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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

SAUL HERNANDEZ,

Defendant and Appellant.

D059507

(Super. Ct. No. SCN258501)

APPEAL from a judgment of the Superior Court of San Diego County, Joan P.

Weber, Judge. Affirmed.

A jury convicted defendant Saul Hernandez of one count of second degree murder (Pen. Code, § 187, subd. (a)),¹ and found true the special allegation he personally used a knife in committing the murder (§ 12022, subd. (b)(1)). The court sentenced Hernandez to a prison term of 16 years to life.

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

On appeal, Hernandez contends he was denied a fair trial because of a comment made by a prosecution witness concerning his prior arrests, and the admission of inflammatory photographs. He also contends the court erroneously did not sua sponte instruct the jury on voluntary manslaughter under *People v. Garcia* (2008) 162 Cal.App.4th 18 (*Garcia*), and gave improper instructions on other issues. He also contends cumulative errors resulted in a denial of a fair trial.

I

FACTS

A. Prosecution Evidence

The Murder

In February 2009 Hernandez was living in a shed behind the home of his sister, Zenaida Echevarria. The shed appeared to have been a garden shed being used as a place to sleep because there was a mattress, a second bed made from outdoor cushions, makeshift appliances, and extension cords from the house to provide electricity. There were bins outside the shed filled with bottles to be recycled.

On February 16, 2009, between 4:00 and 5:00 p.m., Echevarria saw Hernandez and Garcia (the victim) go to the shed. She had seen Garcia with Hernandez at least one other time the prior week, and knew Garcia previously had stayed in the shed as Hernandez's guest. The next morning, around 8:30 a.m., Echevarria saw a bike parked outside the shed. She went to the shed, called out for Hernandez, and knocked on the door. When there was no answer, she opened the door and found Garcia's body. She called police.

Authorities responded and found Garcia dead on a makeshift bed with an almost full bottle of beer next to him.² Authorities did not notice or collect any broken glass in or around the shed. The autopsy showed Garcia was killed by a single six-inch deep stab wound that passed through a rib, his heart and his left lung. The wound caused Garcia to bleed into his chest and airways, but death was not immediate. The wound pattern suggested the stabbing instrument was a narrow but not sharp implement, like an ice pick. The stabbing instrument first passed through Garcia's jacket, shirt and skin before penetrating the internal organs, and the expert concluded the amount of force necessary to inflict the wound was dependent on how sharp the instrument was, but Garcia's clothing, skin and rib would have presented great resistance. Hernandez's DNA was found under one of Garcia's fingernails.

Late that morning, while police were still at her house, Echevarria received a phone call from Hernandez, who told Echevarria to check if Garcia was still there and, if he was, to tell him to leave. Hernandez told her he had a disagreement or fight with Garcia and was checking on him. Hernandez also told her that he was at a 99 Cent Store in Vista.³ Police overheard this statement and went to both 99 Cent stores in Vista but were unable to find Hernandez. An officer took the phone from Echevarria and told Hernandez he wanted to interview him. Hernandez replied he would return home within

² A defense expert testified Garcia had a blood alcohol level of between .24 and .30 at the time of his death. That level of intoxication would cause Garcia to experience poor coordination, disorientation, lack of awareness, and to appear to be drunk.

³ Cell phone records showed he was not in the Vista area at the time the call was placed.

an hour for an interview. However, Hernandez did not return to Echevarria's house. Records of his phone calls showed Hernandez was in the San Ysidro area the next day, and in the Calexico and Holtville areas the following day.

The Arrest and Interview

Hernandez was finally located and arrested on April 9, 2009. He was interviewed by police and a videotape of that interview was played to the jury.

In the interview, Hernandez told police Garcia was a homeless person he had befriended and occasionally let sleep in the shed with him. The week before he was killed, Garcia had stayed in the shed with Hernandez, and on February 16 they had been drinking together. Hernandez left for a while to collect cans; when he returned, Garcia came out of the shed with a broken beer bottle, angry and cursing at him. Hernandez did not know why Garcia was angry. Garcia tried to cut at Hernandez from about five feet away. Hernandez told Garcia to calm down because Hernandez was going into the shed to get a blade from inside and "take care of him." Garcia turned his back and Hernandez went into the shed. After a three- to five-minute search for a weapon, Hernandez found a long piece of iron with a sharp point. He then reemerged with the weapon and tried to calm Garcia, but when Garcia persisted, Hernandez stabbed him once. Garcia then went back inside and Hernandez left, tossing the weapon into the street.⁴

Hernandez said he stabbed Garcia because he was afraid Garcia would hit him and he had to defend himself. Hernandez was scared and went to Mexico for a few months.

⁴ Police did not find the weapon in or around the site of the murder.

II

ANALYSIS OF MISTRIAL CLAIM

Hernandez contends the reference at trial to his prior encounters with police warranted a mistrial, and requires reversal on appeal, because it was so inflammatory it denied him a fair trial.

A. Background

Prior to trial, Hernandez moved in limine under Evidence Code section 1101 to exclude evidence concerning his two prior convictions, and that he was arrested in 2003 for carrying a concealed knife, in 2006 for assault with a knife and attempted robbery, and for threatening a former girlfriend with a knife. Hernandez also moved to exclude evidence from Echeverria that he "becomes violent and crazy when he's drunk [and] hit her in the face eight years ago." Hernandez argued these uncharged prior acts were inadmissible propensity evidence under Evidence Code section 1101, subdivision (a), and were not admissible for any of the purposes specified in Evidence Code section 1101, subdivision (b). He also argued that, even were the prior conduct admissible for some purpose identified in Evidence Code section 1101, subdivision (b), the evidence should be excluded under Evidence Code section 352 because the prejudicial effect outweighed any probative value. The prosecution argued that, if Hernandez elected to testify, his prior convictions and arrest record would be admissible for impeachment purposes.

At the pretrial hearing on the motion, the prosecution stated that, except for Echeverria's statements about Hernandez's violent tendencies when drunk, it intended to reserve evidence of these events as impeachment should Hernandez elect to testify, and

did not intend to introduce his prior conduct in their case-in-chief as prior acts under Evidence Code section 1101. The trial court therefore "tabled" those items as "moot," at least until Hernandez decided to testify, and turned to whether Echeverria's statements about Hernandez's "unpredictable" behavior when drunk would be admitted. The court concluded her statements would be excluded under Evidence Code section 352, and directed the prosecutor to instruct Echeverria "not [to] talk about" her fear of Hernandez's unpredictability or that he had struck her in the past.

At trial, the first witness to testify was San Diego County Deputy Sheriff Patterson, the first responder to arrive after Echeverria found Garcia's body and called 911. After Patterson described her initial contacts with Echeverria, her first observations of the body and its condition, and Hernandez's phone call to Echeverria, Patterson began describing the efforts by police to locate Hernandez, including dispatching two deputies to Vista to look for him. When the prosecutor asked Patterson, "[How] were you able to identify who [Echeverria's] brother was?" Patterson responded that "[Echeverria] told me her brother's name and his D.O.B." and then continued "I contacted Detective Boudreau, who was at the station. [Echeverria] told me [Hernandez] had been arrested multiple—" at which point the trial court sustained a defense objection and engaged in a sidebar conference. At the sidebar, the court questioned the prosecutor (Ms. Stark) in the following colloquy:

"The Court: Ms. Stark, please tell me that you instructed her not to make that statement in front of the jury.

"[The prosecutor]: Yes, I did. I told her not to mention it. And I apologize.

"The Court: Okay.

"[The prosecutor]: Can you give a curative instruction?

"The Court: I'm just going to reiterate that the jury is to disregard that answer.

"[The prosecutor]: Okay.

"The Court: Do we need to take a break and instruct this officer again?

"[The prosecutor]: Yeah, let me do that please.

"[Defense Counsel]: And I would make a motion for mistrial based on this officer's statements.

"The Court: Ms. Stark?

"[The prosecutor]: I don't think it's grounds for a mistrial at this point, your Honor, as long as we give a curative instruction. The deputy was reiterating something that another witness had told her. It's hearsay. I think if we give a curative instruction, then it's not—doesn't rise to the level of a mistrial."

The court reminded the jury that the answer had been stricken, instructed the jury to disregard it, and then announced the court would take a five-minute recess to discuss something briefly on the record. Out of the presence of the jury, Deputy Patterson said she had no recollection of being told not to mention any prior arrests of Hernandez, but the prosecutor stated she had told the officer "prior to the preliminary hearing . . . so I didn't remind her before she came in court here today." The defense reiterated it was moving for a mistrial based on the "inadmissible hearsay that the jury has already heard through Deputy Patterson and . . . particularly in light of the fact that they are now hearing he's had multiple arrests." The court denied the mistrial motion.

B. Legal Framework

Prosecutorial misconduct can violate the federal Constitution when it consists of "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.) When the complained-of conduct does not render a criminal trial fundamentally unfair, it may still constitute prosecutorial misconduct under state law, but "only if it involves ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' ' ' (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.) It is well settled that it is misconduct for a prosecutor to violate a court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a court order. (*People v. Crew* (2003) 31 Cal.4th 822, 839.)

The prosecutor has the added obligation "to guard against statements by his witnesses containing inadmissible evidence. [Citations.] If the prosecutor believes a witness may give an inadmissible answer during his examination, he must warn the witness to refrain from making such a statement." (*People v. Warren* (1988) 45 Cal.3d 471, 481-482.)

Even if the prosecutor has not deliberately engaged in misconduct by eliciting or attempting to elicit inadmissible evidence in violation of a court order, a witness's volunteered statement containing inadmissible evidence can provide grounds for a mistrial when the trial court finds the statement resulted in incurable prejudice. (*People v. Wharton* (1991) 53 Cal.3d 522, 565.) There is little doubt exposing a jury to a defendant's prior criminal convictions can prejudice the defendant's case. (See, e.g.,

People v. Price (1991) 1 Cal.4th 324, 431 [evidence defendant could not remember dates as he had been in prison so long should have been excluded as more prejudicial than probative]; *People v. Morgan* (1978) 87 Cal.App.3d 59, 76 [evidence of defendant's parole status is "obviously of a prejudicial nature"], disapproved on other grounds in *People v. Kimble* (1988) 44 Cal.3d 480, 497-498.)

When the issue is whether the witness's comment was so incurably prejudicial that a new trial was required, our standard of review is deferential. (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1581 ["Whether in a given case the erroneous admission of such evidence warrants granting a mistrial or whether the error can be cured by striking the testimony and admonishing the jury rests in the sound discretion of the trial court."].) As the court explained in *People v. Ledesma* (2006) 39 Cal.4th 641, 683:

" 'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' [Citation.] A witness's volunteered statement can, under some circumstances, provide the basis for a finding of incurable prejudice. (See *People v. Wharton*[, *supra*, 53 Cal.3d at p. 565] [motion for mistrial properly was denied because court's admonition and witness's later testimony under cross-examination dispelled prejudice]; *People v. Rhinehart* (1973) 9 Cal.3d 139, 152 . . . [witness's inadvertent answer was insufficiently prejudicial to justify a mistrial].) But we do not presume that knowledge that a defendant previously has been convicted and is being retried is incurably prejudicial. (See *People v. Anderson* (1990) 52 Cal.3d 453, 468 . . . [claim that trial court improperly disclosed to jury that the defendant previously had been sentenced to death for the same offense was waived by counsel's tactical failure to object, and was not prejudicial].)"

C. Analysis

We are convinced the trial court acted within its broad discretion when it denied Hernandez's motion for a mistrial. First, the prosecutor's question to Patterson was innocuous ("[How] were you able to identify who [Echevarria's] brother was?") and did not ask what Echeverria had told Patterson about Hernandez's criminal record. Instead, after Patterson responded to the question (saying "[Echeverria] told me her brother's name and his D.O.B."), Patterson continued with a narrative about contacting a detective at the station and then related Echeverria's statements about her brother's multiple arrests. The prosecutor's question was not misconduct. (See *People v. Leonard* (2007) 40 Cal.4th 1370, 1405 [no misconduct where prosecutor's question was innocuous and "not inherently likely to elicit a reference" to inadmissible evidence and no evidence it was asked with the intent to elicit such reference].) Second, although the jury heard a brief reference to Hernandez "multiple arrests," the jury was not exposed to *any* information on the alleged *conduct* underlying those arrests, much less to any information that Hernandez had been *convicted* on any of those charges, and therefore the primary information the in limine ruling intended to keep from the jury (e.g. Hernandez's alleged assaultive behavior, his alleged carrying of a concealed knife, and his prior criminal convictions) was not placed before the jury.⁵ Finally, the court admonished the jury to

⁵ For this reason, the cases on which Hernandez relies for his claim that he was denied a fair trial because of the error are inapposite. Although the admission of otherwise inadmissible evidence of a defendant's prior *convictions* can render the resulting conviction suspect (*People v. Harris, supra*, 22 Cal.App.4th at p. 1580), that evidence was not presented here.

disregard the statement, and we presume the jury heeded that instruction and disregarded the reference. (Cf., *People v. Burgener* (2003) 29 Cal.4th 833, 874 ["We do not agree the isolated references to an escape, immediately followed by an admonition to disregard them, mandated a mistrial. In the absence of evidence to the contrary, we presume the jury heeded the admonition."].) Because there was no pattern of egregious conduct, but instead was a single brief remark volunteered by a witness that was cured by the court's admonishment, Hernandez was not denied a fair trial, and denial of his mistrial motion was not an abuse of discretion.

III

ANALYSIS OF *GARCIA* CLAIM

The trial court instructed the jury on murder, the degrees of murder, and voluntary manslaughter in both the "heat of passion" and "imperfect self-defense" variants. Hernandez did not request any additional lesser included offense instructions. However, Hernandez contends on appeal that the court sua sponte was required to instruct the jury on voluntary manslaughter under *Garcia, supra*, 162 Cal.App.4th 18. He argues the trial court erred in not sua sponte instructing the jury that an unintentional killing without malice, committed during the course of an inherently dangerous assaultive felony, can constitute voluntary manslaughter. He argues that, because there was sufficient evidence from which the jury could have found the death (while occurring in the course of a felony) was nevertheless unintentional and without malice, there was a gap in the instructions. Hernandez therefore contends that, to fully instruct the jury on the applicable law and all lesser included offenses supported by substantial evidence, the trial

court was required to instruct the jury sua sponte on the theory of voluntary manslaughter allegedly approved in *Garcia*, e.g., that an unintentional killing without malice, committed during the course of an inherently dangerous assaultive felony, constitutes voluntary manslaughter. Because the language from *Garcia* on which Hernandez relies can only be understood in the context of the law governing the instructional obligations in the arena of murder, we begin with an overview of the applicable law.

A. The Duty to Instruct

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. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*)). " "The duty to instruct, sua sponte, on general principles closely and openly connected with the facts before the court also encompasses an obligation to instruct on defenses' " (*People v. Lopez* (1992) 11 Cal.App.4th 1115, 1120) "supported by substantial evidence [and] not inconsistent with the defendant's theory of the case." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) Substantial evidence, in this context, is evidence from which a jury of reasonable persons could conclude the lesser offense, but not the greater, was committed. (*Breverman, supra*, 19 Cal.4th at p. 162.)

Voluntary manslaughter is a lesser included offense to murder. (*People v. Rios* (2000) 23 Cal.4th 450, 460.) "[I]t is the 'court's duty to instruct the jury not only on the crime with which the defendant is charged, but also on any lesser offense that is both

included in the offense charged and shown by the evidence to have been committed.' " (People v. Gutierrez (2009) 45 Cal.4th 789, 826.) "Conversely, even on request, the court 'has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction.' " (People v. Cole (2004) 33 Cal.4th 1158, 1215.) Substantial evidence "is not merely 'any evidence . . . no matter how weak' [citation], but rather ' "evidence from which a jury composed of reasonable [persons] could . . . conclude[]" ' that the lesser offense, but not the greater, was committed." (People v. Cruz (2008) 44 Cal.4th 636, 664.) " 'On appeal, we review independently the question whether the trial court failed to instruct on a lesser included offense.' " (People v. Avila (2009) 46 Cal.4th 680, 705.)

B. Murder and Manslaughter

Murder is the unlawful killing of a human being with malice. (§ 187, subd. (a).) Malice may be either express or implied. It is express when the defendant manifests "a deliberate intention unlawfully to take away the life of a fellow creature." (§ 188.) It is implied when " ' "the killing proximately resulted from 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." ' " (People v. Dellinger (1989) 49 Cal.3d 1212, 1218.)

Thus, when the defendant unlawfully kills another while acting with a specific culpable form of intent—either because he intends to kill or because he intends to perform an act he knows presents a danger to the life of another but acts in conscious disregard for that danger—the killing is ordinarily deemed to constitute second degree

murder because the requisite malice is present. However, when the defendant unlawfully kills another while acting *without* the culpable form of intent the law labels as "malice," the killing is deemed the less culpable form of homicide, i.e., the crime of manslaughter (§ 192), a lesser included offense of murder. (*Breverman, supra*, 19 Cal.4th at p. 154; *People v. Verdugo* (2010) 50 Cal.4th 263, 293.)

Traditionally, *voluntary* manslaughter is an *intentional* unlawful killing done *without* malice.⁶ (*People v. Moye* (2009) 47 Cal.4th 537, 549.) "A defendant lacks malice and is guilty of voluntary manslaughter in 'limited, explicitly defined circumstances: either when the defendant acts in a "sudden quarrel or heat of passion" (§ 192, subd. (a)), or when the defendant kills in "unreasonable self-defense" [Citations.]' " (*People v. Lasko* (2000) 23 Cal.4th 101, 108.) Thus, an *intentional* killing is reduced from murder to manslaughter if the defendant's "reason was actually obscured as the result of a strong passion aroused by a 'provocation' sufficient to cause an 'ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.'" ' " (*Breverman, supra*, 19 Cal.4th at p 163.) A killing is *also* reduced from murder to manslaughter if the defendant "kills in "unreasonable self-defense"—the unreasonable but good faith belief in having to act in self-defense" ' " (*Lasko*, at p. 108; *People v. Blakeley* (2000) 23 Cal.4th 82, 88-89 [effect of unreasonable self-defense to reduce killing from second

⁶ Another form of manslaughter is vehicular manslaughter (§ 192, subd. (c)), but this statutory form of manslaughter is irrelevant here.

degree murder to voluntary manslaughter also applies when defendant did not intend to kill but did act with implied malice].)

C. Hernandez's Proposed New Form of Voluntary Manslaughter

Relying principally on *Garcia*, Hernandez argues that in addition to the "heat of passion" and "imperfect self-defense" forms of voluntary manslaughter, there is now a third category of voluntary manslaughter potentially applicable as a lesser included offense. He argues this third form of voluntary manslaughter arises when a person kills unintentionally and without implied malice during commission of a felony. Because Hernandez asserts a jury could have found these elements were present, he contends the trial court erred in not instructing the jury on this third category of voluntary manslaughter. (*Breverman, supra*, 19 Cal.4th at pp. 153, 162 [trial court must instruct on all theories of lesser included offenses supported by the evidence].)

In *Garcia*, the victim and defendant were involved in a confrontation. The victim moved toward (or "lunged" at) the defendant, then holding a shotgun. The defendant, concerned the victim might try to take the shotgun, swung at the victim with the butt of the gun to back the victim up, and the gun struck the victim in the face. This caused the victim to fall and hit his head on the sidewalk, causing him to die from the injuries sustained in the fall. (*Garcia, supra*, 162 Cal.App.4th at pp. 22-23, 25.) The defendant asserted he did not purposefully hit the victim in the face and did not intend to kill him. The jury was instructed on the crimes of murder and the lesser included offense of voluntary manslaughter, and the jury acquitted the defendant of murder but found him guilty of voluntary manslaughter. (*Id.* at pp. 23-26.)

On appeal, the defendant in *Garcia* claimed the trial court committed prejudicial error in refusing to instruct the jury on *involuntary* manslaughter as a lesser offense of murder. The defendant argued such instruction was required because there was substantial evidence the killing "was committed without malice and without either an intent to kill or conscious disregard for human life and, therefore, was neither murder nor voluntary manslaughter." (*Garcia, supra*, 162 Cal.App.4th at p. 26.) The argument in *Garcia* was limited to whether evidence showing an unintentional killing without implied malice during commission of an inherently dangerous felony could support an instruction for *involuntary* manslaughter. *Garcia* rejected that claim, stating an "unlawful killing during the commission of an inherently dangerous felony, even if unintentional, is *at least* voluntary manslaughter." (*Id.* at p. 31, italics added.) The italicized language was dicta and contained no specification of the circumstances, if any, under which the killing might be voluntary manslaughter and under what circumstances it would be a greater offense. (*Ibid.*)

D. *Garcia* Does Not Support Hernandez's Claim of Reversible Error

Hernandez argues that because the evidence showed he committed an assault with a deadly weapon, an inherently dangerous assaultive felony, but there was some evidence from which the jury could have found that he killed unintentionally and without malice while committing the assault, the trial court had a sua sponte duty to instruct under *Garcia* that the jury could convict him of the lesser offense of voluntary manslaughter if they found he killed unintentionally and without malice. The People contend in response that (1) the language in *Garcia* from which this theory derives was dicta; (2) even if

Garcia intended to create this new theory, the Legislature has already carved out separate crimes for such assaultive felonies on elders and children and therefore did not intend this type of voluntary manslaughter to exist; (3) even if *Garcia* intended to and legitimately could create this new theory, there is no sua sponte duty to instruct on this theory of voluntary manslaughter as it is not an established rule of law; and (4) even if such a theory of voluntary manslaughter is supported by the law, there was no evidence supporting such an instruction in this case.

We note this particular theory of voluntary manslaughter is at issue in cases currently pending before the California Supreme Court, including *People v. Bryant* (2011) 198 Cal.App.4th 134 (review granted Nov. 16, 2011, S196365) on which Hernandez relies in this proceeding. However, it is unnecessary for us definitively to resolve the issues that will be resolved by the California Supreme Court because we conclude that, even assuming *Garcia* intended to and did validly create a new theory of voluntary manslaughter,⁷ there was no substantial evidence from which a jury composed of reasonable people could have concluded the lesser offense, but not the greater, was committed, and therefore not instructing the jury in accordance with the theory espoused in *Garcia* in the instant case was correct.

⁷ The statement from *Garcia* on which Hernandez relies, that an "unlawful killing during the commission of an inherently dangerous felony, even if unintentional, is *at least* voluntary manslaughter" (*Garcia, supra*, 162 Cal.app.4th at p. 31, italics added), was apparently dicta, because the holding was that the defendant in *Garcia* was not entitled to an *involuntary* manslaughter instruction. Indeed, *Garcia* contains no specification of the circumstances, if any, under which such a killing might be voluntary manslaughter and under what circumstances it would be a greater offense. (*Ibid.*)

Even assuming the theory of manslaughter derived from *Garcia* is legitimate, the evidence in this case did not warrant the instruction. The *Garcia* theory of voluntary manslaughter requires the killing be committed *without* malice. "[M]alice may be [either] express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature." (§ 188.) Malice is implied "when a killing results from an intentional act, the natural consequences of which are dangerous to human life, and the act is deliberately performed with knowledge of the danger to, and with conscious disregard for, human life." (*People v. Cook* (2006) 39 Cal.4th 566, 596.)

Here, the evidence demonstrated Hernandez stabbed the victim with such great force that the victim's heart and lung were both pierced. Even if the *Garcia* theory survives Supreme Court review, there was no evidence from which a rational jury could have concluded Hernandez's intentional act of stabbing Garcia was done without Hernandez harboring at least implied malice because there was no evidence a stabbing thrust of such substantial force was not an intentional act whose natural consequences are dangerous to human life; nor was there any evidence Hernandez did not act with a conscious disregard for human life posed by such an act when he stabbed Garcia. (*People v. Knoller* (2007) 41 Cal.4th 139, 157.) Accordingly, the trial court had no sua sponte duty to instruct the jury with the theory of voluntary manslaughter referred to in *Garcia*.

IV

ANALYSIS OF OTHER CLAIMS

A. The Cumulative Instruction Claim

Hernandez contends the trial court erred because, after instructing the jury with CALCRIM No. 520 (defining murder) and CALCRIM No. 521 (defining the distinction between first and second degree murder), it also gave CALJIC Nos. 8.30 and 8.31.⁸ Hernandez does not argue either group of instructions were legally incorrect. Instead, he argues the CALJIC instructions were cumulative to the CALCRIM instructions, and he was prejudiced because repeating the second degree murder instructions "added unfair emphasis to the second-degree murder option."

We do not agree that giving instructions that correctly state applicable legal principles is error merely because the instructions contain duplication or restatements of the correct legal principles using slightly different phraseology, and Hernandez cites no authority that a court's decision to reiterate correct legal principles in its charge to the jury is error. Moreover, we are unconvinced by Hernandez's claim that the jury's verdict, finding him guilty of second degree murder, somehow represents a "strong indication that [the jury] was unfairly influenced by" the reiteration of the applicable principles for deciding whether he was guilty of first or second degree murder. Instead, we presume the jury understands and follows the instructions (cf. *People v. Horton* (1995) 11 Cal.4th

⁸ CALJIC No. 8.30 explains that an intentional killing done without deliberation and premeditation is second degree murder, and CALIC No. 8.31 explains second degree murder based on implied malice.

1068, 1121), which included (in this case) the instruction that the jury is to consider all of the instructions together and cautioned, "If I repeat any instruction or idea, do not conclude that it is more important than any other instruction or idea just because I repeated it." Hernandez's claim of prejudice overlooks that, to the extent giving CALJIC No. 8.30 reemphasized the defining characteristics of second degree murder, it *also* reemphasized that a critical element of second degree murder was when there was an intentional killing but "the evidence is insufficient to prove deliberation and premeditation." A reemphasis of this distinction may have *benefitted* him because, here, there *was* evidence of premeditation and deliberation; Hernandez stabbed Garcia only after spending several minutes searching for a weapon before reemerging from the shed, and therefore there was evidence supporting a conviction for first degree murder. However, CALJIC No. 8.30 reminded the jury that evidence beyond a reasonable doubt concerning deliberation and premeditation was required for a conviction of first degree murder and, because the jury ultimately acquitted him of first degree murder, the reemphasis may have aided rather than harmed Hernandez.

B. The Modified CALCRIM No. 625 Claim

Hernandez contends the court erred when it modified CALCRIM No. 625 to include the words "express malice" in the instruction.

Background

In its unmodified form, CALCRIM No. 625 provides:

"You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill[.]

[or] [the defendant acted with deliberation and premeditation[,]]
[[or] the defendant was unconscious when (he/she) acted[,]] [or the
defendant _____ <insert other specific intent required in a
homicide or other charged offense>.]

"A person is *voluntarily intoxicated* if he or she becomes intoxicated
by willingly using any intoxicating drug, drink, or other substance
knowing that it could produce an intoxicating effect, or willingly
assuming the risk of that effect.

"You may not consider evidence of voluntary intoxication for any
other purpose."

The prosecution, citing *People v. Timms* (2007) 151 Cal.App.4th 1292, proposed
to amend CALCRIM No. 625 to insert the words "express malice" to the second sentence
immediately before the words "intent to kill," arguing that under *Timms*, "voluntary
intoxication is not a defense to implied malice or conscious disregard" murder. The
defense argued it should be given in its unmodified form. The court agreed with the
prosecution, and instructed the jury:

"You may consider evidence, if any, of the defendant's voluntary
intoxication only in a limited way. You may consider that evidence
only in deciding whether the defendant acted with an *express malice*
intent to kill or the defendant acted with deliberation and
premeditation. [¶] A person is voluntarily intoxicated if he becomes
intoxicated by willingly using any intoxicating drug, drink or other
substance knowing that it could produce an intoxicating effect or
willingly assuming the risk of that effect. [¶] *You may not consider
evidence of voluntary intoxication for any other purpose.*" (Italics
added.)

Analysis

The instruction, as given, was a correct statement of the law. On a murder charge,
evidence of voluntary intoxication is admissible "solely on the issue of . . . whether the
defendant premeditated, deliberated, or harbored express malice aforethought." (§ 22,

subd. (b) ["Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought[.]"]; see *People v. Mendoza* (1998) 18 Cal.4th 1114, 1125.) The *Timms* court held "the language of . . . CALCRIM No. 625 . . . is true to section 22, as amended" (*People v. Timms, supra*, 151 Cal.App.4th at p. 1298), and the addition of the two words ("express malice") does not alter the meaning of the instruction but instead clarifies that voluntary intoxication is not relevant to implied malice murder.

Hernandez argues the instruction was made "confusing" by the addition of the words "express malice" and those words were "unnecessary" because the instruction already told the jury it "may not consider evidence of voluntary intoxication for any other purpose." However, the redundancy did not make the instruction incorrect, and we therefore are not persuaded by Hernandez's claim it was error to give the modified instruction.⁹

⁹ Hernandez appears to argue the instruction, although facially accurate, was impliedly erroneous by carrying an implication that it precluded consideration of voluntary intoxication on his intent to kill for purposes of voluntary manslaughter because it required the jury to ignore the effect of voluntary intoxication on the issues of heat of passion or unreasonable self-defense. We reject this claim, for several reasons. First, the instruction Hernandez sought below carried the identical implication, because it stated "[y]ou may not consider evidence of voluntary intoxication for any other purpose," and Hernandez does not explain how the addition of the offending two words carried some different message than the quoted language. Second, he cites no authority that voluntary intoxication is relevant to those mitigating factors. Finally, to the extent Hernandez claims the complained-of implication was misleading absent additional instructions on the proper role the evidence of voluntary intoxication might have in the present case, he was required to call the ambiguity to the court's attention and seek an

C. The Consciousness of Guilt Instructions Claim

Hernandez contends there was no evidentiary basis for giving CALCRIM No. 362 or CALCRIM No. 371.

Background

The prosecutor argued for inclusion of CALCRIM No. 362¹⁰ (the false statement/consciousness of guilt instruction) and CALCRIM No. 371¹¹ (the suppression of evidence/consciousness of guilt instructions) in the instructions to the jury, and the defense objected. The prosecution asserted the "false statement" version was warranted by, among other things, the evidence that when Hernandez phoned his sister to ask her to check on the victim, he (1) said he was calling from a 99 Cent Store in Vista when he was

appropriate clarifying pinpoint instruction. (See *People v. Bolden* (2002) 29 Cal.4th 515, 559 ["[A]n instruction on voluntary intoxication, explaining how evidence of a defendant's voluntary intoxication affects the determination whether defendant had the mental states required for the offenses charged, is a form of pinpoint instruction that the trial court is not required to give in the absence of a request."].) Absent that request, Hernandez cannot assert there was error as the result of some claimed latent ambiguity in the instructions given. (*Ibid.*)

¹⁰ CALCRIM No. 362, as given to the jury below, stated: "If the defendant made a false or misleading statement before this trial related to the charged crime knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime, and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

¹¹ CALCRIM No. 371, as given to the jury here, provided that, "If the defendant tried to hide evidence or discourage someone from testifying against him, that conduct may show that he was aware of his guilt. [¶] If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself."

in fact not at that location but was calling from a different city, and (2) told police he would return home voluntarily for an interview but never appeared and instead left for Mexico.

The prosecution argued the suppression of evidence version was warranted by the evidence that he admitted to police he took the weapon from the murder scene, and claimed he disposed of it nearby, but police were never able to find the weapon. The court agreed to give both instructions.

Analysis

Hernandez argues the instructions were improper because there was no evidence to support them.¹² However, as long as there is evidence from which a jury could conclude Hernandez made a false or misleading statement and knew it was false or intended to mislead, CALCRIM No. 362 is properly given. (*People v. Bowman* (2011) 202 Cal.App.4th 353, 366.) Here, there was evidence from which a jury could have found that Hernandez, knowing police were looking for him, made two statements he knew to be false or misleading (e.g., as to his location during the phone call and as to his intent to turn himself in voluntarily) that hindered the ability of police to apprehend him. This evidence supported instructing with CALCRIM No. 362.

¹² Hernandez also appears to assert that because the consciousness of guilt instructions pinpoint specific evidence, and because the court in *People v. Wright* (1988) 45 Cal.3d 1126 held a defendant is not entitled to instructions that identify specific evidence as a basis for finding reasonable doubt, the converse is equally true and these instructions are always improper and can never be given because they are argumentative in the prosecution's favor. However, our Supreme Court has rejected this argument (*People v. Kelly* (1992) 1 Cal.4th 495, 532 ["Nothing in *Wright* affects such an instruction [on consciousness of guilt.]") and we are bound by *Kelly*.

Similarly, as long as there is some evidence from which the jury could conclude the defendant attempted to hide evidence of the crime, CALCRIM No. 371 is properly given. (*People v. Williams* (1996) 46 Cal.App.4th 1767, 1780.) Here, Hernandez told police he had taken the murder weapon from the site and disposed of it, and the evidence showed police never found that important piece of physical evidence. That evidence supported the giving of CALCRIM No. 371. (*Williams*, at p. 1780 [where police unable to locate clothing worn by appellant that day, "it was entirely reasonable to assume . . . appellant hid certain items of clothing . . . he wore . . . to thwart efforts to establish his identification. Accordingly, the trial court did not err in giving [suppression of evidence/consciousness of guilt instruction.]".])

Hernandez argues the instructions are improper when a defendant confesses to the crimes (*People v. Mattson* (1990) 50 Cal.3d 826, 871-872), and his statements to police after his apprehension therefore made the instructions improper. However, Hernandez pleaded not guilty to the charged offense and, although conceding the stabbing, he contested the mental state he harbored at the time he stabbed Garcia. Under these circumstances, it is not error to give the consciousness of guilt instructions. (See, e.g., *People v. Breaux* (1991) 1 Cal.4th 281, 304-305.)

D. The Inflammatory Photographs Claim

Hernandez contends the court abused its discretion by admitting photographs of Garcia's body and from the autopsy. He argues the photographs were highly prejudicial

but had little evidentiary value because they were cumulative, and therefore asserts it was an abuse of discretion under Evidence Code section 352 to admit the photographs.¹³

Background

Prior to trial, Hernandez objected to numerous photographs of Garcia's body, asserting there was no issue as to the cause of death. The court excluded some photographs under Evidence Code section 352, but admitted two autopsy photographs (exhibits 49 and 50) depicting the injury to Garcia's heart and lung, reasoning the exhibits showing the extent of the damage to those organs would assist the jury in evaluating the evidence. The defense also objected to exhibits 8, 9 and 12, crime scene photographs depicting the blood on and around Garcia's face, but the court admitted the exhibits, reasoning the photographs illustrated what Hernandez would have seen on Garcia's body after stabbing him and also aided in understanding the medical examiner's testimony that Garcia died from aspirating blood internally.

Legal Framework

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time." (*People v. Rodrigues* (1994) 8

¹³ Hernandez also argues admission of the photographs deprived him of due process by rendering the trial fundamentally unfair. However, because we conclude admission of the evidence did not violate state evidentiary rules, his due process argument is without merit. (*People v. Cole, supra*, 33 Cal.4th at p. 1197, fn. 8 [defendant's arguments that erroneous admission of evidence violated the right to due process failed because the evidence was properly admitted].)

Cal.4th 1060, 1124.) The undue prejudice Evidence Code section 352 seeks to avoid " "is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." [Citations.] "Rather, the statute uses the word in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors." ' ' [Citation.] Painting a person faithfully is not, of itself, unfair." (*People v Harris* (1998) 60 Cal.App.4th 727, 737.)

Specifically concerning photographs of a victim, admission into evidence of photographs is within the broad discretion of the trial court when a claim is made that they are unduly gruesome or inflammatory. (*People v. Ramirez* (2006) 39 Cal.4th 398, 453-454.) "The admission of photographs of a victim lies within the broad discretion of the trial court when a claim is made that they are unduly gruesome or inflammatory. [Citations.] The court's exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect. [Citations.]' [Citation.] '[A] court may admit even "gruesome" photographs if the evidence is highly relevant to the issues raised by the facts, or if the photographs would clarify the testimony of a medical examiner.' [Citation.] 'We have consistently upheld the introduction of autopsy photographs disclosing the manner in which a victim was wounded as relevant not only to the question of deliberation and premeditation but also aggravation of the crime and the appropriate penalty [Citations.]' " (*Ibid.*)

"Where, as here, a discretionary power is inherently or by express statute vested in the trial [court], [its] exercise of that wide discretion must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or

patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

Analysis

We conclude Hernandez has not shown the decision to admit the complained-of photographs was arbitrary, capricious, or patently absurd. Although the *fact* Garcia was killed by Hernandez was not disputed, the *circumstances* under which the killing occurred was in dispute, and the *manner* of the killing depicted in the photographs provided some evidence from which a reasonable jury could conclude Hernandez intended Garcia to die.

Admission of the autopsy photographs, which showed the depth of the wound, were proper to illustrate the medical examiner's testimony concerning the force employed by Hernandez. The power exerted by Hernandez when he stabbed Garcia provided some evidence from which a jury could conclude Hernandez was not drunkenly flailing at Garcia in self-defense, but instead intended the thrust as a killing blow. " 'Generally, photographs that show the manner in which a victim was wounded are relevant to the determination of malice, aggravation and penalty.' [Citations.] Here, the autopsy photographs not only showed criminal activity that involved the use of force or violence, but they aided [the medical examiner] in his explanation to the jury regarding the massive number and nature of the wounds inflicted upon the victim" (*People v. Farnam* (2002) 28 Cal.4th 107, 185.) Hernandez's claim that they were unnecessary, and therefore were admitted in violation of Evidence Code section 352, is without merit because "[c]ontrary to defendant's suggestion otherwise, the photographs . . . were not

impermissibly cumulative or inflammatory. Photographs are not cumulative simply because they illustrate facts otherwise presented through testimony." (*Ibid.*)

Admission of the crime scene photographs showing Garcia did not die immediately, but instead slowly drowned in his own blood, were proper to illustrate the medical examiner's testimony concerning the manner in which Garcia died after Hernandez stabbed him. These photographs, which showed Garcia's internal bleeding was accompanied by obvious external manifestations of his medical distress, had two potentially relevant purposes: it showed Hernandez could have recognized Garcia's condition and called for assistance but instead allowed him to die (supporting the prosecution's theory that Hernandez intended to kill him), and it could also support an inference that Hernandez was dissembling when he claimed (in his phone call to his sister) he wanted her to check on whether Garcia was still in the shed and to tell Garcia to leave. We conclude Hernandez has not shown the court exercised its discretion in an arbitrary, capricious or patently absurd manner when it allowed admission of the complained-of photographs.

V

CUMULATIVE ERROR

Hernandez contends that even if individual trial errors do not warrant reversal of his conviction, their cumulative effect deprived him of a fair trial. However, we have determined there were no individual errors and therefore the cumulative error argument is not applicable.

DISPOSITION

The judgment is affirmed.

McDONALD, J.

I CONCUR:

McCONNELL, P. J.

Aaron, J, concurring.

I join in parts I, II, IV, and V of the majority opinion. With respect to part III, I agree with the majority's conclusion that the trial court did not err in failing to instruct the jury concerning the theory of voluntary manslaughter discussed in *People v. Garcia* (2008) 162 Cal.App.4th 18 (*Garcia*) because "there was no evidence from which a rational jury could have concluded Hernandez's intentional act of stabbing Garcia was done without Hernandez harboring at least implied malice" However, I disagree with the majority's characterization of the *Garcia* court's statement that "an unlawful killing during the commission of an inherently dangerous felony, even if unintentional, is *at least* voluntary manslaughter" (*Garcia, supra*, at p. 31, italics added by majority) as "apparent[] dict[um]" (maj. opn. at p. 17, fn. 7, italics added) and its dismissal of the statement on that basis.

"Dicta consists of observations and statements unnecessary to the appellate court's resolution of the case." (*Garfield Medical Center v. Belshé* (1998) 68 Cal.App.4th 798, 806; see, e.g., *Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1301 [dicta are "general observations unnecessary to the [court's] decision"].) In my view, the *Garcia* court's statement that "an unlawful killing during the commission of an inherently dangerous felony, even if unintentional, is *at least* voluntary manslaughter" (*Garcia, supra*, 162 Cal.App.4th at p. 31, italics added), cannot be dismissed as dictum, because this language *is* necessary to the *Garcia* court's holding that the defendant in that case was not entitled to an involuntary manslaughter instruction. While the defendant in

Garcia was convicted of voluntary manslaughter (*id.* at p. 23) and the *Garcia* court thus was not required to determine whether the defendant in that case was entitled to a *voluntary* manslaughter instruction based upon the theory of voluntary manslaughter that it had described, that fact does not convert the *Garcia* court's reasoning into mere dictum.

In sum, while I agree with the majority that no *Garcia* instruction was warranted given the particular factual record present in this case, I do not join in the remainder of the majority's discussion of *Garcia*.

AARON, J.