrating the defendant's boyfriend and making sexually explicit suggestions. (*Id.* at pp. 524, 528.) Among other arguments presented to the Supreme Court, the defendant argued that "malice cannot be implied in this case because the evidence before the grand jury assertedly establishes as a matter of law either justifiable killing in self-defense or at least provocation adequate to reduce the crime to voluntary manslaughter." (*Id.* at p. 528.)

The *Jackson* court rejected the argument and explained: “As an abstract proposition, it is of course conceivable that a case of homicide could be presented to the grand jury in which evidence of adequate provocation or self-defense were both uncontradicted and sufficient as a matter of law; in that event it could reasonably be contended that an indictment for murder would be in excess of the grand jury’s power. But this is not such a case. Here petitioner’s theory is that the killing was ‘provoked by the decedent’s persistent and clearly-demonstrated determination to commit a sexual assault’ upon her, and she naturally emphasizes those aspects of the evidence which support her theory. That evidence, however, is neither uncontradicted nor susceptible of only one interpretation.” (*Jackson, supra*, 62 Cal.2d at p. 528.) The evidence must be uncontradicted and susceptible of only one interpretation because, as an appellate court, we do not “resolve any such conflicts or questions of credibility . . . for these issues are peculiarly within the province of the trier of fact.” (*Id.* at p. 529.)

B.

Second Degree Murder and Voluntary Manslaughter

Murder is defined as “the unlawful killing of a human being or a fetus, with malice aforethought.” (§ 187, subd. (a).) “ ‘Second degree murder is the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. (§§ 187, subd. (a), 189; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102.)’ ” (*People v. Sarun Chun* (2009) 45 Cal.4th 1172, 1181, quoting *People v. Hansen* (1994) 9 Cal.4th 300, 307.)

Second degree murder may be reduced to voluntary manslaughter with evidence that negates malice. “ ‘ ‘A defendant who commits an intentional and unlawful killing but who lacks malice is guilty of . . . voluntary manslaughter. (§ 192.)’ ” (*People v.*

Barton (1995) 12 Cal.4th 186, 199 (*Barton*.) Generally, the intent to unlawfully kill constitutes malice. (§ 188; *People v. Saille* (1991) 54 Cal.3d 1103, 1113; see *In re Christian S.* (1994) 7 Cal.4th 768, 778–780 (*Christian S.*.) “But a defendant who intentionally and unlawfully kills lacks malice . . . 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 (see [*Christian S.*, *supra*,] 7 Cal.4th 768; [*People v. Flannel* (1979)] 25 Cal.3d 668.” (*Barton, supra*, 12 Cal.4th at p. 199.) “ ‘Because heat of passion and unreasonable self-defense reduce an intentional, unlawful killing from murder to voluntary manslaughter by *negating the element of malice* that *otherwise inheres* in such a homicide [citation], voluntary manslaughter of these two forms is considered a lesser necessarily included offense of intentional murder [citation].’ ([*People v. Breverman* (1998) 19 Cal.4th 142,] 153–154.)” (*People v. Moye* (2009) 47 Cal.4th 537, 549 (*Moye*.)

In contrast to most elements of crimes, “ ‘[n]either heat of passion nor imperfect self-defense is an element of voluntary manslaughter’ that must be affirmatively proven. (*People v. Rios* (2000) 23 Cal.4th 450, 454.) Rather, they are ‘theories of partial exculpation’ that reduce murder to manslaughter by negating the element of malice. (*People v. Sinclair* (1998) 64 Cal.App.4th 1012, 1016.)” (*Moye, supra*, 47 Cal.4th at p. 549.) Thus, “in a murder case, unless the People’s own evidence suggests that the killing may have been provoked or in honest response to perceived danger, it is the *defendant’s* obligation to proffer some showing on these issues sufficient to raise a reasonable doubt of his [or her] guilt of murder. (§ 189.5, subd. (a); *People v. Sedeno* (1974) 10 Cal.3d 703, 719 (*Sedeno*); *Jackson v. Superior Court* (1965) 62 Cal.2d 521, 526; *People v. Bushton* (1889) 80 Cal. 160, 164; see also *Barton, supra*, 12 Cal.4th

186, 199.) [¶] If the issue of provocation or imperfect self-defense is thus ‘properly presented’ in a murder case (*Mullaney v. Wilbur* (1975) 421 U.S. 684, 704, 44 L.Ed.2d 508), the *People* must prove *beyond a reasonable doubt* that these circumstances were *lacking* in order to establish the murder element of malice. (*Id.*, at pp. 703–704; *People v. Bloyd* (1987) 43 Cal.3d 333, 349.)” (*People v. Rios* (2000) 23 Cal.4th 450, 461-462, fns. omitted.)

C.

Whether the Evidence Required a Voluntary Manslaughter Conviction

In arguing for a reduction of his conviction to voluntary manslaughter, defendant does not deny he engaged in an intentional homicide or that the evidence was sufficient to convict him of second degree murder. Instead, the gravamen of his argument is that the jury was *required to accept additional evidence* proving he committed only voluntary manslaughter on grounds of heat of passion and imperfect self-defense. As to this argument, we conclude the reasoning in *Jackson* applies in this case where the contention is that the trier of fact was required as a matter of law to accept evidence that would reduce murder to voluntary manslaughter. (62 Cal.2d at pp. 528-529) Applying *Jackson*’s guidance, we reject defendant’s argument.

Here, two witnesses testified they watched defendant argue with Montejano, pull out a gun, and repeatedly shoot Montejano. “The act of firing toward a victim at a close, but not point blank, range ‘in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill. . . .’ ” (*People v. Smith* (2005) 37 Cal.4th 733, 741, quoting *People v. Lashley* (1991) 1 Cal.App.4th 938, 945.) Thus, the evidence supported defendant’s conviction of second degree murder. Defendant, however, seeks to negate this evidence of second degree murder by arguing the jury also was required to accept evidence showing defendant acted in the heat of

passion and in imperfect self-defense. In support of his argument, he relies on the following statements of the trial court at sentencing:

“In my view where I sit and watch the evidence, it’s a tragedy because I think it is, as [defense counsel] said, an event that could have been avoided by both young men. I think both of these young men made bad decisions, and I don’t want to beat up on the Montejano family, but I think Christopher pushed things. He was angry. He came back not once, not twice, but three times. His nickname was ‘Criminal.’ So people knew about him. [Defendant] knew about him. He had a backpack. People could make assumptions about what was in the backpack.”

The court further stated, “I do agree with the jury’s verdict. I don’t disagree at all. I think that ultimately what happened did occur. I think that [defendant] was fed up, and I’m not saying he wasn’t provoked. He was by [Montejano] coming back repeatedly to the birthday party. It’s clear that people were trying to cool him down, and he would not listen, referring to [Montejano], but it’s also clear that [defendant] decided he had enough and armed himself ahead of time and then walked down the street and made the decision to kill and did kill.”

The trial court elaborated, “I do think [defendant] committed the second degree murder that is imposed here. I do think he was provoked, and I think the jury took that into consideration and did not find him guilty of the first degree murder. [¶] So I agree with the ultimate resolution of the case.”

Regardless of the trial court’s statements at sentencing, the evidence relied upon by defendant in his appellate arguments to establish heat of passion and imperfect self-defense was not contradicted or susceptible of only one interpretation.

1. Heat of Passion

For purposes of voluntary manslaughter, a heat of passion defense “ ‘has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively. As [the California Supreme Court] explained long ago in interpreting the language of section 192, “this heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances,” because “no defendant may set up his [or her] own standard of conduct and justify or excuse himself [or herself] because in fact his [or her] passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable [person].” ’ (People v. Steele [(2002)] 27 Cal.4th 1230, 1252–1253.)” (People v. Cole (2004) 33 Cal.4th 1158, 1215-1216.)

Here, the trial court’s comments regarding defendant being “provoked” by Montejano do not establish the jury was *required* to find the evidence showed defendant killed in heat of passion. Defendant did not testify. And the defense did not call any witnesses to show he was enraged when he confronted Montejano on the street. Instead, the evidence showed defendant invited Montejano to go down the street by saying, “[Y]ou want to talk, let’s talk.” After defendant and Montejano walked several houses away, the two began shouting at each other. None of the witnesses testified as to what the yelling was about. Based on this evidence, the jury had evidence on which to conclude defendant did not act in heat of passion. (*People v. Cole, supra*, 33 Cal.4th at p. 1216.) The jury had a credible evidentiary basis to find that when defendant told the victim, “let’s talk,” he meant just that: he wanted to talk and was not enraged.

We reject defendant's attempt to equate this case with the facts presented in *People v. Bridgehouse* (1956) 47 Cal.2d 406 (*Bridgehouse*) (overruled on another ground in *People v. Lasko* (2000) 23 Cal.4th 101, 110) and *People v. Elmore* (1914) 167 Cal. 205 (*Elmore*). In *Bridgehouse*, the defendant's wife had an affair "which had extended over a considerable period of time" with the victim. (*Bridgehouse, supra*, 47 Cal.2d at p. 406.) Defendant's wife refused to end her affair or to approve of defendant commencing divorce proceedings. And the defendant was "mentally and emotionally exhausted" when he was surprised to meet the victim at his mother-in-law's house. (*Id.* at p. 413.) The Supreme Court noted defendant's own testimony mirrored that of the police officers and it was undisputed defendant was "a man of excellent character" with a reputation for "peace and quiet." (*Id.* at p. 412.) Under these circumstances, the Supreme Court held the evidence, as a matter of law, established the homicide to be a crime committed with the heat of passion. (*Id.* at pp. 413-414.)

In *Elmore*, the undisputed evidence showed the victim, Fred W. Polio, insulted, slapped, and threatened the defendant in the town's saloon. (*Elmore, supra*, 167 Cal. at pp. 207-208.) After the defendant declined to step outside to fight the victim, the victim appeared ready to lunge at defendant. To this, defendant replied: "You son of a bitch, don't you hit me. You let me alone or I will hurt you." The victim ignored the threat, rushed at the defendant, and struck him on the shoulder. (*Id.* at p. 208.) As the victim struck defendant a second time, the defendant fatally stabbed the victim with a sharp, two-inch knife. (*Ibid.*) The Supreme Court held the mortal blow was struck with the heat of passion. (*Id.* at p. 210.) The *Elmore* court stated, "*Upon any reasonable view of the evidence in this case, the first impression would be that the fatal wound was inflicted without legal malice and solely as the result of the sudden heat of passion excited in*

Elmore by the unprovoked attack and violent blows of Polio.” (*Id.* at p. 211, italics added.)

In contrast to the undisputed nature of the provocative acts presented in *Bridgehouse, supra*, 47 Cal.2d 406 and *Elmore, supra*, 167 Cal. 205 the evidence in this case does not show Montejano hit or rushed at defendant. There is no evidence defendant was mentally or emotionally exhausted when he met with Montejano. And Montejano’s statement — “[I]f you’re gonna shoot me, shoot me” — is not sufficient to prove provocation *as a matter of law*. In short, the evidence was not so clear and uncontradicted the jury was *required* to find defendant acted with heat of passion.

2. Imperfect Self-Defense

We also reject defendant’s contention the jury was required to find he shot Montejano in imperfect self-defense, i.e., with an actual but unreasonable belief in the need to exercise self-defense.

As the California Supreme Court has explained, “ ‘ “Under the doctrine of imperfect self-defense, when the trier of fact finds that a defendant killed another person because the defendant *actually*, but unreasonably, believed he [or she] was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and thus can be convicted of no crime greater than voluntary manslaughter.” ’ ” (*In re Christian S.* (1994) 7 Cal.4th 768, 771.)” (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.) The doctrine of imperfect self-defense has been described as “narrow” because it “requires without exception that the defendant must have had an *actual* belief in the need for self-defense.” (*People v. Manriquez, supra*, 37 Cal.4th at p. 581.) Thus, the Supreme Court has also “ ‘emphasize[d] what should be obvious. Fear of future harm — no matter how great the fear and no matter how great the likelihood of the harm — will not suffice. The defendant’s fear must be of *imminent* danger to life or great bodily injury.

“ ‘[T]he peril must appear to the defendant as immediate and present and not prospective or even in the near future. *An imminent peril is one that, from appearances, must be instantly dealt with.*’ ” (*People v. Aris* [(1989)] 215 Cal.App.3d [1178,] 1192, italics added.)’ (*In re Christian S.* (1994) 7 Cal.4th 768, 783; see also *People v. Wright* (2005) 35 Cal.4th 964, 974.)” (*Manriquez, supra*, at p. 581.)

Regardless of whether the evidence might have allowed the jury to find imperfect self-defense, the jury was not *required* to find imperfect self-defense. Instead, the evidence sufficed to support the jury’s implicit rejection of the suggestion defendant acted with an actual but unreasonable belief in his need to defend himself from Montejano. The evidence supported the finding defendant was not fearful when meeting Montejano. Defendant was armed with a gun when he met Montejano and led him away from the party to “talk.” None of the witnesses testified Montejano threatened defendant when the shouting began. Instead, Griffin testified defendant shot Montejano immediately after the victim said, “[I]f you’re gonna shoot me, shoot me.” The jury relied on this evidence and it allowed the jury to reject imperfect self-defense.

Defendant relies on Montejano’s possession of a gun during the argument as a basis to support an imperfect self-defense argument. However, no one saw Montejano’s gun prior to the shooting. Only when defendant grabbed Montejano’s backpack after the shooting did Sabala see the gun inside the backpack. Regardless of what defendant *might* have seen in Montejano’s backpack, the jury had substantial evidence defendant armed himself and led the victim away from the party with an intent to shoot him. We conclude the evidence did not *require* the jury to conclude defendant shot Montejano in imperfect self-defense.

As the California Supreme Court noted in *Jackson, supra*, 62 Cal.2d at p. 528, there might be a case in which the evidence is uncontradicted and subject to only one interpretation so that murder must be reduced to voluntary manslaughter based on heat of passion or imperfect self-defense. Regardless of that possibility, this is not such a case. Here, the jury had evidence with which it could reasonably find defendant did *not* act with heat of passion or in imperfect self-defense.

II

Prosecutorial Misconduct

Defendant contends the prosecutor engaged in misconduct during closing arguments by misstating the law regarding voluntary manslaughter and the order of deliberations. In his supplemental letter brief, he adds to the argument on the basis of the California Supreme Court's decision of *People v. Beltran* (2013) 56 Cal.4th 935 (*Beltran*) that was decided after the original briefing was completed. And at oral argument, he brought to our attention the case of *People v. Lloyd* (2015) 236 Cal.App.4th 49 (*Lloyd*). We have considered the argument and cited authority, but conclude there was no reversible error.

A.

Review of Claimed Prosecutorial Misconduct at Trial

“ “The applicable federal and state standards regarding prosecutorial misconduct are well established. ‘ “A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct ‘so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.’ ” ’ (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ‘ “ ‘the use of deceptive or

reprehensible methods to attempt to persuade either the court or the jury.’ ” ’ (*People v. Espinoza, supra*, 3 Cal.4th at p. 820.)” (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)’ ” (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

“Regarding the scope of permissible prosecutorial argument, ‘ “ ‘a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.’ [Citation.] ‘A prosecutor may “vigorous[ly] argue his [or her] case and is not limited to ‘Chesterfieldian politeness’ ” [citation], and he [or she] may “use appropriate epithets. . . .” (*People v. Wharton* [(1991)] 53 Cal.3d [522,] 567–568.)’ (*People v. Williams* (1997) 16 Cal.4th 153, 221.)” (*People v. Stanley* (2006) 39 Cal.4th 913, 951-952.)

B.

Statements Regarding Order of Jury Deliberations

Defendant contends the prosecutor misadvised the jury by asserting an incorrect constraint on the order of deliberations. Specifically, defendant refers to the following portion of the People’s closing argument:

“Now, there are some other laws I want to talk about because we’ve got first degree murder. We’ve got second degree murder, and then there is something after that called voluntar[y] manslaughter, which is a lesser included.

“Now, first, remember this:

“You don’t even get into a discussion about is this voluntary manslaughter unless each and every one of you find him not guilty of first degree murder, and then you would have to find him not guilty of second degree murder before you would even get there, and

it's one of these things where the reason this is up here isn't because voluntary manslaughter is what he is guilty of. It is because I want to use this as an opportunity to explain to you why voluntar[y] manslaughter is not something you should consider; why voluntar[y] manslaughter is not justice, and, once again apply the facts" (Italics added.)

Defendant contends the italicized portion of the argument constitutes prosecutorial misconduct because it incorrectly constrained the jury to a particular order for its deliberations. (See *People v. Dennis* (1998) 17 Cal.4th 468, 536 ["[A] trial court should not tell the jury it must first unanimously acquit the defendant of the greater offense before deliberating on or even considering a lesser offense".]) However, the defense did not object to the argument at trial. For lack of objection, the contention has not been preserved for appellate review. As the Supreme Court has held, " 'a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion — and on the same ground — the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072.)' [Citation.]" (*People v. Stanley, supra*, 39 Cal.4th at p. 952.)

Anticipating our conclusion the contention has not been preserved for review, defendant alleges he received ineffective assistance of counsel due to the lack of objection to the prosecutor's argument. "A defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel's inaction violated the defendant's constitutional right to the effective assistance of counsel." (*People v. Lopez* (2008) 42 Cal.4th 960, 966.) Under the United States and California Constitutions, a criminal defendant is entitled to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 694, 80 L.Ed.2d 674 (*Strickland*); *In re Fields* (1990) 51 Cal.3d 1063, 1069.) "This right ' "entitles the defendant not to some

bare assistance but rather to effective assistance. Specifically, it entitles him [or her] to ‘the reasonably competent assistance of an attorney acting as his [or her] diligent conscientious advocate.’ ” ” ” (In re Fields, supra, 51 Cal.3d at p. 1069, quoting In re Cordero (1988) 46 Cal.3d 161, 180.) “If counsel’s performance has been shown to be deficient, the defendant is entitled to relief only if it can additionally be established that he or she was prejudiced by counsel’s deficient performance. (Strickland, supra, at pp. 691–692; accord, [People v.] Ledesma [(1987)] 43 Cal.3d at p. 217.) As to these issues, the defendant bears the burden of proof. ([People v. Pope (1979) 23 Cal.3d 412,] 425.)” (In re Edward S. (2009) 173 Cal.App.4th 387, 407.)

Here, we conclude defendant cannot establish prejudice due to defense counsel’s failure to object because the trial court properly instructed the jury it had discretion to determine the order of deliberations. The jury was instructed with CALCRIM No. 640 on the consideration of lesser offenses, as follows:

“[Y]ou will be . . . given verdict forms for guilty and not guilty of first degree murder (./and) [second degree murder] [./and)] voluntary manslaughter] [¶] You may consider these different kinds of homicide in whatever order you wish, but I can accept a verdict of guilty or not guilty of second degree murder only if all of you have found the defendant not guilty of first degree murder, [and I can accept a verdict of guilty or not guilty of voluntary manslaughter only if all of you have found the defendant not guilty of both first and second degree murder].”

The jury was additionally instructed with CALCRIM No. 200 that: “You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys’ comments on the law conflict with my instructions, you must follow my instructions.”

We presume the jury understood and followed the trial court's instructions. (*People v. Williams* (2009) 170 Cal.App.4th 587, 635.) Accordingly, we conclude any error by the People in misdescribing the order of deliberations to be undertaken by the jury was nonprejudicial.

C.

Prosecutor's Closing Argument Regarding Heat of Passion

Defendant next contends the prosecutor's closing argument prejudicially misstated the law regarding the heat of passion defense to second degree murder. The Attorney General responds that the claim has not been preserved for appeal for lack of request to admonish the jury regarding alleged misstatement of the law. We find the issue is cognizable but conclude the error on this point was not prejudicial.

In arguing against a conviction for voluntary manslaughter, the prosecutor stated the following during closing arguments:

“Heat of passion. Was the defendant provoked?”

“As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his judgment.

“Was he provoked when Montejano was trying to fight with him? Maybe.

“Did it get him to act rashly?”

“That's debatable.

“But here's where it gets lost: [¶] The provocation would have caused a person of average disposition — once again, not someone in the position of the defendant; a regular average person, okay. The standard that we all would judge ourselves by. That it would cause an average person to act rashly and without deliberation.

“Basically was that provocation so strong, Montejano’s challenge to a fight was so strong that the average person would think that what I need to do is pull out a gun and shoot him six times.

“[Defense counsel]: I will object. That misstates the law.

“THE COURT: All right if I can see you both at sidebar briefly?

“(Unreported discussion held at bench)

“THE COURT: I’ll overrule the objection as far as what is printed on the screen, and counsel can — [the prosecutor] can explain what he meant, and what is on the screen is taken from the jury instruction with regard to Element Number Three.

“[The prosecutor]: You are going to get a jury instruction that will have all of the facts, and you are going to look at it, and you will see that it says that provocation would have caused a person of average disposition to act rashly and without due deliberation.

“So what provocation are we talking about?

“We are talking about Montejano challenging Ramirez to a fight.

“Okay. *That’s the provocation that would have caused a person of average disposition, what’s the rash action and deliberation? Shooting him.*” (Italics added.)

As the colloquy shows, defense counsel timely objected when the People first misstated the definition for provocation justifying heat of passion. In the wake of the trial court’s overruling the objection, the defense was excused from having to request that the jury be admonished or to raise another, futile objection after the second misstatement of law. “[T]he absence of a request for a curative admonition does not forfeit the issue for appeal if ‘the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request.’ (*People v. Green* (1980) 27 Cal.3d 1, 35, fn. 19 . . . ; *People v. Pitts* (1990) 223 Cal.App.3d 606, 692; *People v. Lindsey* (1988) 205 Cal.App.3d 112, 116, fn. 1; see also

People v. Noguera [(1992) 4 Cal.4th 599,] 638 [must request curative admonition ‘if practicable’.]” (*People v. Hill* (1998) 17 Cal.4th 800, 820-821, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069 & fn. 13.) A defendant is also excused from having to make a futile objection after the trial court has overruled an objection. (*Hill* at pp. 820-821.) Consequently, the issue has been preserved for appeal.

The trial court instructed the jury with CALCRIM No. 570 regarding voluntary manslaughter based on heat of passion. In pertinent part, the court informed the jury:

“A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion.

“The defendant killed someone because of a sudden quarrel or in the heat of passion if:

“1. The defendant was provoked.

“2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured (his reasoning or judgment;

“AND

“3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from heat of passion rather than from judgment.

“Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection.

“In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I

have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient.”

The trial court further instructed: “The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder.”

Here, the prosecutor explained heat of passion by arguing it would cause the average person to draw a gun and shoot the victim six times.

In his supplemental opening brief, defendant argues the italicized portion of the prosecutor’s argument misstated the law as articulated in *Beltran, supra*, 56 Cal.4th 935 when arguing the test for provocation asked whether “the average person would think that what I need to do is pull out a gun and shoot him six times.” The Attorney General concedes the contention has merit in light of the *Beltran* court’s holding provocation requires only that “a standard requiring such provocation that the ordinary person of average disposition would be moved to *kill* focuses on the wrong thing. The proper focus is placed on the defendant's state of mind, not on his [or her] particular act. To be adequate, the provocation must be one that would cause an emotion so intense that an ordinary person would simply *react*, without reflection.” (*Beltran, supra*, 56 Cal.4th at p. 949.)

We agree the prosecutor’s statement is not a correct statement of the law. The heat of passion defense to second degree murder requires only that the provocation “ ‘cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.’ ” (*Beltran, supra*, 56 Cal.4th at p. 942, quoting *People v. Barton* (1995) 12 Cal.4th 186, 201.) “The focus is on the provocation — the surrounding circumstances — and

whether it was sufficient to cause a reasonable person to act rashly. *How the killer responded* to the provocation and the reasonableness of the response is not relevant to sudden quarrel or heat of passion.” (*People v. Najera* (2006) 138 Cal.App.4th 212, 223, italics added.)

However, the prosecutor’s misstatement of the law of heat of passion was immediately followed by the prosecutor’s statement that the jury should follow the court’s instruction on the law regarding provocation. This curative comment also applies to the prosecutor’s brief return to the theme the shooting was not a warranted response to the provocation. Specifically, the prosecutor referred as follows to Montejano’s challenging Ramirez: “That’s the provocation that would have caused a person of average disposition, what’s the rash action and deliberation? Shooting him.” This comment followed almost immediately the prosecutor’s indication that the jury should rely on the jury instruction on voluntary manslaughter.

Moreover, the record indicates the prosecutor’s misstatements were made while the correct statement of the law of provocation was displayed for the jury. At oral argument, the parties did not disagree the trial court’s reference to “what is on the screen is taken from the jury instruction with regard to Element Number Three” of voluntary manslaughter displayed the correct statement of law for the jury. Thus, the trial court’s reference to the screen indicates the misstatements were cured as soon as they were committed. As we have already noted, we presume the jury understood and followed the trial court’s instructions. (*People v. Williams, supra*, 170 Cal.App.4th at p. 635.) Nothing in the record undermines this presumption that jurors properly heeded the court’s instruction displayed for them on the screen during the prosecutor’s misstatement of the law regarding provocation *and* reiterated by the trial court’s instructions.

The prosecutor's express direction in this case that the jury should look to the jury instructions regarding the law of provocation sets this case apart from the circumstance presented in *Lloyd, supra*, 236 Cal.App.4th 49. *Lloyd* involved multiple misstatements of the reasonable doubt standard by the prosecutor. The prosecutor in *Lloyd* erred "[b]y equating a not guilty verdict based on self-defense or defense of others as meaning the defendant must establish the defense to the point the jury considers his [or her] actions 'absolutely acceptable' and by arguing not guilty means the defendant is *innocent*" (*Id.* at p. 63.) Defense counsel objected, but the trial court overruled the objection. (*Id.* at p. 63.) The *Lloyd* court reversed under the totality of the circumstances even though the jury was later correctly instructed on the reasonable doubt standard. (*Id.* at p. 52.) In reversing, the *Lloyd* court noted it is "improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements." (*Id.* at p. 62, quoting *People v. Hill* (1998) 17 Cal.4th 800, 829-830.)

The prejudice in *Lloyd, supra*, 236 Cal.App.4th 49 derived from the uniquely pivotal role the reasonable doubt standard plays in informing the jury and the fact the jury's mistaken understanding of the standard was reinforced by the trial court's overruling of the defense's objections so that the misconceptions were not corrected until the jury was later instructed by the court. (*Lloyd*, at p. 63.) By contrast, in this case the prosecutor's misstatements of an element of voluntary manslaughter coincided with the prosecutor's pointing to the jury instructions as the correct statement of law. The prosecutor told the jury: "You are going to get a jury instruction that will have all of the facts, *and you are going to look at it*" (Italics added.) Although not as powerfully corrective as an admonishment by the trial court to follow the jury

instructions, the prosecutor's statement had sufficient curative effect to alleviate his earlier misstatement.

Accordingly, we conclude the court's instructions cured the prosecutor's misstatement of the law regarding voluntary manslaughter.

III

Whether the Trial Court Had a Duty to Instruct on Defense of Others

The trial court instructed the jury on self-defense with respect to the murder charge and on imperfect self-defense as it related to voluntary manslaughter. However, the court did not instruct on defense of others as a defense either to murder or voluntary manslaughter. Defendant contends the trial court should have instructed sua sponte on defense of others based on the threat posed by Montejano to others at the birthday party defendant had been attending. We conclude any error was harmless.

A.

Trial Court Refusal to Instruct on Defense of Others

During the conference on jury instructions, the following colloquy occurred on the issue of whether to instruct on defense of others:

“[THE COURT:] This is CALCRIM 505, justifiable homicide, self defense or defense of another.

“The instruction as I'm proposing to edit it would only apply to self-defense and not defense of others for the following reasons.

“There are threats that are made to others, referring to kids and bitches and things at the party. It's my perception that those kinds of threats are covered on page two at line[s] six through line 14.^[2]

² Here, the trial court referred to the portion of CALCRIM No. 505 that was given as follows: “[The defendant's belief that (he[, she, or] someone else) was threatened may

“For example, at line nine it says if you find that . . . the victim threatened or harmed the defendant or others in the past, you may consider that information in deciding whether the defendant’s conduct and beliefs were reasonable.

“Here the defendant and the victim had three series of — of altercations, verbal altercations, the victim comes to the party seeking the defendant, makes statements at different times. The last altercation is the one that ultimately leads to the shooting.

“There are statements that threaten the group in general.

“However, in the last incident the two men walk away from the party, Box, the defendant . . . reportedly says that they want[] to settle it old school.

“They walk several houses — two or three houses down the street away from everyone else. And then the evidence most favorable to the defense, the victim reaches for a gun and the defendant acts in self-defense and shoots.

“At that moment in time no matter what version you believe, the People’s, that the defendant premeditated and planned it, got the gun from [Daniel Uribe] and was isolating the defendant away from the party or isolating the victim rather away from the party, which the People would argue that it was a setup to get him into a narrative, that he’s away from everyone to kill him.

“Or, if you believe the defendant’s version, there is no one in his immediate proximity that the defendant is acting to defend. He is not defending himself at that moment.

be reasonable even if (he) relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true.] [¶] [If you find that Chris Montejano threatened or harmed the defendant [or others] in the past, you may consider that information in deciding whether the defendant’s conduct and beliefs were reasonable.] [¶] [If you find that the defendant knew that Chris Montejano had threatened or harmed others in the past, you may consider that information in deciding whether the defendant’s conduct and beliefs were reasonable].”

“And I would note that the — it says in bullet number two on page one at line 18, the defendant reasonably believed that the immediate — immediate use of deadly force was necessary to defend.

“And he — at that moment when he draws his gun, the defense will argue that the victim has reached for the backpack which contains a gun, but the defendant’s not . . . intervening to protect another person. He is acting to defend his own life at that time.

“In addition, while guns can shoot at long-range, the present ability is yes, existent in the sense that the victim has a gun on his body, but is not aiming it. It’s in the backpack. He’s not aiming it at the crowd.

“He hasn’t just now said I’m going to shoot the F-ing kids and bitches or things like that. And thus the defendant’s intervening.

“The motion to the gun from all the evidence, no matter whose perspective, it seems to be a threat if at all of the defendant So I don’t think there is defense of others factually at all at that moment.”

Despite these findings, the defense requested instruction on defense of others. On this point, the trial court inquired whether the defense intended to argue defendant was “acting to defend a specific person or a group of people.” Defense counsel responded he was “not ruling it out” but such argument was “unlikely.” During closing arguments, the defense asserted: “You have the right to protect yourself is what you have. You don’t have to make assumptions that will get you killed.” However, defense counsel did not argue defendant acted to quell an immediate threat *to others* — only that he acted in reasonable self-defense.

B.

Defense of Others

Imperfect defense of another has also been recognized by the California Supreme Court to negate malice and reduce murder to voluntary manslaughter. An actual but unreasonable belief in the need to defend another person from immediate harm is required. “One who kills in imperfect self-defense -- in the actual but unreasonable belief he [or she] must defend himself [or herself] from imminent death or great bodily injury -- is guilty of manslaughter, not murder, *because he [or she] lacks the malice required for murder.* [Citations.] For the same reason, one who kills in imperfect defense of others -- in the actual but unreasonable belief he [or she] must defend another from imminent danger of death or great bodily injury -- is guilty only of manslaughter.” (*People v. Randle* (2005) 35 Cal.4th 987, 996-997, overruled on another ground in *People v. Sarun Chun* (2009) 45 Cal.4th 1172, 1200-1201.)

“ ‘It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury’s understanding of the case.’ (*People v. St. Martin* (1970) 1 Cal.3d 524, 531, quoted in *People v. Breverman* (1998) 19 Cal.4th 142, 154.) [¶] This duty to instruct sua sponte applies to defenses that are not inconsistent with the defendant’s theory of the case. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) [¶] However, ‘the court’s obligation to instruct sua sponte extends only to those general principles of law “closely and openly connected with the facts before the court.” ’ (*People v. Guzman* (1988) 45 Cal.3d 915, 952.)” (*People v. Watie* (2002) 100 Cal.App.4th 866, 881-882, fns. omitted.) However, even if the defendant asks for

instruction on a particular defense, “the court must ‘give a requested instruction concerning a defense only if there is substantial evidence to support the defense.’ ” (*People v. Larsen* (2012) 205 Cal.App.4th 810, 823, quoting *People v. Moore* (2002) 96 Cal.App.4th 1105, 1116.) “ ‘Even so, the test is not whether any evidence is presented, no matter how weak. Instead, the jury must be instructed when there is evidence that “deserve[s] consideration by the jury, i.e., ‘evidence from which a jury composed of reasonable [people] could have concluded’ ” that the specific facts supporting the instruction existed. [Citations.]’ (*People v. Petznick* (2003) 114 Cal.App.4th 663, 677.)” (*People v. Larsen, supra*, at p. 824.)

C.

Harmless Error Analysis

Assuming for the sake of argument the trial court erred in refusing to instruct on defense of others, we assess whether such error would require reversal. In engaging in an analysis of prejudice, we begin by determining the applicable standard. The People argue defendant’s contention regarding failure to properly instruct on voluntary manslaughter, a lesser included offense of second degree murder, constitutes an error of state law that is reviewed for prejudice under *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). As the People correctly note, proof of imperfect self-defense would have reduced murder to its lesser included offense of voluntary manslaughter. (*People v. Duff* (2014) 58 Cal.4th 527, 561–562.)

Defendant contends we should instead employ the analysis of prejudice that applies to errors of federal constitutional dimension under *Chapman v. California* (1967) 386 U.S. 18, 24, 17 L.Ed.2d 705 (*Chapman*). In so arguing, defendant relies on *People v. Thomas* (2013) 218 Cal.App.4th 630. In *Thomas*, the Court of Appeal considered the applicable standard for prejudice after the California Supreme Court transferred the case

back with directions to consider whether refusal to instruct the jury on heat of passion voluntary manslaughter amounted to federal constitutional error. (*Id.* at p. 633.) Although the *Thomas* court had initially applied the *Watson* test, after the transfer it concluded the *Chapman* standard applied. The *Thomas* court explained that “this case concerns the court’s duty to give a requested instruction, not the sua sponte duty to instruct [on a lesser included offense] at issue in [*People v.*] *Breverman* [(1998) 19 Cal.4th 142]. In any event, the legal classification of heat of passion manslaughter as a lesser included offense of murder does not end the analysis. Heat of passion manslaughter is a lesser included offense of murder, facts permitting, because it negates the element of malice. ([*People v.*] *Rios* [(2000)] 23 Cal.4th [450,] 454, 461.) If provocation is properly presented in a murder case, then, proving the element of malice requires the People to prove the absence of provocation beyond a reasonable doubt. (*Id.* at p. 462.) ‘[J]ury instructions relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense violate the defendant’s due process rights under the federal Constitution.’ (*People v. Flood* [(1998)] 18 Cal.4th [470,] 491.)” (*Thomas*, at p. 644.)

We need not resolve the issue of whether *Watson*, *supra*, 46 Cal.2d 818 or *Chapman*, *supra*, 386 U.S. 18 applies in this case because we conclude the claimed instructional error is harmless under both standards. In other words, any error in the trial court’s refusal to instruct on self-defense is harmless beyond a reasonable doubt. Here, the jury rejected the defenses of self-defense and imperfect self-defense. Defendant’s claims of self-defense were stronger than any claim of defense of others he might have had. Montejano showed up at the party to challenge *defendant* to a fight. Defendant was Montejano’s object of scorn because of a perceived slight committed a week earlier when defendant pulled the hair of Montejano’s ex-girlfriend and the mother of his child.

Although Montejano showed up three times at the party attended by defendant, Montejano did not assault any of the other guests. Instead, Montejano left twice upon being told to resolve his gripe with defendant after the party.

In short, Montejano sought to fight defendant only. Other party guests did not perceive themselves to be in danger from Montejano. As the trial court noted during the conference on jury instructions, “if you believe the defendant’s version, there was no one in his immediate proximity that the defendant is acting to defend.” Consistent with this, defense counsel did not argue defendant acted in defense of others but only in self-defense. The jury, however, did not credit the self-defense argument. Nor did the jury find imperfect self-defense. Instead, it convicted defendant of second degree murder. The jury’s rejection of self-defense and imperfect self-defense renders any error in failure to instruct on defense of others harmless under any standard of prejudice.

IV

Cruel and Unusual Punishment

Defendant contends his sentence enhancement of 25 years to life in prison for violating section 12022.53, subdivision (d), constitutes cruel and unusual punishment. Here, the trial court sentenced defendant to serve 15 years to life in prison for second degree murder and a consecutive term of 25 years to life in prison for the section 12022.53, subdivision (d), firearm enhancement. We join with other California appellate courts on this issue in rejecting the contention.³

³ Although the parties do not discuss whether the issue has been forfeited for failure to raise an argument of cruel and unusual punishment in the trial court (but see *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27 [holding cruel and unusual punishment argument to be forfeited for lack of objection in the trial court]), we conclude the issue is cognizable because defendant’s argument is limited to a facial challenge to the constitutional validity

Defendant challenges the facial validity of section 12022.53, subdivision (a), under the Eighth Amendment to the United States Constitution and under article I, section 17, of the California Constitution. In so arguing, he acknowledges similar challenges have been rejected in *People v. Hernandez* (2005) 134 Cal.App.4th 474; *People v. Gonzalez* (2001) 87 Cal.App.4th 1; and *People v. Martinez* (1999) 76 Cal.App.4th 489.

As the *Martinez* court explained, “Section 12022.53, also known as the ‘10-20-life’ law, was enacted in 1997 to substantially increase the penalties for using a firearm in the commission of designated felonies. The Legislature found ‘that substantially longer prison sentences must be imposed on felons who use firearms in the commission of their crimes, in order to protect our citizens and deter violent crime.’ (Stats. 1997, ch. 503, § 1.) . . . [¶] The statute provides increasing prison terms (10 years, 20 years, and 25 years to life) for increasingly serious circumstances of firearm use. Under subdivision (b), if the defendant ‘personally used a firearm’ [citation], the mandatory additional consecutive punishment is 10 years. Under subdivision (c), if the defendant ‘intentionally and personally discharged a firearm,’ the mandatory additional consecutive punishment is 20 years. Under subdivision (d), . . . if the defendant ‘intentionally and personally discharged a firearm and proximately caused great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice,’ the mandatory additional consecutive punishment is 25 years to life. The punishment is not subject to being stricken or reduced in the trial court’s discretion.” (*People v. Martinez, supra*, 76 Cal.App.4th at p. 493.)

of section 12022.53 that does not require consideration of its application to the facts of this case. (*Ibid.*)

The *Martinez* court properly noted that “[t]he judicial inquiry commences with great deference to the Legislature. Fixing the penalty for crimes is the province of the Legislature, which is in the best position to evaluate the gravity of different crimes and to make judgments among different penological approaches. (*Harmelin v. Michigan* [(1991)] 501 U.S. [957,] 998 (conc. op. of Kennedy, J.); *People v. Dillon* [(1983)] 34 Cal.3d [441,] 477.) Only in the rarest of cases could a court declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive. (*People v. Weddle* [(1991)] 1 Cal.App.4th [1190,] 1196–1197; *People v. Mora* (1995) 39 Cal.App.4th 607, 615–616.) This is not such a case.” (*People v. Martinez, supra*, 76 Cal.App.4th at p. 494.)

“Section 12022.53 as a whole represents a careful gradation by the Legislature of the consequences of gun use in the commission of serious crimes. The section is limited, in the first place, to convictions of certain very serious felonies [including murder]. The statute then sets forth three gradations of punishment based on increasingly serious types and consequences of firearm use in the commission of the designated felonies: 10 years if the defendant merely used a firearm, 20 years if the defendant personally and intentionally discharged it, and 25 years to life if the defendant’s intentional discharge of the firearm proximately caused great bodily injury.” (*People v. Martinez, supra*, 76 Cal.App.4th at p. 495, fn. omitted.) We agree with *Martinez* that the Legislature’s “careful gradation” of sentences to address the serious nature of violent crime committed by use of a firearm does not run afoul of the constitutional prohibition on arbitrary or cruel punishment. Accordingly, we reject defendant’s facial challenge to the constitutional validity of section 12022.53, subdivision (d).

V

Presentence Custody Credits

In his reply brief, defendant withdraws the contention regarding presentence custody credits raised in his opening brief. We accept defendant's withdrawal of this contention.

VI

CALCRIM No. 3472

The trial court instructed the jury with CALCRIM No. 3472 as follows: "A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force."

Defendant contends CALCRIM No. 3472 misled the jury by stating a defendant who provokes a non-deadly fistfight has no right of self-defense against subsequent lethal force. We are not persuaded.

A.

Cognizability

The Attorney General asserts this issue has not been preserved for appellate review for lack of objection by the defense to the giving of CALCRIM No. 3472. The record indicates defendant's trial attorney did not object to CALCRIM No. 3472 or request that it be modified. Nonetheless, we determine the issue is cognizable on appeal. "Where [a] defendant asserts that an instruction is incorrect in law an objection is not required. (*People v. Smithey* (1999) 20 Cal.4th 936, 976–977, fn. 7; § 1259 [‘The appellate court may . . . review any instruction given, . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby’].)" (*People v. Capistrano* (2014) 59 Cal.4th 830, 875, fn. 11.) Here, defendant

argues CALCRIM No. 3472 misstates the law regarding self-defense. No objection was necessary to preserve this issue for our review.

B.

Review

It is well established that “[t]he trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request.” (*People v. Blair* (2005) 36 Cal.4th 686, 744.) “In reviewing a claim of instructional error, the ultimate question is whether ‘there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner.’” (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1220.) “‘[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.’” (*Ibid.*) We review de novo a claim of instructional error. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

C.

Right of Self-defense by Initial Aggressor

For more than a century, it has been the “the rule that, ‘Where the original aggressor is not guilty of a deadly attack, but of a simple assault or trespass, the victim has no right to use deadly or other excessive force. . . . If the victim uses such force, the aggressor’s right of self-defense arises. . . .’ (1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses § 75, p. 410), or its corollary, ‘If, however, the counter assault be so sudden and perilous that no opportunity be given to decline or to make known to his [or her] adversary his [or her] willingness to decline the strife, if he [or she] cannot retreat with safety, then as the greater wrong of the deadly assault is upon his [or her] opponent, he [or she] would be justified in slaying, forthwith, in self-defense.’ (*People v. Hecker*

(1895) 109 Cal. 451, 463–464.)” (*People v. Quach* (2004) 116 Cal.App.4th 294, 301–302.)

Here, defendant contends he was entitled to engage in self-defense because “at least some jurors likely believed that [he] provoked a fistfight by leaving the party to accept Montejano’s invitation to fight.” However, defendant asserts, CALCRIM No. 3472 erroneously foreclosed any claim of self-defense. In so arguing, defendant relies on the majority decision in *People v. Ramirez* (2015) 233 Cal.App.4th 940 (*Ramirez*).⁴

Testimony at trial in *Ramirez* established two codefendant gang members instigated a fistfight with rival gang members. (233 Cal.App.4th at p. 944.) One of the codefendants testified that when he saw a rival gang member draw an object that appeared to be a gun, he pulled out his own gun and shot the rival gang member. (*Id.* at p. 945.) During closing arguments the prosecutor argued, based on the language of CALCRIM No. 3472, that even if the defendants sought only to engage in a fistfight, their intent to provoke any kind of fight forfeited any claim of self-defense. (*Id.* at pp. 943, 945–946.) The trial court in *Ramirez* instructed the jury with CALCRIM No. 3472. (*Ramirez*, at pp. 946, 948.) Convicted of first degree murder, the codefendants appealed and argued CALCRIM No. 3472 erroneously precluded the jury from finding they acted in justifiable self-defense. (*Id.* at p. 943.)

The majority in *Ramirez* reversed, explaining that “CALCRIM No. 3472 *under the facts before the jury* did not accurately state governing law.” (233 Cal.App.4th at pp. 947, 953, italics added.) Compounding the error, “the prosecutor’s argument erroneously required the jury to conclude that in contriving to use force, even to provoke only a

⁴ The defendant in this case is not the same defendant as in *Ramirez*, *supra*, 233 Cal.App.4th 940.

fistfight, defendants entirely forfeited any right to self-defense.” (*Id.* at p. 953.) Moreover, on motion of the prosecution, the trial court modified another instruction, CALCRIM No. 571, to prevent the jury from relying on imperfect self-defense. (*Id.* at p. 952.) The problematic modification of CALCRIM No. 571 “told the jury: ‘The principle of imperfect self-defense *may not be invoked* by a defendant who, through his [or her] own wrongful conduct (e.g., the invitation of a physical assault or the commission of a felony) has created circumstances under which his [or her] adversary’s attack or pursuit is legally justified.” (*Ramirez*, at p. 952, italics added.)

We reject defendant’s reliance on *Ramirez* because this case does not suffer the same errors. We begin by noting the *Ramirez* court acknowledged CALCRIM No. 3472 “states a correct rule of law in appropriate circumstances.” (*Ramirez, supra*, 233 Cal.App.4th at p. 947.) Moreover, as the dissent in *Ramirez* noted, “By its express language, CALCRIM No. 3472 does not apply to every person who initiates a fight and subsequently claims self-defense. Instead, it applies to a subset of individuals who not only instigate a fight, but do so with the specific intent that they contrive the necessity for their acting thereafter in ‘self-defense,’ and thus justify their further violent actions.” (*Id.* at p. 954 [Fybel, J., dissenting].) Unlike *Ramirez*, other pattern instructions in this case clearly informed the jury defendant could claim both perfect and imperfect self-defense.

Where the modified version of CALCRIM No. 571 in *Ramirez, supra*, 233 Cal.App.4th 940 removed self-defense from consideration in that case, here CALCRIM No. 571 informed the jury self-defense and imperfect self-defense were issues for the jury to decide. As given in this case, CALCRIM No. 571 stated in pertinent part:

“A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self-defense[.] [¶] *If you*

conclude the defendant acted in complete self-defense his action was lawful and you must find him not guilty of any crime. The difference between complete self-defense and imperfect self-defense depends on whether the defendant's belief in the need to use deadly force was reasonable. [¶] The defendant acted in imperfect self-defense if: [¶] 1. The defendant actually believed that he was in imminent danger of being killed or suffering great bodily injury; [¶] and [¶] 2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger; [¶] but [¶] 3. At least one of those beliefs was unreasonable. [¶] . . . [¶] *The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense. If the People have not met this burden, you must find the defendant not guilty of murder.*" (Italics added and brackets, capitalization, parenthesis, and slashes omitted.) Defendant's jury was also instructed with CALCRIM No. 505 that defined self-defense and stated in pertinent part that: "The defendant is not guilty of murder or manslaughter if he was justified in killing someone in self-defense." (Brackets, parenthesis, and slashes omitted.)

In short, CALCRIM No. 3472 in this case provided a correct expression of the law that a defendant may not contrive to initiate a fight in order to create a claim of self-defense. CALCRIM No. 3472 did not remove from the jury's consideration the possibility defendant acted in self-defense or imperfect self-defense. And CALCRIM Nos. 505 and 571 expressly defined self-defense and imperfect self-defense. These instructions explained defendant was not guilty of any offense if he acted in self-defense and he was only guilty of manslaughter if he acted in imperfect self-defense. Consistent with these instructions, the prosecutor in this case acknowledged the availability of self-defense and imperfect self-defense as defenses to the charges, but argued the evidence did not support a finding defendant acted in self-defense or imperfect self-defense. The

prosecutor did not mention CALCRIM No. 3472 or assert defendant contrived a claim of self-defense. Consequently, defendant has not demonstrated the trial court erred by instructing the jury with CALCRIM No. 3472.

VII

Cumulative Prejudice

In his reply brief and again in his supplemental opening brief, defendant contends the cumulative effect of the errors he alleges rendered his trial unfair. We have rejected defendant's claims of error except for the issue of the People's misstatement regarding voluntary manslaughter. As to that issue, we have concluded the trial court's jury instructions cured any misstatement by the prosecution. We also concluded any misinstruction on defense of others was harmless beyond a reasonable doubt. On the whole, defendant has not established errors for which prejudice aggregated to deprive him of a fair trial. (*People v. Bolin* (1998) 18 Cal.4th 297, 335.)

DISPOSITION

The judgment is affirmed.

/s/
HOCH, J.

I concur:

/s/
RAYE, P. J.

MURRAY, J., Concurring.

I concur in the result reached by the majority, but I write separately on one issue raised by defendant.

I. Claim of Insufficient Evidence to Support Second Degree Murder Conviction

A. Substantial Evidence Review

I respectfully disagree with the reasoning employed by the majority to measure the sufficiency of the evidence of second degree murder.

Defendant contends that at most, the evidence showed he “killed in the heat of passion or in imperfect self-defense.” Both parties agree that the substantial evidence standard applies, but the majority does not employ that familiar test.

Under the substantial evidence test, “the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578 (*Johnson*)). Under this test, appellate courts “ ‘presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ [Citations.] The court does not, however, limit its review to the evidence favorable to the respondent. . . . ‘[The task of appellate courts] . . . is twofold. First, we must resolve the issue in the light of the *whole record* -- i.e., the entire picture of the defendant put before the jury -- and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements . . . is *substantial*; it is not enough for the respondent simply to point to “some” evidence supporting the finding, for “Not every surface conflict of evidence remains substantial in the light of other facts.” ’ ” (*Id.* at pp. 576-577.) This standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. (*People v. Bean* (1988) 46 Cal.3d 919, 932.)

The current substantial evidence test in criminal cases has its origin in *Jackson v. Virginia* (1979) 443 U.S. 307 [61 L.Ed.2d 560]. There, the court explained, “the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (*Id.* at p. 319.) “This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, *and to draw reasonable inferences* from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder’s role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution.” (*Ibid.*, first italics added.)

Instead of reviewing the evidence to determine whether there is substantial evidence establishing malice, the majority finds guidance in *Jackson v. Superior Court* (1965) 62 Cal.2d 521, 523 (*Jackson*), a case not cited by either party. *Jackson* predated the United States Supreme Court’s decision in *Jackson v. Virginia, supra*, 443 U.S. 307 by 14 years and our high court’s decision in *Johnson* by 15 years. And *Jackson* did not involve the sufficiency of evidence evaluated by a factfinder at trial; rather, the *Jackson* court evaluated the sufficiency of the evidence presented to a grand jury in support of an indictment. (*Jackson*, 62 Cal.2d at p. 523.) I have found no cases where an appellate court has applied *Jackson* the way the majority does here.

In *Jackson*, the court concluded there was sufficient evidence to support the indictment. In doing so, it reasoned, “To sustain a conviction of either degree of murder, . . . it must be proved at the trial that the homicide was committed by the accused with the state of mind known in the law as ‘malice aforethought.’ But it does not follow that the same showing must be made before the grand jury to support a mere accusation of

murder.”¹ (*Jackson, supra*, 62 Cal.2d at p. 525.) The court went on to explain in dicta that “[a]s an abstract proposition, it is of course conceivable that a case of homicide could be presented to the grand jury in which evidence of adequate provocation or self-defense were both uncontradicted and sufficient as a matter of law; in that event it could reasonably be contended that an indictment for murder would be in excess of the grand jury’s power.” (*Id.* at p. 528.) Based on this language, the majority frames the issue before us as “whether the evidence required a voluntary manslaughter conviction” (maj. opn., *ante*, p. 10) and holds that the evidence here does not establish voluntary manslaughter as a matter of law because “the evidence relied upon by defendant in his appellate arguments to establish heat of passion and imperfect self-defense was not uncontradicted or susceptible of only one interpretation.” (Maj. opn., *ante*, p. 11.) I prefer to employ the familiar substantial evidence test.

Viewing the whole record in the light most favorable to the judgment, I have no trouble concluding that there is evidence which is reasonable, credible, and of solid value establishing that killing was done with malice and was not the result of sudden quarrel/heat of passion or imperfect self-defense. Defendant cites some of this same evidence in asserting his conviction should be reduced to voluntary manslaughter, but in doing so, he overlooks the rule that requires us to view this evidence in a light most

¹ Much of the opinion in *Jackson* focuses on whether the prosecution was required to prove malice at the probable cause stage and the rule that even at trial, there was a presumption of malice grounded in part on the now-repealed Penal Code section 1105. (*Jackson, supra*, 62 Cal.2d at pp. 526-528.) As the court noted, “It follows [from the presumption of malice] that to require the prosecution, as petitioner urges, to present specific proof of ‘malice aforethought’ at the grand jury hearing, over and above its fundamental showing of the killing of the victim by the defendant, would in effect place a greater burden on the prosecution at the accusatory stage than at the trial itself.” (*Id.* at p. 527.) And the court went on to note, “[A]ccusations of murder have been upheld in a number of cases without specific evidence of malice, upon a showing of the fact of the homicide and the accused’s participation in it.” (*Ibid.*)

favorable to the judgment. In other words, the evidence defendant cites as establishing voluntary manslaughter based on both mitigation theories cuts two ways, and we are required to accept that which supports the verdict. “ ‘ “Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant’s guilt beyond a reasonable doubt. ‘ “If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.” ’ ’ ’ ” (People v. Cravens (2012) 53 Cal.4th 500, 507-508.) Thus, “[w]hen presented with two reasonable inferences that can be drawn from the evidence, we must uphold the inference that supports the conviction.” (People v. Shamblin (2015) 236 Cal.App.4th 1, 12.) Stated slightly differently, substantial evidence review requires that we draw all reasonable inferences in support of the judgment. (People v. Mackey (2015) 233 Cal.App.4th 32, 121.) A defendant’s conviction must “stand ‘unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].” ’ ’ ” (Cravens, at p. 508.)

Looking at the evidence and inferences that can be reasonably drawn therefrom in a light most favorable for the judgment, the following evidence and inferences support the conclusion that there was substantial evidence establishing that the killing here was done with malice aforethought and was not the result of imperfect self-defense or provocation sufficient to reduce the killing to voluntary manslaughter.

1. Instead of calling the police to report the victim’s behavior, defendant went out to confront the victim. A reasonable inference can be drawn that defendant decided to take care of the situation himself.

2. Defendant armed himself before he went out to confront the victim. From this evidence, a reasonable inference can be drawn that defendant intended to shoot the victim when he walked away from the house with the victim.

3. Defendant had suffered nerve damage in a prior shooting and knew he could not fight. Thus, a reasonable inference can be drawn that defendant knew he could *never* settle the problem between he and the victim “old school style,” so his intent was to shoot the victim, not fight him.

4. The victim had interrupted the birthday party three times to call out defendant. This behavior showed disrespect for defendant in front of a number of people, some of whom were gang members. A reasonable inference can thus be drawn that defendant, who had just been handed a gun, sought to avenge this disrespect by shooting the victim.²

5. The victim never threatened to shoot or kill defendant; he only said he wanted to fight him. From this, it can be reasonably inferred that defendant was not afraid the victim would kill him.

6. Defendant went outside to confront the victim after the victim threatened to kill the women and children. A reasonable inference can be drawn that, given this statement by the victim, defendant had enough and decided to end it.

7. Defendant walked the victim away from the party across the street and in front of a van two or three houses from the party, where they were out of sight from people at the party. From this evidence, a reasonable inference can be drawn that defendant did that to minimize the chance of the people at the party seeing the shooting and/or being injured by gunfire.

² Ms. Almanza testified that calling someone out at a party is considered disrespect and that such conduct could result in retaliation, including a shooting, especially in the neighborhood in which she resided.

8. Just before being shot, the victim told defendant, “[G]o ahead [and] shoot me, if you’re gonna shoot me, shoot me.” From this, it can be reasonably inferred that defendant displayed his weapon first. If defendant displayed his weapon first, it can be inferred he was the initial aggressor. A person who is the initial aggressor is not entitled to claim self-defense or imperfect self-defense. (*People v. Seaton* (2001) 26 Cal.4th 598, 665; *In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1.)³

9. The victim defiantly invited defendant to shoot him. From this disrespectful challenge, it can be reasonably inferred that defendant shot the victim in acceptance of that challenge.

10. The victim kept his gun in his backpack. Since he did not make the weapon readily accessible in advance of confronting defendant, e.g., by secreting it in his waistband, it can be reasonably inferred that the victim had intended to fight defendant, not shoot him.

11. Defendant shot the victim six times. A reasonable inference can be drawn that this was excessive and not done in the actual belief in the need to defend himself, but rather in revenge for being disrespected.

12. Defendant fled the scene with the evidence and then fled the state. A reasonable inference can be drawn that this conduct evinced consciousness of guilt because if defendant had really acted in self-defense or honestly thought he needed to do so, he would have stayed at the scene, talked to the police, and showed them the victim’s gun.

³ *People v. Ramirez* (2015) 233 Cal.App.4th 940, cited by defendant in his supplemental briefing, has no application where the initial aggressor initiates aggression by using deadly force or the threat of deadly force as defendant did here by displaying the gun he brought to this confrontation. (*Id.* at p. 948 [“a defendant who assaults his victims with a gun may not set up a valid self-defense claim with evidence he believed the victims also reached for a gun, since they would be justified in meeting deadly force with deadly force”].)

The inference that defendant sought to vindicate his reputation by intentionally killing the victim because of the victim's repeated public display of disrespect for him is reasonable and supports the conviction. Although defendant argues that the evidence supports inferences that he killed the victim in the heat of passion or in imperfect self-defense, those arguments do not refute or disprove the evidence and inferences supporting the jury's finding that defendant killed the victim with malice and not in the heat of passion or in imperfect self-defense. Accordingly, applying the appropriate substantial evidence test, I conclude there is substantial evidence to support the second degree murder conviction.

B. Remarks of the Trial Court

In my view, the central thrust of defendant's insufficient evidence contention is grounded on the remarks the trial court made at sentencing. It appears defendant believes the trial court inadvertently conceded the shooting was done in the heat of passion. First, these remarks were not evidence in the trial and thus are not part of our substantial evidence review. Second, contrary to defendant's argument, the trial court's remarks do not establish that there was provocation sufficient to establish voluntary manslaughter because the trial court was not referring to that level of provocation.

The trial court stated, "I think that [defendant] was fed up, and I'm not saying he wasn't provoked. He was by [the victim] coming back repeatedly to the birthday party. It's clear . . . that [defendant] had enough and armed himself ahead of time and then walked down the street and made a decision to kill and did kill." The trial court went on to explain what it meant by provoked: "I do think [defendant] committed the second degree murder that is imposed here. I do think he was provoked, and I think the jury took that into consideration and did not find him guilty of the first degree murder. [¶] So I agree with the ultimate resolution of the case."

It is clear to me that the trial court did not mean its reference to provocation to be the level of provocation that "would cause an emotion so intense that *an ordinary person*

would simply *react*, without reflection” sufficient to make an intentional killing voluntary manslaughter. (*People v. Beltran* (2013) 56 Cal.4th 935, 949, first italics added.) Rather, the trial court meant exactly what it said. The provocation here was a circumstance the jury likely considered in arriving at its second degree murder verdict instead of first degree murder. (*People v. Thomas* (1945) 25 Cal.2d 880, 903 [“Provocation of a kind, to a degree, and under circumstances insufficient to fully negate or raise a reasonable doubt as to the idea of *both* premeditation *and* malice (thereby reducing the offense to manslaughter) might nevertheless be adequate to negate or raise a reasonable doubt as to the idea of premeditation or deliberation, leaving the homicide as murder of the second degree; i.e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation.”]; see also *People v. Rogers* (2006) 39 Cal.4th 826, 877-878 [CALJIC No. 8.73, the predecessor to CALCRIM No. 522, bears on the question of whether the defendant deliberated and premeditated]; *People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1333-1335 [CALCRIM No. 522 asks the jury to determine whether the defendant was provoked enough to create a doubt as to whether the offense was deliberate, premeditated first degree murder rather than a rash, impulsive second degree murder].)⁴ And this is why the trial court agreed with the verdict.

⁴ The trial court appropriately instructed the jury from CALCRIM No. 522 as follows: “Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.]”

II. Conclusion

I concur with the opinion of the majority in all other respects and further concur in the result. The judgment of the trial court should be affirmed.

_____/s/
MURRAY, J.