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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KYM LAURA CANO,

Defendant and Appellant.

D057760

(Super. Ct. No. JCF19024)

APPEAL from a judgment of the Superior Court of Imperial County, Raymundo Ayala Cota, Judge. Affirmed.

A jury convicted Kym Laura Cano of second degree murder (Pen. Code,¹ § 187, subd. (a), count 1) of her husband, Francisco Cano. The jury also found true that Cano personally used a handgun (§ 12022.53, subd. (b)), personally and intentionally discharged a handgun (§ 12022.53, subd. (c)), and personally and intentionally discharged a handgun, which proximately caused great bodily injury and death (§ 12022.53, subd. (d)). The court sentenced Cano to prison for 40 years to life.

¹ Statutory references are to the Penal Code unless otherwise specified.

Cano appeals, contending the court committed reversible error in failing to sua sponte instruct the jury, under *People v. Garcia* (2008) 162 Cal.App.4th 18 (*Garcia*), that an unintentional killing committed without malice during the commission of an inherently dangerous felony constitutes voluntary manslaughter. Assuming Cano's interpretation of *Garcia* is correct, we nevertheless conclude such an instruction was not warranted on the record before us and affirm.

FACTUAL AND PROCEDURAL HISTORY

Prosecution

Cano and Francisco's Relationship

Francisco was raised by his aunt and uncle in Calexico, California. After attending college in San Diego, Francisco joined the National Guard, worked at Home Depot for a period of time, and was eventually hired as a California Highway Patrol (CHP) officer. In the early 1990's, Francisco met Cano, who was a close friend of Francisco's cousin, Deborah Hernandez (Hernandez and Cano had known each other since their high school days). Cano and Francisco moved in together and later got married. Cano had a daughter, Ashley, from a previous marriage. Cano and Francisco had three children together, F., M., and C.

After working as a CHP officer for a period of time in Fontana, California, Francisco was reassigned to Calexico. The family purchased and moved into a home there. By this time, Hernandez and her family had moved to Calexico as well, and the two families got together often. Cano and Hernandez were very close, and Cano often told Hernandez that she was very unhappy in her marriage to Francisco. Cano was "bitter" and

"angry" and referred to Francisco as a "fuckin' loser" and a "fuckin' alcoholic." Cano would tell Hernandez that Francisco needed to be on "meds" because he was depressed. Hernandez asked Cano why she had not left Francisco if she was so unhappy. Cano said that she and her kids were accustomed to a certain lifestyle, and she could not leave Francisco for financial reasons. During her conversations with Hernandez, Cano never mentioned that there was any violence in her marriage. Cano told Hernandez that she called the police after a fight she and Francisco had when they lived in Fontana, but she called them just to "cover her ass" in case anything happened.

Hernandez had never seen Francisco become drunk or violent at any of the family get-togethers. However, Hernandez had seen Cano become physically violent with Francisco. On one occasion, Francisco was outside with Hernandez's brother, and Cano drove up with her tires screeching. Cano got out of her car and slammed the door. Cano approached Francisco saying, "You fucking asshole. You fucking loser. You ruined my fucking life." Cano then started hitting Francisco with her fists. While Cano was punching Francisco, he just covered his face, but did not hit Cano back.

In 2005, during a CHP softball tournament in Las Vegas, Cano told a group of CHP wives that her husband was having an affair. Cano stated that she heard a voicemail on Francisco's cell phone from a woman telling Francisco that she loved and missed him. She confronted Cano by waking him up, sitting on him, and pointing his gun at him.

F. was 16 years old at the time of his trial testimony. He recalled arguments between his mother and father in which Cano would loudly accuse Francisco of cheating on her. Francisco would deny the accusations.

According to F., Francisco usually drank water when he was home. When F. saw his father drink alcohol, it usually was at family parties. He saw his father drink beer, but not hard liquor. F. further testified that if Francisco drank at home, it typically occurred while he was watching a football game or other sporting event. F., however, did not recall his father ever getting drunk. F. never saw his father get angry or violent with anybody after drinking. F. recalled that his father would become silly and goofy after drinking, but did not become mean.

F. recalled seeing one of the arguments between his mother and father turn physical. After an argument, Francisco was walking away from Cano when Cano grabbed Francisco's shirt and ripped it. Francisco did not retaliate, but simply walked away with F. and went to F.'s room where he laid down on one of the bunks. Cano followed them into F.'s room and was angry. Cano told Francisco to get off F.'s bed.

M. was 12 years old at the time of her trial testimony. Her interactions with her father were positive. She also recalled that her father normally drank water around the house and would drink alcohol at parties. She did not see her father drink alcohol a lot at home. She did not believe her father's personality changed after he drank alcohol. Specifically, she never observed him becoming mad or violent after drinking. M. indicated that her father's personality was always the same: "goofy," "talkative," and "loud."

M. had also observed arguments between her parents. She recalled hearing her mother accuse her father of cheating. M. never saw her father hit her mother or become violent with her. She did, however, see her mother hit her father. M. recalled an occasion

when Cano was angry and arguing about an affair Francisco was having, but Francisco did not respond to her. Francisco appeared confused. He walked away and went to a room and sat down with his children. Cano entered the room, pulled Francisco away from his children and hit him on the arm with an open hand (like a slap). Cano loudly said to Francisco, "Don't try to use the kids to protect yourself." Francisco did not hit Cano back.

Ashley was 22 years old at the time of her trial testimony. Ashley had grown up with Francisco as her father since the age of two or three.² She was very close to him, admired him, and called him "Dad." Ashley testified Francisco would occasionally drink beer around the house. She recalled that Francisco would become loud and goofy when he would drink. He would tell jokes, make random comments, and was very outgoing. Ashley never saw Francisco get violent after drinking, except for occasional slamming of doors and tossing of items when Cano would start "bugging" him about drinking. Ashley believed money or Francisco's drinking caused most of the arguments between Cano and Francisco. Cano would complain about Francisco's drinking, and Francisco would complain about Cano's excessive spending. Ashley testified that Francisco was not a mean person, but would occasionally get angry, causing him to yell and swear a lot. When Cano and Francisco would fight, Ashley sometimes heard Cano say, "Don't touch me," and Francisco say, "Stop hitting me."

Ashley remembered her mother getting physically violent with Francisco. On an occasion when Cano and Francisco were in the kitchen yelling and screaming, Cano

² Ashley lived with her biological father from the age of nine to the age of 12.

grabbed a steak knife from the counter and held it out to Francisco (from a couple of feet away) while saying, "What if I did something like" ³ Francisco responded to Cano, "Go ahead. See what happens. See where you're going to be after that." This was similar to what was said by Francisco during a lot of the fights when Cano would suggest hurting Francisco in some way while asking Francisco, "What if I did this?" Francisco would say to Cano, "Go ahead. See what happens if you do something. Basically, you're not going to see the kids because something is going to happen to you and they're going to go and stay with my family." Francisco did not physically react to Cano during the knife incident.

On another occasion, Ashley heard her mother ask Francisco, "What if I go get your gun and what if I shot you?" Francisco again responded, "Go ahead. Do it. See what happens." Ashley heard Cano mention Francisco's gun during other arguments as well.

On August 21, 2005, when the Canos still lived in Fontana, Police Officer Rajaie Sayegh responded to a domestic dispute call at the Cano residence. Sayegh made contact with Cano outside, and she was "very loud, aggressive, very disturbed." Cano told Sayegh that Francisco was "fucking abusive." Cano smelled like alcohol. Her speech was slurred, and she appeared intoxicated. She was vulgar and used a lot of profanity. Sayegh asked Cano to elaborate on whether she meant Francisco was physically or verbally abusive.

³ Ashley did not remember the exact wording of how this sentence ended.

However, Cano would not provide any detail and merely continued to say Francisco was "abusive."

Sayegh entered the residence and spoke with Francisco. Francisco was very calm. Sayegh did not smell any alcohol on him. Francisco told the officer that a verbal dispute took place between him and Cano, and the dispute never turned physical. Neither Cano nor Francisco showed any signs of a physical fight. The house was clean and well kept. Francisco volunteered to leave the house for the night. Sayegh concluded that no arrests were warranted because no crimes had occurred.

On May 6, 2006, Alexander Gallegos flew to San Diego from his home in Seattle to attend a birthday party for Brenda O'Neil. At the party, he talked with Cano, who seemed sullen and withdrawn. After the party was over, several people in attendance went to O'Neil's house. Gallegos was spending the night at O'Neil's and he went to his bedroom to read. While he was reading, Cano entered his bedroom and thanked him for being nice to her at the party. Cano appeared upset and she asked Gallegos if she could get some advice from him. Cano explained to Gallegos that she was having marital problems and believed her husband was having an affair. Gallegos suggested marriage counseling as a way to save the marriage, but Cano said Francisco would never agree to counseling. Gallegos then mentioned divorce, but Cano said she enjoyed taking care of her children and her lifestyle. Cano said that if she got a divorce she would have to get a job and everything would change. Cano said that her only option was to get even with Francisco by having an affair of her own, and she then attempted to kiss Gallegos. Gallegos rebuffed Cano's advance, which apparently angered Cano. Gallegos told Cano that getting

revenge and humiliating Francisco was not the answer to her problems, and that it would only make the situation worse. After Cano made two more sexual advances toward Gallegos, he asked her to leave the bedroom. She left.

During the following summer, Cano called Gallegos about three times. During the first call, Cano told Gallegos her marriage was not going well, and she was considering leaving Francisco. During the second call, Cano said that she and Francisco had "split up" and that they were getting a divorce. Cano also told Gallegos she would be in San Francisco in August and asked him to join her for the weekend. During the third call, Cano reiterated that she had left Francisco, the marriage was over, and she was getting a divorce. She again asked Gallegos to spend some time with her in San Francisco. Gallegos had no further contact with Cano after the third call.

Francisco's Death

On December 1, 2006, Cano called CHP Officer Pablo Torrez and left him a hysterical message claiming that Francisco was having some kind of nervous breakdown. She asked Torrez not to call Francisco. By the time Torrez returned Cano's call, she was already at the CHP office speaking with CHP Sergeant Sid Turner. Cano was agitated, and she was using her hands quite often and looking around. Cano told Turner that Francisco was working too many hours and was drinking too much. She thought he was having a nervous breakdown. Cano said Francisco came home late that morning, made breakfast for the kids and took them to school, and then started painting the house and drinking. Turner asked Cano specifically if Francisco had hit her, or if there was any abuse. Cano said, "No." She had no bruises or lacerations. However, Cano said

Francisco yelled at the dog often. She also said Francisco drove while intoxicated on Thanksgiving and almost had three accidents on the way home.

Turner went to the Cano residence to investigate further. Francisco was asleep when he arrived, but woke up and said, "Hey, Sarge." Francisco's demeanor was calm, but appeared nervous as Cano was present in the house banging drawers, cabinets, and doors, and making her presence known. While Turner was speaking with Francisco, Cano appeared with a duffel bag and pillow. Francisco asked her, "Where are you going?" Cano responded in a very terse and cold tone, "Frank, I'm leaving you." As Cano began to walk through the garage door, Turner said, "Wait. Hold on. I'll leave so you guys can talk about this." Turner said, "I think you guys should talk about this." Cano said, "No." She walked up to Turner and said, "I'm afraid of [Francisco]." Cano then left.

Turner suggested to Francisco that he and his wife seek counseling. Turner told Francisco not to go to work that evening, and that he would list Francisco as being sick that day. Turner did not want an officer going to work if his mind was not focused on the job because he could get in trouble or hurt. Turner felt Francisco should work things out at home before returning to work.

At about 11:00 a.m. on December 4, 2006, a dispatcher for the Calexico Police Department received a 911 call from Cano.⁴ Hysterical and crying, Cano told the dispatcher that she had just shot her husband who was a CHP officer. Cano explained, "I accidentally shot my husband with his gun." Cano continued, ". . . it was an accident . . .

⁴ A tape recording of this call was played for the jury.

please hurry! . . . please hurry! . . . oh, my God! . . . it was an accident! it was an accident!" Cano screamed, "I didn't know his gun was loaded! . . . I didn't know!" Cano told the dispatcher she shot Francisco in the eye, and that he was bleeding through his nose, and there was blood all over. Cano again stated that the shooting was an accident, "I accidentally hit him in his eye and he's still bleeding."

Detectives Julio Diaz and Erik Longoria and two other officers from the Calexico Police Department were among the first of many officers to arrive at the Cano residence. Investigator Brian Porras arrived shortly thereafter. Cano opened the front door hysterical and crying and said, "I just shot my husband in the eye." Several of the officers entered the residence to look for Francisco. They found him in the master bedroom in a seated position with his back up against the vanity and his right shoulder against the door frame of the walk-in closet. There was a pool of blood next to him and blood coming from one of his eye sockets.

A handgun was lying next to him with its safety in the off position. There were no signs of a struggle in the house. The room had an odor of burnt gunpowder. Although paramedics were called to provide first aid to Francisco, he appeared to be dead at the scene and his body was later removed from the residence.

Cano was taken to the Calexico Police Department. While in an interview room, at about 12:30 p.m., Diaz told Cano he was going to test her hands for gunshot residue. Diaz did not ask Cano any questions, but she began talking nonetheless. Cano told Diaz the police knew what she had done; she had shot her husband. She also told Diaz she did not take her medication that day because she did not want her husband to worry about her.

At about 12:48 p.m., Diaz again met with Cano and she repeated that the police knew what had happened. Porras took Cano to Pioneer Hospital after she consented to a blood draw. On the drive, Porras did not ask Cano any questions, but Cano again provided unsolicited statements. She said the shooting was an accident, and she was sorry. She never stated that she shot Cano in self-defense, she was under attack in any way, or she was being abused. After arriving at the hospital, Cano said that Francisco had been upset with her because she was taking antidepressant pills and painkillers. Cano then kept repeating, "I shot him. Don't let him die."

At the hospital, Cano volunteered additional statements. Cano told Diaz that she wanted to kill herself with her husband's gun, but that he walked in on her, and she then pointed the gun at him, and pulled the trigger and shot him. Cano also said she did not know the gun was loaded. Cano said the shooting was an accident and she was "just being stupid." Some of Cano's statements at the hospital were recorded and later played for the jury at her trial.

Cano was interviewed by Porras and three other officers during the time she was at the Calexico Police Department. Cano told the officers that Francisco was "a good man, perfect husband, and a good father." She said she shot Francisco in the eye, but she reiterated that she did not believe the gun was loaded. Cano told Porras that she intended to kill herself. However, when Cano walked in, she shot him in the eye. At one point, Cano said, "I'm that crazy psycho person that no one would ever want in their life . . . what the hell just happened . . . oh, my God . . . oh . . . , God . . . my kids are so

wonderful . . . I mean, I have a great life . . . I have a great life . . . I just can't believe I just did this . . . oh, my God . . . this wasn't supposed to happen" Cano continued, ". . . we're exactly what everybody wants in life . . . [CRYING] . . . a good marriage . . . beautiful children . . . [CRYING] . . . and love . . . we love each other very much . . . still, after [UI] sixteen [16] years together we're still in love . . . [CRYING] . . . I can't live without him . . . I'm still in love with him . . . [CRYING] . . . he has to live . . . he has to live" The interview was videotaped and played at Cano's trial.

Forensic pathologist Darryl Garber performed an autopsy on Francisco and determined the cause of Francisco's death was a gunshot wound to the head. Garber concluded that Francisco was shot at a distance because there was no evidence of gunpowder, stippling, soot, or tattooing on Francisco's skin around the wound. Garber also found some healing bruises on Francisco's body; one to his right lower chest (one inch in diameter) and one on his right upper thigh. Francisco's blood screen tested negative for alcohol and drugs.

Criminalist James Hall examined Francisco's gun. The gun was designed to operate in both single and double action and the trigger required six pounds of pressure to fire in single action mode and nine and three-quarter pounds of pressure to fire in double action mode. Hall opined that the gun was functioning properly, and it did not have a "hair trigger." Based on the lack of stippling around Francisco's wound, Hall opined that the gun was fired from at least three feet away, if not farther, from Francisco. Based on various aspects of evidence at the scene of the shooting, Hall opined that Francisco was

just outside the master bedroom's walk-in closet when he was shot, and the bullet was fired from inside the closet.

Defense

Cano's Testimony

Cano grew up in Mountain View, California. Her high school friends were Renee Truglio and Brenda Aldrete. Hernandez was Aldrete's older sister, and Cano became friends with Hernandez as well. At age 14, Cano started battling depression. She had frequent suicidal thoughts and was hospitalized after attempting suicide multiple times. Cano was required to participate in mandatory counseling for a year after she got out of the hospital.

Cano first met Francisco at Aldrete's house when she was 17 years old. Later, at age 18, Cano married Henry Thuener and gave birth to Ashley. The marriage was short-lived, and Cano moved back in with her mother and stepfather.

At age 21, Cano reconnected with Francisco at Aldrete's wedding in El Cajon in 1990. After the wedding, Cano and Francisco stayed in touch by telephone and letters. They would fly to see each other about once a month.

In March of 1991, Cano moved in with Francisco in El Cajon. Francisco was working at Home Depot at the time. After living together for a year and a half, Cano became pregnant with F., and Cano and Francisco married prior to F.'s birth. After F. was born, Cano stopped working. Francisco gave her a budget and taught Cano the way he liked order kept around the house. Francisco wanted the house to be run military style.

Between the years 1991 and 1993, Francisco began drinking a lot, and there were arguments between Cano and Francisco about his drinking. The arguments started becoming physical as Francisco pushed Cano on multiple occasions. At times, when Francisco would drink, he would become scary, mean, violent, and abusive. Francisco would drag, pull, and push Cano. Cano hit her head on one occasion when she fell. Sometimes Francisco would get on top of Cano to control her so she was unable to get away. Francisco once threatened Cano by saying, "I will kill you or any man that you are with if you leave me." Cano did not leave Francisco because he would apologize and say he was going to drink less.

The family moved to Chino Hills after Francisco graduated from the CHP academy (in January of 2000) and was hired as a CHP officer. Francisco's drinking was not bad at the time. However, after Francisco passed his probationary period as a CHP officer, he began drinking heavily once more and the abuse started again. Cano and Francisco resumed arguing often and occasionally they would become physical, resulting in bruises on Cano. Cano would not tell her children the truth about the bruises, but would say she got them by bumping into something. Cano was embarrassed about the violence and did not want Francisco to lose his job if she said anything about the abuse.

In July 2000, the family moved to Fontana and the drinking, fighting, and abuse continued. Francisco was rough with the children. During one argument, F. came into the Canos' bedroom to tell them to stop. Francisco started moving toward F., and Cano thought Francisco was going to hurt F., so she grabbed Francisco's shirt and it ripped. On another occasion, Francisco yanked and spanked C. very hard.

Francisco and Cano also argued about the family dogs. After one such argument, Francisco threw one of the dogs three feet and kicked the other one.

Cano would run from Francisco, and he would chase her and physically assault her. On one occasion when she ran from Francisco, he said, "You better F'ing run, because I'm going to F'ing kill you." Cano ran to their bedroom, locked the door, and then hid in the closet. Francisco busted the door in, and found Cano in the closet and put his hands around her neck and started choking her.

In 2003, Cano and Francisco began arguing over Francisco cheating on Cano. Francisco denied having a physical affair, but admitted having an emotional affair. Cano was devastated, and she continued telling Francisco that she believed the affair had turned physical. After learning of the affair, Cano told Francisco that she wanted a separation. Francisco responded that he would never divorce her and they were together for life. Francisco added that he would kill Cano before letting her be with another man. He also told her that he would take the kids from her and tell the court she was crazy.

Cano told multiple people about her problems with Francisco. For example, Cano told an acquaintance that she confronted Francisco about the affair by pouring a glass of water on him while he was sleeping.

The fighting between Cano and Francisco also led to occasions when Cano called the police. After one incident, Cano told the responding officer that Francisco had scared her, but had not hurt her. On another occasion, Cano told police that Francisco was abusing her.

The family moved to Calexico in 2006, and Cano forgave Francisco for the affair. The arguments about the affair ceased. However, Francisco started having bad mood swings, was unhappy about having to work night shifts, seemed angry all the time, and started drinking a lot more. At Cano's request, Francisco saw a doctor about depression and was prescribed some medication, but Cano never saw him take it.

Cano began having problems with her back due to a ruptured disc and was prescribed several painkiller medications. Her back eventually required surgery. Cano was taking Vicodin, Valium, Naxprofen, Darvocet, steroids, and Soma. Due to all the pain medications Cano was taking, Francisco told her, "You're turning into a F'ing drug addict." Cano admitted she was "getting really addicted to the Vicodin." Francisco felt uncomfortable about Cano taking the pain medication.

On Thanksgiving Day 2006, Francisco went to a baseball game that was part of a Calexico High School reunion. Around 2:00 or 2:30 p.m., Cano drove to the ballpark with F. to look for Francisco. She wanted Francisco to come home because it was their first Thanksgiving in their new Calexico home, and Cano's parents were visiting and wanted to spend some time with Francisco. When Cano and F. got to the ballpark, Cano spotted Francisco and honked at him, and Francisco waved. Francisco approached their car wobbling, and he smelled of alcohol and had blood shot eyes. Francisco refused to let Cano drive him home. Francisco drove himself home swerving in and out of traffic. When Francisco got home, he went upstairs to bed without joining the family for Thanksgiving dinner. He did not wake up until that evening when he went to work.

On the morning of December 1, 2006, Francisco came home after working the night shift. He drove the kids to school and then returned to the house. He appeared hyper, was sweating profusely, and had glazed eyes. Cano asked him if he was going to sleep, and Francisco said, "No. I'm going to paint right now. I'm going to paint the upstairs loft." Francisco started painting upstairs, turned some music on full blast, and began singing loudly. Later, Francisco went into the tearoom and was really loving with Cano. Francisco was hugging and kissing Cano and wanted to have sex with her. Francisco approached Cano a couple of times that morning, and then, at about 10:30 a.m., he started drinking beer. Cano picked up the kids later that afternoon, and left them at Hernandez's house so they would not see how Francisco was acting.

Cano called CHP Officer Pablo Torrez and left him a message about how Francisco was acting. She said in the message that she believed Francisco was having a nervous breakdown. Cano then went to the CHP office and spoke with Turner. She told Turner she was afraid Francisco might hurt her and she did not want to be left alone with him after going to his workplace and complaining. Turner followed Cano to the house so he could talk to Francisco. When they arrived, Francisco was upstairs asleep on the floor in his underwear and T-shirt, snoring loudly, and covered in paint. Cano pointed out some beer bottles to Turner and showed him paint that was all over their new carpet. Cano packed some items for her and the kids and left Turner and Francisco together alone in the house. She did not return to the house until the following day. She stayed away because she was afraid of Francisco.

On the morning of December 4, 2006, Francisco seemed upset as Cano was about to take her medication. Cano told him she would not take the medication that day so he would not be upset. Cano took some of her medication, but did not take any pain medication that morning. Francisco was happy and smiled at Cano. His demeanor changed, however, when Cano asked him if he had called an 800 number on a business card Turner left when he visited the house. Francisco became angry, raised his voice, and started cussing. Cano was scared and felt she was going to pay for contacting Turner about Francisco.

Cano was extremely afraid of Francisco and went upstairs while whispering to herself, "I just want to die." She was in a lot of pain and started feeling hopeless. Cano wanted to hurt herself. She went to the master bedroom and got in the closet, which is where she would go when she was trying to get away from Francisco. Francisco's open duty bag was in the closet. Francisco's holstered duty gun was inside the bag, and Cano pulled the gun out of the holster. Cano put the gun to her head and closed her eyes. She thought she was going to kill herself, but then she did not think the gun was loaded.

Cano visualized her daughter M.'s face, and she decided that she could not kill herself. She put the gun down to her side, but then heard Francisco running toward her. She opened her eyes and saw Francisco approaching.

Cano wanted Francisco to take her seriously, and not attack her, or kill her, or do something terrible to her. Cano pointed the gun toward the upper wall and was trying to get it "up to the upper ceiling." She closed her eyes and pulled the trigger. Cano was not trying to aim at Francisco and did not intend to shoot him. Cano was "just trying to fire a

warning shot up in the upper wall, upper ceiling so [Francisco] would take [her] seriously and not attack [her]." When Cano opened her eyes, she realized she had shot Francisco. Francisco's eye had popped out of its socket. Cano grabbed Francisco's hand, but Francisco leaned up against the wall next to the vanity and slowly slid down into a sitting position. Cano was hysterical and called 911. She was screaming, "Where's the ambulance? Hurry up. Hurry up." Cano did not remember a lot of what happened after that point.

Witnesses

Katrina Duffy and Cano were friends when the Cano family lived in Fontana. Duffy's family lived in the same neighborhood as the Canos, and daughters from both families were friends. Duffy recalled that when Francisco would drink beer during football games he would get "silly." Duffy believed Francisco was under the influence of alcohol during those occasions because he was not normally a very goofy kind of guy. When Francisco would drink and watch football games his demeanor would change from happy and relaxed to upset and angry if his team was losing. On one occasion when his team was losing, Francisco got upset, hollered and cussed at the television, and slammed his fist down on the coffee table. He also threw something at the television. On another occasion, Francisco lost his temper and cracked the coffee table.

Renee McAtee and her mother Nita Truglio had known Cano since she was a child. Cano and her daughter Ashley had lived with the Truglios for a period of time after Cano separated from her first husband. Neither McAtee nor Truglio were of the opinion that Cano had personality traits for violence or murder.

M. recalled seeing bruises on Cano's arms and legs. Cano informed M. that she got the bruises from gardening or from moving furniture. M. told a social worker named Paula Alvarado that she heard an argument between Cano and Francisco in the middle of the night, and Cano was saying "You were drunk driving." The next day, M. noticed some blood stains on a pillow in her parents' bedroom. The very first argument between M.'s parents that she could remember involved Cano crying and hitting Francisco because he had cheated on her with somebody from work.

Although Ashley testified she saw Cano threaten Francisco with a knife, according to Detective Diaz, when he interviewed Ashley, she never mentioned anything about the knife. Nor did she mention that Cano had threatened to shoot Francisco.

Private investigator Russell Green spoke with Ashley nearly two years after the shooting, and Ashley was very angry and belligerent toward her mother. When asked why she was so hostile toward her mother, Ashley said that her mother was having an affair and cheating on her father. The interview ended abruptly when Ashley angrily left.

Laura Swortwood, Cano's mother, visited Cano and Francisco on occasion. Sometimes Francisco was warm and friendly, and other times he made her feel uncomfortable. She noticed that Cano was quieter and more anxious when Francisco was home. On some visits, Swortwood saw bruises on Cano's arm and legs, but when Swortwood asked about them, Cano just said she bruised easily. Swortwood recalled that Cano participated in gymnastics, snow skiing, and water skiing when she was younger, and she did not have any problems with excessive bruising.

During Swortwood's Thanksgiving visit with Cano and Francisco in 2006, Francisco was not home for Thanksgiving dinner. When Francisco eventually got home, he went upstairs and did not eat with the family. Swortwood had seen Francisco drink alcohol frequently and once saw him pass out after drinking at a party in El Cajon.

Expert Witnesses

Matthew Carroll, a psychiatrist, testified the drugs Cano was taking for her back pain can affect a person's ability to perceive as well as the person's judgment and behavior. He explained that a person who takes Lexapro regularly for depression, and suddenly stops taking it, can fall into a very severe depression. He also testified that a person taking Vicodin for pain can experience even worse pain and withdrawals if the person abruptly stops taking it. Dr. Carroll interviewed Cano, and Cano described for him the events that took place on the morning of December 4, 2006. Dr. Carroll was of the opinion that Cano's psychological history combined with the medication she took and did not take on the day of the shooting impaired her judgment, ability to perceive, and ability to appreciate the risks of what was happening.

David Wexler, a clinical psychologist, was of the opinion that the information and reports he reviewed were consistent with Cano suffering from battered women's syndrome. He was of the opinion that battered women's syndrome could have significantly impacted Cano's perception and judgment when she shot Francisco.

Rebuttal

Officer Porras placed bags over Cano's hands at the police station and did not see any blood on her hands or inside the bags. Diaz removed the bags from Cano and likewise did not see any blood.

Nola Castillo, a neighbor of the Cano family when they lived in Fontana, testified that during the summer of 2000, Cano told her Francisco always kept his gun locked in a safe in their closet.

Forensic psychologist Michael Kania reviewed the case and determined that in the Cano marriage, Cano was "more likely to be demanding and controlling or attempting to control." Dr. Kania did not agree with Dr. Wexler's battered women's syndrome conclusion. According to Dr. Kania, information in the case suggested that Francisco, not Cano, was on the receiving end of the violence in the relationship.

Francisco's cousin, Elva Ocha, was an assistant principal and teacher at a Catholic high school. Francisco had lived with her and her family from first grade through 12th grade. Francisco was like a brother to her. Ochoa maintained contact with Francisco over the course of his life, and she did not believe Francisco had a character trait for violence. She never saw him engage in violence with anyone. At family parties, he liked to be funny, loud, and silly, talk about sports, and have a good time. Cano, on the other hand, could be violent. Cano had told Ochoa that Francisco was a good man, husband, and father who helped her with the kids often. Cano described herself as lucky to have met and married Francisco. Cano told Ochoa that it was her decision to move to Calexico and

Francisco did not want to do so, but he agreed to move to appease Cano. Francisco had three life insurance policies that totaled \$485,000. Cano was the beneficiary of all three.

Surrebuttal

Cano testified on surrebuttal that she did not have a conversation with Nola Castillo in 2000 about a safe that she and Francisco owned. According to Cano, she and Francisco did not purchase a safe until October 20, 2002.

On one occasion when Francisco had been drinking all day, Cano was reluctant to give him the car keys when he wanted to go buy more beer. Francisco swore at Cano and said "Give me the F'ing Keys. You F'ing B." Francisco started charging at Cano, and two guests who were present had to get between Francisco and Cano. Ochoa was present during the incident and she said to Cano, "I can't believe that he treats you like that." When Ochoa asked Cano if Francisco always treated her like that, Cano said, "No, he actually treats me worse than that."

DISCUSSION

I

THE COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY THAT AN UNINTENTIONAL KILLING COMMITTED WITHOUT MALICE DURING THE COMMISSION OF AN INHERENTLY DANGEROUS FELONY CONSTITUTES VOLUNTARY MANSLAUGHTER

A. Cano's Assertion

Cano shot and killed Francisco, and the People charged Cano with murder. The jury therefore had to decide if Francisco's death was unlawful and if so, if the homicide was murder or manslaughter. (See CALCRIM No. 500.) The jury convicted Cano of

second degree murder. Cano argues, however, the court committed reversible error by failing to sua sponte instruct the jury that an unintentional killing committed without malice during the commission of an inherently dangerous felony constitutes voluntary manslaughter. This theory of manslaughter is not found in any CALCRIM jury instruction. Instead, Cano argues the holding of *Garcia, supra*, 162 Cal.App.4th 18 mandates providing such an instruction to the jury.

B. Homicide and Related Jury Instructions

"California statutes have long separated criminal homicide into two classes, the greater offense of murder and the lesser offense of manslaughter. The distinguishing feature is that murder includes, but manslaughter lacks, the element of malice." (*People v. Rios* (2000) 23 Cal.4th 450, 460.)

Murder is the unlawful killing of a human being "with malice aforethought." (§ 187, subd. (a); *People v. Knoller* (2007) 41 Cal.4th 139, 151; *People v. Blakeley* (2000) 23 Cal.4th 82, 87 (*Blakeley*).) Express malice is an unlawful intent to kill. (§ 188.) Malice is express "when the defendant manifests 'a deliberate intention unlawfully to take away the life of a fellow creature.' " (*Blakeley, supra*, at p. 87.) "Implied malice" requires a defendant's awareness of engaging in conduct that endangers the life of another. (*Knoller, supra*, at p. 143.) "Malice is implied when the killing is proximately caused by 'an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.' " (*Ibid.*)

Manslaughter is the "unlawful killing of a human being without malice." (§ 192; *Blakeley, supra*, 23 Cal.4th at p. 87.) A defendant who commits an intentional and unlawful killing but who lacks malice is guilty of voluntary manslaughter. (See *People v. Breverman* (1998) 19 Cal.4th 142, 153-154 (*Breverman*).) However, a specific intent to kill is not a necessary element of manslaughter. (*Blakeley, supra*, at pp. 88-89.) For example, voluntary manslaughter can consist of a defendant killing someone in unreasonable self-defense. (*Ibid.*) If a defendant, acting with conscious disregard for life, unintentionally but unlawfully kills in sudden quarrel or heat of passion, the killing is voluntary manslaughter. (*People v. Lasko* (2000) 23 Cal.4th 101, 108.)

Involuntary manslaughter is the unlawful killing of a human being without malice "in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (§ 192, subd. (b).) Involuntary manslaughter based on "an unlawful act, not amounting to felony"—a killing resulting from the commission of a misdemeanor—requires proof not only that the defendant acted with general criminal intent but also that the predicate misdemeanor was dangerous to human life under the circumstances of its commission. (*People v. Cox* (2000) 23 Cal.4th 665, 667, 675-676; *People v. Wells* (1996) 12 Cal.4th 979, 982.) Involuntary manslaughter based on the commission of a lawful act that might produce death "without due caution and circumspection" requires proof of criminal negligence—that is, "aggravated, culpable, gross, or reckless" conduct that creates a high risk of death or great bodily injury and that evidences a disregard for human life or indifference to the consequences of the conduct.

(See *People v. Penny* (1955) 44 Cal.2d 861, 879; *People v. Evers* (1992) 10 Cal.App.4th 588, 596.)

Here, the court thoroughly instructed the jury on the law of homicide. To this end, the judge instructed the jury under CALCRIM No. 500 (Homicide: General Principles), CALCRIM No. 505 (Justifiable Homicide: Self-Defense or Defense of Another), CALCRIM No. 510 (Excusable Homicide: Accident), CALCRIM No. 520 (Murder with Malice Aforethought), CALCRIM No. 570 (Voluntary Manslaughter: Heat of Passion—Lesser Included Offense), CALCRIM No. 571 (Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense), and CALCRIM No. 580 (Involuntary Manslaughter: Lesser Included Offense).

However, citing *Garcia, supra*, 162 Cal.App.4th 18, Cano asserts the trial court had a sua sponte duty to instruct the jury on an additional type of voluntary manslaughter: a killing committed without malice during the course of an inherently dangerous assaultive felony. In *Garcia*, the defendant assaulted the victim with the butt of a gun, causing the victim to strike his head on the pavement and suffer fatal head injuries. The defendant argued at trial he had only meant to hurt the victim, not kill him. The jury, instructed on the offense of murder and the lesser included offense of voluntary manslaughter based on provocation or imperfect self-defense, convicted the defendant of voluntary manslaughter.

On appeal, the defendant argued the trial court had a sua sponte duty to instruct the jury on involuntary manslaughter because there was substantial evidence the victim was killed without malice, that is, without an intent to kill or conscious disregard for human life. (*Garcia, supra*, 162 Cal.App.4th at p. 26.) The Court of Appeal explained that, in

most instances, when the victim is killed during the commission of an inherently dangerous felony, the defendant could be found guilty of second degree murder under the felony-murder doctrine without proof of express or implied malice. (*Id.* at p. 28.)

However, when the felony is an assault, application of the felony-murder rule is prohibited under the *Ireland* merger doctrine. (*Id.* at p. 29, citing *People v. Ireland* (1969) 70 Cal.2d 522, 580 ["To allow such use of the felony-murder rule would effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault—a category which includes the great majority of all homicides. This kind of bootstrapping finds support neither in logic nor in law."].)⁵

Thus, the issue before the court in *Garcia, supra*, 162 Cal.App.4th 18 was not whether a new voluntary manslaughter jury instruction was necessary, but instead, whether the facts of the case warranted an involuntary manslaughter instruction. Concluding they did not, the court noted "an unlawful killing during the commission of an inherently dangerous felony, even if unintentional, is at least voluntary manslaughter." (*Id.* at p. 31.) Therefore, Cano's interpretation of *Garcia* requires us to extend that case beyond the issue it addressed.

While we believe the *Garcia* opinion is scholarly and well written, the People correctly point out that Cano's proposed instruction is based on dicta in *Garcia, supra*, 162

⁵ This prohibition of the application of the felony-murder rule to underlying assaultive felonies resulting in death, identified in *People v. Ireland, supra*, 70 Cal.2d at page 539, is known in our jurisprudence as the *Ireland* merger doctrine.

Cal.App.4th 18. Further, although *Garcia* may illuminate a potential "third theory" of manslaughter currently not covered by the CALCRIM instructions, we are somewhat hesitant to create a new jury instruction when it is not clear the court in *Garcia* intended to do such, and, more importantly, our Legislature has not seen fit to address this "third theory" of voluntary manslaughter.

Nevertheless, we are aware that this court, in at least one case, agreed with Cano's interpretation of *Garcia, supra*, 162 Cal.App.4th 18. (See *People v. Bryant* (2011) 198 Cal.App.4th 134, 155 ["Accordingly, we conclude that the trial court erred in failing to instruct the jury on the lesser included offense of voluntary manslaughter, based on the theory articulated by the court in *Garcia*."].) However, *Bryant* is no longer citable authority because our Supreme Court granted a petition for review on November 16, 2011. (Cal. Rules of Court, rules 8.1105(e)(1), 8.1115(a).)

Here, we need not reach the issue addressed in *Bryant, supra*, 198 Cal.App.4th 134. Even if we assume *Garcia, supra*, 162 Cal.App.4th 18 requires a court to sua sponte instruct a jury under a new theory of voluntary manslaughter, such an instruction was not warranted under the facts of this case.

C. The Law Governing Whether a Trial Court Must Instruct the Jury on a Lesser Included Offense

The law governing a trial court's duty to instruct the jury on lesser included offenses, and the standard of review that this court applies in reviewing a trial court's decision regarding whether to give such an instruction, are well established:

"Instructions on lesser included offenses must be given when there is substantial evidence for a jury to conclude the defendant is guilty of

the lesser offense but not the charged offense. [Citations.] Substantial evidence is defined for this purpose as 'evidence sufficient to "deserve consideration by the jury," that is, evidence that a reasonable jury could find persuasive.' [Citation.] 'In deciding whether evidence is "substantial" in this context, a court determines only its bare legal sufficiency, not its weight.' [Citation.] The trial court's decision whether or not the substantial evidence test was met is reviewed on appeal under an independent or de novo standard of review. [Citations.]" (*Garcia, supra*, 162 Cal.App.4th at pp. 24-25.)

D. Substantial Evidence Does Not Support the Giving of an Additional Voluntary Manslaughter Instruction

Cano argues "there was very substantial evidence that [she] committed an unintentional killing without malice in the course of committing an assault with a deadly weapon," and thus, the court erred in not instructing the jury under the theory of voluntary manslaughter discussed in *Garcia, supra*, 162 Cal.App.4th 18. Cano argues the record discloses there was a history of confrontation, abuse, and domestic violence between her and Francisco. She notes that a few days before Francisco's death, Cano made a negative report to Francisco's superior and fellow CHP officers suggesting he was mentally unstable.

Cano also argues the circumstances of Francisco's death underscore her lack of malice. On the morning Cano shot Francisco, she and Francisco had a confrontation. After Francisco gave Cano a threatening look, Cano ran upstairs, felt suicidal, put a gun to her head, but had second thoughts. Cano was in extreme pain and feared Francisco might attack her. As he approached her, she pointed the gun in his direction, but aimed at the

ceiling. With her eyes closed, she pulled the trigger, but did not intend to shoot Francisco, but instead, fire a warning shot into the ceiling. None of this evidence, however, supports Cano's theory that she committed assault with a deadly weapon (here, a gun).

"[An] assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*People v. Williams* (2001) 26 Cal.4th 779, 790.) "Assault with a deadly weapon is termed a 'general intent' crime because it is not necessary to find a specific intent to cause a particular injury. What is required, however, is the general intent to willfully commit a battery, an act which has the direct, natural and probable consequences, if successfully completed, of causing injury to another.

[Citations.] Intent to frighten or mere reckless conduct is insufficient. [Citation.]"

(*People v. Brown* (1989) 212 Cal.App.3d 1409, 1419, disapproved on another ground in

People v. Hayes (1990) 52 Cal.3d 577, 628, fn. 10.) "All that is required to sustain a

conviction of assault with a deadly weapon is proof that there was an assault, that it was

with a deadly weapon, and that the defendant intended to commit a violent injury on

another. [Citation.] A battery, or a wounding[,] is not necessary in order to sustain a

conviction for assault with a deadly weapon. [Citation.]" (*People v. Birch* (1969) 3

Cal.App.3d 167, 177, abrogated on other grounds in *People v. Felix* (2009) 172

Cal.App.4th 1618, 1629.) Here, because Cano used a gun, the elements of assault with a

firearm are: (1) a person willfully committed an act that by its nature would probably and

directly result in a battery, with actual knowledge of such facts; (2) at the time the act was

committed, such person had the present ability to apply physical force to the person of another; and (3) the assault was committed with a firearm. (§ 245, subd. (a)(2).)

Most of the evidence Cano cites has no bearing on the crime, assault with a firearm. Her history of confrontation, abuse, and domestic violence with Francisco does not satisfy any element of the crime. Nor does her negative report about Francisco's behavior to Francisco's superior implicate that she committed assault with a firearm. Moreover, Cano's confrontation with Francisco the morning of his shooting also does not provide any evidence of an assault with a firearm. Instead, all this evidence seems to explain why Cano shot Francisco and possibly supports a jury instruction for voluntary manslaughter based on provocation or imperfect self-defense. The jury was properly instructed under these theories of manslaughter, and Cano does not argue otherwise.

In addition, if the jury had believed Cano that she pointed the gun at the ceiling, closed her eyes, and did not intend to shoot Cano but merely fire a warning shot into the ceiling, it could not have convicted Cano of assault with a firearm. Under this factual scenario, Cano would lack the general intent necessary to establish assault. In other words, she would not have shot the gun with "actual knowledge of those facts sufficient to establish that" shooting the gun would "probably and directly result in the application of physical force against another[.]" namely the bullet would hit Francisco. (See *People v. Williams, supra*, 26 Cal.4th at p. 790.)

In her reply brief, Cano argues that "pointing a loaded gun at someone and pulling the trigger with the intent that the bullet fly over the person's head constitutes the crime of assault with a firearm." Cano's assertion, however, is not supported by the record. Cano

did not testify that she pointed the gun at Francisco and tried to shoot over his head. Instead, she testified that she wanted to fire a warning shot into the ceiling. Indeed, after the prosecutor established that Cano held the gun away from her at the level of her head before she shot Francisco, Cano's attorney tried to establish that Cano's wrist was pointing up toward the ceiling although her arm might have been level with her head. Further, Cano later reiterated that she did not point the gun at Francisco the day he was shot.

In addition, Cano argues there was substantial evidence to support the conclusion that she did not possess implied or express malice, and as such, the court should have sua sponte instructed the jury that an unintentional killing, committed without malice, during the commission of an inherently dangerous felony constitutes voluntary manslaughter. Cano's argument, however, misses the mark. The new theory of manslaughter discussed in *Garcia, supra*, 162 Cal.App.4th 18 is not triggered by the mere absence of malice, but also by the commission of an inherently dangerous assault. As the record does not establish the elements of such a crime, no instruction under *Garcia* was necessary. Moreover, we are reluctant to expand the additional theory of manslaughter found in *Garcia* to a case in which a defendant shoots a victim at close range. To do so, we essentially must ignore the potential danger of a loaded gun. (See *People v. Hansen* (1994) 9 Cal.4th 300, 311, overruled on other grounds in *People v. Chun* (2009) 45 Cal.4th 1172, 1199. ["The tragic death of innocent and often random victims, both young and old, as the result of the discharge of firearms, has become an alarmingly common occurrence in our society—a phenomenon of enormous concern to the public."]; *People v. Tophia* (1959) 167 Cal.App.2d 39, 45, abrogated on other grounds by *People v. Cox*

(2000) 23 Cal.4th 665, 675 ["It is universally accepted that a loaded gun is so dangerous an instrument that a high degree of caution and circumspection is required of the person handling it."]; *People v. Freudenberg* (1953) 121 Cal.App.2d 564, 580 ["From the time of the common law, firearms were recognized as a dangerous instrumentality because of their great potential harm and in the interest of the preservation of human life and safety a high degree of care was demanded of those who use them."].)

Further, courts have recognized that the mere 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 an intent to kill" (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945.) Also, implied malice can be found when a defendant willfully discharges a firearm with gross negligence in violation of section 246.3. (See *People v. Clem* (2000) 78 Cal.App.4th 346, 353 ["However, a killer who violates section 246.3 'is engaged in a felony whose inherent danger to human life renders logical an imputation of malice on the part of all who commit it.' "].)

In sum, even if *Garcia, supra*, 162 Cal.App.4th 18 requires a trial court to sua sponte instruct the jury on a new theory of manslaughter, we conclude such an instruction is not warranted in a situation, like here, in which a defendant fires a gun at, above, or near a single victim who is in close proximity to the shooter. Although a jury instruction for voluntary manslaughter based on *Garcia* may be appropriate under some circumstances involving a deadly shooting, this is not that case.

E. Even if the Court Should Have Given the Instruction, There Was No Prejudice

California Constitution, article VI, section 13, prohibits a reviewing court from setting aside a judgment due to trial court error unless it finds the error prejudicial. Here, even if we determined the court should have sua sponte instructed the jury under the theory of manslaughter articulated by the court in *Garcia, supra*, 162 Cal.App.4th 18, we conclude Cano was not prejudiced.

"[W]hen a trial court violates state law by failing to properly instruct the jury on a lesser included offense, this test applies: '[I]n a noncapital case, error in failing sua sponte to instruct, or to instruct fully, on all lesser included offense and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under [*People v. Watson* [(1956) 46 Cal.2d 818, 836. . .]. A conviction of the charged offense may be reversed in consequence of this form of error only if, "after an examination of the entire cause, including the evidence" (Cal. Const., art. VI, § 13), it appears "reasonably probable" the defendant would have obtained a more favorable outcome had the error not occurred. [Citation.]' " (*People v. Lasko, supra*, 23 Cal.4th at p. 111.)

Cano, however, argues we should apply the standard of prejudice set forth in *Chapman v. California* (1967) 386 U.S. 18, which is used in reviewing federal constitutional errors, under the theory expressed by Justice Kennard in her dissent in *People v. Moyer* (2009) 47 Cal.4th 537, 563 (dis. opn. of Kennard, J.). In her dissent, Justice Kennard stated, "[T]he trial court's failure to instruct on the heat of passion theory of voluntary manslaughter was federal constitutional error 'because the trial court . . . inadequately instructed the jury on the elements of murder by failing to explain that the

element of malice is not present when the defendant kills in the heat of passion.' " (*Id.* at p. 564; see also *Breverman, supra*, 19 Cal.4th at p. 194 (dis. opn. of Kennard, J.) [noting that jury instructions that erroneously describe an element of an offense are subject to the *Chapman* standard of prejudice].) Justice Kennard reasoned, " 'Given the manner in which California has structured the relationship between murder and voluntary manslaughter, the complete definition of malice is the intent to kill or the intent to do a dangerous act with conscious disregard of its danger *plus the absence of* both heat of passion and unreasonable self-defense.' [Citation.]" (*Moye, supra*, at pp. 563–564 (dis. opn. of Kennard, J.).)

Even assuming that our Supreme Court were to adopt Justice Kennard's view, it has no application to a trial court's failure to instruct the jury that an unintentional killing without malice committed during the course of an inherently dangerous assaultive felony constitutes voluntary manslaughter. Unlike acts committed in a heat of passion or unreasonable self-defense, which "negate malice" (*People v. Manriquez* (2005) 37 Cal.4th 547, 585), the theory of voluntary manslaughter articulated in *Garcia, supra*, 162 Cal.App.4th 18 applies independently of, and in the absence of, malice. The failure to instruct on the *Garcia* theory of voluntary manslaughter thus does not constitute an erroneous description of the malice element of murder. Therefore, the standard of prejudice under *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*) applies. (See *Breverman, supra*, 19 Cal.4th at p. 177.)

In applying the *Watson* standard of prejudice, we follow our high court's guidance in *Breverman, supra*, 19 Cal.4th 142:

"Appellate review under *Watson* . . . focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have 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." (*Id.* at p. 177.)

Based on our review of the record, if the trial court erred by failing to provide an additional voluntary manslaughter instruction, we determine the trial court's error was harmless under the *Watson* standard. Here, the evidence overwhelmingly supports Cano's conviction for second degree murder.

Several witnesses testified that Cano was abusive toward Francisco and had threatened to kill him. For example, Hernandez testified that Cano verbally and physically attacked Francisco in front of her. F. saw Cano tear Francisco's shirt after an argument. Ashley testified that Cano had threatened Francisco with a knife and asked him what would happen if she shot him. There also was evidence that Cano had threatened Francisco with a gun when she suspected him of having an affair.

After shooting Francisco, Cano told the police that she was going to kill herself, but when Francisco walked into the room, she pointed the gun at him and pulled the trigger. She never told the police that she was being abused or shot Francisco in self-defense.

The prosecution offered evidence that Cano was in her bedroom closet when she shot Francisco, who was at least three feet away, having entered the master bedroom and moved toward the closet. Put differently, Cano fired a gun at close range at Francisco exhibiting "conscious disregard for human life." (See *Knoller, supra*, 41 Cal.4th at

p. 143.)

In contrast to the prosecution's strong evidence, Cano's defense was lacking. At trial, she did not argue she committed an inherently dangerous felony without malice. Instead, her defense was based on the contentions she was a battered spouse involved in a volatile marriage, who was afraid for her life at the time she shot Francisco. In addition, she argued the shooting was accidental.

However, she provided little evidence to support her theories. For example, she offered no witnesses who could corroborate her claims that Francisco was abusive. At best, she had a couple witnesses who testified that Francisco could become angry when he watched sports on television and once broke a coffee table while watching a game. Although two witnesses testified that they noticed bruises on Cano, those witnesses did not testify that Francisco caused the bruises.

In addition, Cano's testimony about the shooting was less than clear. At trial, she testified that she intended to kill herself with Francisco's gun, but did not think the gun was loaded. She claimed she was afraid Francisco was going to attack her so she pointed her gun at the ceiling, closed her eyes, and fired a warning shot.

During closing argument, Cano's attorney attempted to explain how Francisco was shot according to Cano's version of events: "If [Cano] went and raised the gun at the ceiling at the same time [Francisco] was coming, he would have looked down, and he could have [been] shot completely unintentionally with an absolute accident happening because of him moving and her bringing the gun up." Cano, however, provided no additional evidence to support her attorney's urged inference of accident. For example,

Cano testified that she shot Francisco "at a distance" and Francisco continued to move forward after he was shot. If Francisco was positioned over Cano at the time he was shot and continued to move forward, he would have run into or fallen on Cano. Yet, Cano presented no such evidence. She offered no ballistic or forensic evidence to support her theory of an accidental shooting with Francisco over her when she fired the "warning shot."

In summary, the evidence supporting Cano's conviction for second degree murder is overpowering. The jury was properly instructed on heat of passion and imperfect self-defense covering Cano's assertions she was afraid for her life when she shot Francisco. In addition, Cano's theory of an accidental shooting had little to no evidence supporting it. Even if the court should have sua sponte given the instruction for an additional theory of voluntary manslaughter, we determine such an error harmless because there is not a "reasonable probability" that Cano would have obtained a more favorable outcome. (See *People v. Lasko, supra*, 23 Cal.4th at p. 111.) We have little doubt that any reasonable jury would have convicted Cano of at least second degree murder on the record before us. Even without the additional manslaughter instruction as articulated in *Garcia, supra*, 162 Cal.App.4th 18, we do not lack confidence in the outcome. (See *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.)

DISPOSITION

The judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

McINTYRE, J.