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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JOSE HUIZAR, Defendant and Appellant.	D060365 (Super. Ct. No. FVI902493)

APPEAL from a judgment of the Superior Court of San Bernardino County, Cheryl C. Kersey, Judge. Affirmed.

The jury convicted Jose Huizar of second degree murder (Pen. Code,[1] § 187, subd. (a); count 1) and attempted murder (§ 664/187, subd. (a); count 2). The jury found true, as to count 1, that Huizar personally used a firearm causing great bodily injury or death within the meaning of section 12022.53, subdivision (d). It also found true, as to count 2, that he personally inflicted great bodily injury and paralysis, he personally and

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

intentionally discharged a firearm causing great bodily injury within the meaning of section 12022.53, subdivision (d), and the attempted murder was committed willfully, deliberately, and with premeditation. The court sentenced Huizar to prison for 72 years to life.

Huizar appeals, contending the court committed reversible error in: (1) denying his *Batson/Wheeler*[2] motion challenging the prosecution's preemptory challenge of an African-American juror; (2) refusing to give a self-defense jury instruction; and (3) failing to instruct the jury on involuntary manslaughter as a lesser included offense of murder. We affirm.

FACTS

Albert Aguirre, Jesse DeCasas, Abel Realivasquez, Efrain Ferguson, and Yasmine Siqueiro were all friends and neighbors. On July 22, 2009, Siqueiro invited Aguirre to go to "the Rocks," a hangout spot toward the hills of Victorville near a mortuary. The group had been there numerous times, often with Sandra Reyes.[3] Reyes was a childhood friend of Siqueiro's, and Huizar's former girlfriend. Siqueiro and her friends would hang out at the Rocks for several hours, drinking beer, smoking cigarettes or marijuana, and watching over the Rocks.

Siqueiro picked up Aguirre, DeCasas, Realivasquez, Ferguson, and Sonnie Calderon (a friend of DeCasas) in her car. After hanging out for awhile and going to the

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2 *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

3 Reyes was a codefendant during Huizar's trial. The jury deadlocked on all counts against her.

store, they decided to visit the Rocks. On the way there, DeCasas called Reyes and told her they were going to the Rocks. When they arrived at the Rocks, they rolled marijuana into a cigar. Ferguson and DeCasas played with a slingshot, shooting rocks at a sign for about five minutes. Ferguson then went back to the car to help Siqueiro who had caught her elbow in the window. Aguirre was using DeCasas's cell phone to access the Internet. Aguirre started walking up the hill, followed by Calderon, Ferguson, and Realivasquez.

DeCasas also started walking up the hill carrying a radio. DeCasas handed the radio to Realivasquez and said he would be right back. Realivasquez continued walking up the hill with the radio.

Subsequently, Reyes decided to drive to the Rocks as well and parked her car there. At this time, Siqueiro and Ferguson were by Siqueiro's car. Siqueiro approached the driver's side of Reyes's car. Ferguson started to walk back up the hill when he heard a door slam. He started walking back to the car and saw Siqueiro "wrestling with some dude." Huizar, wearing gloves, jumped out of the passenger seat of the car, took two steps, then aimed a gun straight out in front of him and fired four shots up the hill. One of the shots hit DeCasas, killing him. As he was shooting, Huizar said, "IE. This is how we do it in the pinta."[4]

An unidentified man with a baseball bat jumped out of the backseat of Reyes's car. While Huizar was shooting, the man with the baseball bat pushed Siqueiro over a low

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4 "Pinta" means jail in Spanish.

wooden fence and hit Ferguson with the bat.[5] Ferguson defended himself, hitting the bat wielding man in the face. Ferguson then threw the man over the wooden fence. Ferguson saw Huizar with the gun, so he ducked and tried to run down the hill. Huizar turned, pointed the gun at Ferguson, and shot him twice in the back. The man with the bat then started hitting Ferguson with the bat while saying, "This is IE." Ferguson tried to tell the man to stop hitting him, but he had trouble breathing due to his gunshot wound. After the man stopped hitting Ferguson with the bat, he said he was from "the IE." Ferguson put his hand up and said, "Don't kill me, man, don't kill me." Huizar looked at Ferguson and then got in Reyes's car. They were at the Rocks for less than two minutes.

Calderon and Realivasquez ran up the hill when they heard gunshots and hid behind a rock. Unbeknownst to his friends, Realivasquez had a .22 single shot derringer-type gun in his pocket. The gun was loaded, and Realivasquez had a bullet in his pocket. He did not fire his gun at the Rocks that night.[6] When he heard gunshots, he threw the radio and his gun. After hiding, Realivasquez came down and looked for DeCasas but did not find him.

Police officers later found a bullet in Realivasquez's pocket. The following morning, Realivasquez took the police and showed them where he threw the gun. The criminalist who later examined the gun testified that initially he was not able to fire it.

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[5] Apparently, the bat wielding man was the same person Ferguson saw Siqueiro wrestling.

[6] Realivasquez had previously fired his gun on July 4, 2009, but the gun kept jamming. The gun was difficult to fire.

He tightened the barrel mount screw, but it still would not fire. Ultimately, the criminalist was able to fire the gun after he pushed the barrel down. The criminalist also determined that a bullet recovered at the scene could not have been fired from Realivasquez's gun. Realivasquez's gun was a single shot gun that could not be fired in rapid succession.

San Bernardino County Sheriff's Sergeant Gina Perez found DeCasas at the Rocks. DeCasas was lying face down on the ground of a sloped hill close to the parking lot of a nearby mortuary. He was dead.

DeCasas's body had abrasions on his right knee and forearm, the back of his left elbow, and on his forehead. Because there was no stippling on the body, the coroner determined the barrel of the gun had been at least two feet away from DeCasas when he was shot, but could have been much farther away. Based on the vegetation and debris on his body, DeCasas likely rolled down the embankment after being shot.

Ferguson, Reyes and others had recently been on a trip to Laughlin. Ferguson believed the shooting was in retaliation for his having a relationship with Reyes.

Defense

Brett Zour from the San Bernardino County Sheriff's Department testified that Siqueiro originally told him she did not know anybody with the type of car Huizar arrived in at the Rocks, but later told him that Reyes had that type of car. She also said she did not believe that Reyes was involved. Siqueiro initially denied that Reyes had a boyfriend, but later said Huizar was Reyes's ex-boyfriend.

Deputy Robert Ripley interviewed Ferguson at Arrowhead Regional Medical Center. Ferguson stated that two Hispanic males drove up in a new black car and attacked him. One was the driver and one got out of the passenger side of the car. He never mentioned a woman accompanying the two men.

Siqueiro's mother, with whom Siqueiro lived at the time of the shooting, testified that about seven or eight days after the shooting, there was graffiti on her garage door that said, "Guilty."

DISCUSSION

I

THE COURT DID NOT ERR IN FINDING HUIZAR DID NOT ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION DURING VOIR DIRE

During voir dire, Huizar's trial counsel brought a *Batson/Wheeler* motion after the prosecutor exercised a peremptory challenge against prospective juror no. 65, who was African-American. The court denied the motion, concluding Huizar had not established a prima facie case of discrimination. Huizar argues this ruling was in error. It was not.

A. Voir Dire

Prospective juror no. 65 was a sales specialist for Home Depot, had some college education, was not married, and did not have any children. Huizar's trial counsel asked her why it was fair that the prosecution prove its case beyond a reasonable doubt as opposed to a preponderance standard, and prospective juror no. 65 answered, "Because -- well, it depends, you really need both cases to be brought forward in whether to have fairness. You can't have a one-sided story."

Defense counsel tried to explain his question better, and asked the question again, and prospective juror no. 65 said, "Because you need the whole package in order to be fair." He asked, "How does that make it fair?" She answered, "Because it --." Counsel then explained he did not mean to put her on the spot and discussed how hard it was speaking in public. Then he moved on to another topic.

Reyes's counsel asked another prospective juror whether, if he or she was the defendant, he or she would want that prospective juror to decide his or her fate. The juror said yes, and counsel turned to prospective juror no. 65 and said, "You're nodding. I see you out of the corner of my eye. Sorry." He asked her whether she was nodding, and she said, "Yes." He then asked, "Would you want you on your jury if you were sitting there?" She said she would "[b]ecause I believe in fairness, and I also know that people's lives are hanging in the balance and you need to have adequate information in order to make decisions properly and fairly."

The prosecutor, in her questioning, asked jurors whether they would hesitate to vote guilty if she had proven the elements of the crime, but there were still some unanswered questions. Prospective juror no. 65 answered, "If I had unanswered questions, I might hesitate but if you have proven all of your elements then I couldn't--it wouldn't affect how I would vote." The prosecutor then followed up on prospective juror no. 65's previous voir dire response and asked about her "comment of, you know, that people's lives are hanging in the balance, and it was--I believe when [Huizar's counsel] was asking you questions. Do you understand that you are not to consider anything that may happen to someone or may not happen to someone based on the decision you render

in this case?" Huizar's trial counsel asked to approach, and the court instead sustained an objection to the prosecutor's question. The prosecutor then rephrased her question and asked whether prospective juror no. 65 knew she was not to consider sentencing "or anything like that" while sitting as a juror, and prospective juror no. 65 said she understood.

When the prosecutor indicated she wanted to excuse prospective juror no. 65, Huizar's counsel asked to approach, and after an unreported bench conference, the court told the prospective juror to remain seated. Subsequently, the court put on the record that at the bench conference, Huizar's trial counsel indicated he would bring a *Batson/Wheeler* motion if she were excused, and Reyes's counsel joined in the motion. Because it was toward the end of the day, the court continued with jury selection and had the parties address the *Batson/Wheeler* motion the following day.

The following day, the prosecutor indicated she still intended to excuse prospective juror no. 65. Huizar's trial counsel renewed his *Batson/Wheeler* motion, which Reyes's counsel joined. While acknowledging it was tough to make a prima facie case, counsel noted the prospective juror was the sole African-American in the jury pool, young, well kept, neat in appearance, employed, and had better than a high school education. He stated the juror did not give any "inappropriate answers" to voir dire questions, and there was nothing objectively disqualifying her from serving on the jury. In response, the prosecutor disputed that the juror was African-American, and stated she was under the impression she was Hispanic. She also pointed out there was an African-American on the panel sitting in the audience. Huizar's trial counsel proposed that if the

court was concerned whether the prospective juror was African-American, it should call her in to ask her whether she was African-American or Hispanic. The court stated it was "fairly certain" prospective juror no. 65 was African-American. It also confirmed there was another African-American in the venire. The court found there was insufficient evidence "to infer reasonably that discrimination has occurred to make a showing for the prima fascia [sic] case" and it did "not appear that the challenge has been--that is going to be exercised is discriminatory in nature." It further explained:

> "There are other African Americans, at least one, within the venire. There has not been an exercise of a disproportional number of peremptory challenges towards a specific group. And there has not been a questioning process by any of the parties involved as to (Juror ID No. 65) or any of the others that would give the Court some kind of evidence that there is an exercise of--or a discrimination process going on by the type of questions that have been asked. [¶] None of the attorneys have asked questions differently from one juror to the another [sic] so there would be a red flag, as they say, that there might be a challenge to particular jurors because of race association. [¶] And at this point, other individuals who have been challenged by [the prosecutor] have been a variety of sex, male and female, Hispanic and White. And it appears, at least for (Juror ID No. 65), that her age--she is probably under 25, and there may be other reasons for that challenge that the Court sees is not discriminatory in nature."

B. Analysis

"It is well settled that the use of peremptory challenges to remove prospective jurors solely on the basis of a presumed group bias based on membership in a racial group violates both the state and federal Constitutions." (*People v. Turner* (1994) 8 Cal.4th 137, 164, abrogated on other grounds by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5 (*Griffin*); *Wheeler*, *supra*, 22 Cal.3d at pp. 276-277; *Batson*, *supra*, 476

U.S. at p. 89.) In *Wheeler*, *supra*, 22 Cal.3d 258, the California Supreme Court held that peremptory challenges could not be constitutionally utilized by a prosecutor to exclude members of a cognizable group on the basis of group bias alone. (*Id*. at pp. 276-277.) In *Batson*, *supra*, 476 U.S. at page 96, the United States Supreme Court accepted a similar proposition. To implement these holdings, both courts adopted a like procedure. A defendant alleging an unconstitutional exclusion of some group from the jury must first make a prima facie showing of such exclusion. This is most often done by establishing a pattern of strikes eliminating most or all members of the group. (*Id*. at p. 97; *Wheeler*, *supra*, at p. 280.) Other factors to be considered include the nature of the questioning by the prosecutor, the racial or ethnic background of the defendant and the victim, and the similarity of the challenged jurors based on characteristics other than group membership. (*Batson*, *supra*, at p. 97; *Wheeler*, *supra*, at pp. 280-281; see also *People v. Turner* (1986) 42 Cal.3d 711, 719.) Once a prima facie case has been established, the burden shifts to the prosecution to demonstrate a neutral explanation for the challenge. (*People v. Johnson* (1989) 47 Cal.3d 1194, 1216.)

"When a trial court denies a *Wheeler* motion because it finds no prima facie case of group bias was established, the reviewing court considers the entire record of voir dire." (*People v. Davenport* (1995) 11 Cal.4th 1171, 1200, abrogated on other grounds by *Griffin, supra,* 33 Cal.4th at p. 555, fn. 5.) "If the record 'suggests grounds upon which the prosecutor might reasonably have challenged' the jurors in question, we affirm." (*People v. Howard* (1992) 1 Cal.4th 1132, 1155, quoting *People v. Bittaker* (1989) 48 Cal.3d 1046, 1092; see *Griffin, supra,* 33 Cal.4th at p. 555 ["When a trial court

denies a *Wheeler* motion with a finding that the defendant failed to establish a prima facie case of purposeful discrimination, we review the record on appeal to determine whether there is substantial evidence to support the ruling."].)

Our analysis begins with the presumption a party exercising a peremptory challenge is doing so on a constitutionally permissible ground. (*Wheeler*, *supra*, 22 Cal.3d at p. 278.) "[T]he law recognizes that a peremptory challenge may be predicated on a broad spectrum of evidence suggestive of juror partiality. The evidence may range from the obviously serious to the apparently trivial, from the virtually certain to the highly speculative. [¶] For example, a prosecutor may fear bias . . . because [a juror's] clothes or hair length suggest an unconventional life-style." (*Id*. at p. 275.)

Huizar argues the court erred in finding that he had not established prima facie evidence of discrimination. He correctly notes the exclusion of only one juror for discriminatory purposes is improper. (See *People v. Christopher* (1991) 1 Cal.App.4th 666, 670-671.) Huizar's argument, however, overlooks the difficulty in finding a discriminatory purpose in striking a single juror. (See *People v. Harvey* (1984) 163 Cal.App.3d 90, 111 ["As a practical matter, however, the challenge of one or two jurors can rarely suggest a *pattern* of impermissible exclusion."], original italics.) Thus, we are left to determine what evidence is necessary to establish a prima facie case of group bias where the number of peremptory challenges exercised by the prosecution is insufficient to establish a "pattern" of systematic exclusion as the court in *Batson, supra*,476 U.S. 579 used the term.

We conclude the court correctly determined Huizar did not establish a prima facie case of discrimination. Although a prima facie case may be made from any information in the record, Huizar offers no evidence of the types California courts have found persuasive. There is no indication the prosecutor's voir dire questioning of prospective juror no. 65 was desultory. Huizar does not argue the victims in this case are members of the same ethnic group as the majority of the members of the jury. (See *People v. Bell* (2007) 40 Cal.4th 582, 597 (*Bell*); *Wheeler*, *supra*, 22 Cal.3d at pp. 280-281; *Batson*, *supra*, 476 U.S. at pp. 96-97.) He also does not argue prospective juror no. 65 and Huizar are members of the same cognizable group. (See *Batson*, *supra*, at p. 97; *Wheeler*, *supra*, at pp. 280-281.)

Instead, Huizar's contention the court erred is based on no more than the fact the prosecutor struck an African-American prospective juror, and he believes she would have been fair and impartial. The striking of a single African-American prospective juror, by itself, is not a sufficient basis to find discrimination. (See *Bell*, *supra*, 40 Cal.4th at pp. 597-598 ["While the prosecutor did excuse two out of three members of this group, the small absolute size of this sample makes drawing an inference of discrimination from this fact alone impossible."], fn. omitted.) Further, the record evidences that there was another African-American prospective juror in the venire.

Huizar's belief prospective juror no. 65 would have been fair and impartial also does not hint at discrimination. Essentially, Huizar's arguments seek to transform a peremptory challenge into a challenge for cause. Neither *Batson*, *supra*, 476 U.S. 79 nor *Wheeler*, *supra*, 22 Cal.3d 258 compel such a transformation. Instead, a peremptory

challenge remains a tool to allow either party to strike a prospective juror because of a perceived bias as long as the challenge is not exercised based solely on the prospective juror's membership of a cognizable group. Neither cause nor actual bias need to be established to justify the exercise of a peremptory challenge. (See *People v. Martin* (1998) 64 Cal.App.4th 378, 384.)

Further, after independently reviewing the record on voir dire, we conclude the prosecutor had nondiscriminatory reasons for striking prospective juror no. 65. Based upon prospective juror no. 65's answers to questions during voir dire, the prosecutor could have believed prospective juror no. 65 would have applied a stricter version of reasonable doubt than legally required, ultimately increasing the prosecutor's burden of proof. Based upon this perceived bias, we are satisfied the prosecutor's use of the peremptory challenge was nondiscriminatory.

Moreover, we note the prosecutor apparently did not believe the prospective juror was African-American. This fact also undermines Huizar's assertion the prosecutor struck the prospective juror solely because she was African-American.

Finally, the court stated prospective juror no. 65 was young (probably under 25 years old) and the witnesses and victims in this case were young. Therefore, it is reasonable to infer the prosecutor believed this juror was not as well suited as other prospective jurors. (See *People v. Sims* (1993) 5 Cal.4th 405, 430 [youthful appearance and lack of experience are facially race-neutral explanations for excusal of jurors]; see also *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328 [limited life experience is race-

neutral explanation for peremptory challenge].) This reason as well would support a nondiscriminatory use of the peremptory challenge on prospective juror no. 65.

Without authority, Huizar argues the court's observation about the prospective juror no. 65's age was not a valid neutral explanation for the peremptory challenge because the prosecutor did not ask the prospective juror about being young or any of the prospective jurors about their age. We conclude there was no requirement for the prosecutor to ask any such questions to support her peremptory challenge of prospective juror no. 65. The prospective juror's youthful appearance was a sufficient basis for the prosecutor to suspect she could be biased. (Cf. *People v. Sims*, *supra*, 5 Cal.4th at pp. 430-431; *Wheeler*, *supra*, 22 Cal.3d at p. 275.)

Simply put, the facts here do not give rise to any reasonable "inference of discriminatory purpose." (*Batson*, *supra*, 476 U.S. at p. 94; see *People v. Cleveland* (2004) 32 Cal.4th 704, 732, fn. 5.) The prosecutor struck a prospective juror who happened to be African-American. There is nothing in the record that leads us to believe she did so based solely on the prospective juror's membership in a cognizable group.

II

THE COURT DID NOT ERR IN REFUSING TO GIVE A JURY INSTRUCTION FOR SELF-DEFENSE

Huizar asserts the court committed reversible error when it declined to provide a self-defense instruction to the jury. We disagree.

A trial court must instruct the jury on all general principles of law relevant to the issues of the case, including defenses and lesser included offenses when they are

supported by substantial evidence. (*People v. Rogers* (2006) 39 Ca1.4th 826, 866-867; *People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.) "[S]ubstantial evidence means evidence which is sufficient to deserve consideration by the jury and from which a jury composed of reasonable persons could conclude the particular facts underlying the instruction existed. The trial court is not required to present theories the jury could not reasonably find to exist." (*Id*. at p. 78.) We review independently the question whether the trial court erroneously failed to instruct on defenses and lesser included offenses. (*Ibid.*)

Self-defense is only applicable when a defendant actually and reasonably believes his safety was endangered. (*People v. Valencia* (2008) 43 Cal.4th 268, 288; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) The belief must be objectively reasonable. (*Ibid.*) Imperfect self-defense reduces a murder to a manslaughter, and exists if a defendant subjectively but unreasonably believes his safety was endangered. (*Ibid*.)

The amount of force used in self-defense must be reasonable based on the circumstances. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1065.) To use force in self-defense, "[a]n aggressor who [initially] uses deadly force must 'not only endeavor to really and in good faith withdraw from the combat, but he must make known his intentions to his adversary.' " (*People v. Crandell* (1988) 46 Cal.3d 833, 871, quoting *People v. Button* (1895) 106 Cal. 628, 632; *Crandell* abrogated on other grounds by *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.)

Here, Huizar argues the self-defense instruction was warranted because "the record is clear that a reasonable trier of fact could conclude a struggle or confrontation

occurred [among] Huizar, codefendant Reyes, and the unidentified Hispanic male and Ferguson before Ferguson and DeCasas were shot." To bolster his argument, Huizar claims at the time of the shooting it was dark, multiple party revelers were present, Realivasquez was carrying a .22 caliber gun (which was fired and recovered at the scene), a verbal and physical confrontation took place between Ferguson and the bat wielding man, there was no stippling present on DeCasas's body proving the gun was fired two feet away from DeCasas, and the condition of DeCasas's body was consistent with him having a struggle prior to being shot.

It is the appellant's duty to support arguments in his brief by references to the record on appeal, including citations to specific pages in the record. (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.) Further, we are "not required to examine undeveloped claims[] [or] to make arguments for parties." (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.) Here, Huizar fails to cite to the record in support of his arguments. As such, we may deem these arguments forfeited. (*Duarte, supra,* at p. 856; see *McComber v. Wells* (1999) 72 Cal.App.4th 512, 522.)

More disturbing than Huizar's failure to cite to the record, however, is his counsel's distortion of it. For example, Huizar states multiple times that Realivasquez was carrying a gun and shot it, suggesting the evidence supports the inference there was a gun fight or Huizar only fired his gun in response to Realivasquez shooting his. We find no evidence in the record that Realivasquez fired his gun at the Rocks. Realivasquez testified he did not fire his gun on the night in question. In fact no one was aware Realivasquez even had a gun that night. At trial, the criminologist testified he could not

fire Realivasquez's gun and was only able to fire it after adjusting it and pushing down the barrel. Huizar's counsel's multiple references to Realivasquez's firing of his gun or a gun fight at the Rocks is merely a perversion of the record.

The condition of DeCasas's body also does not aid Huizar's argument, and again Huizar's counsel misstates the record. Huizar claims the coroner's testimony that there was no stippling indicates the fatal gunshot was fired within a few feet of DeCasas. This is not true. The coroner testified the absence of stippling indicated the gun "could have been fired from three feet away or 30 feet away or a hundred feet away." The absence of any stippling therefore does not create an inference there was a struggle or any close physical interaction between DeCasas and Huizar. In fact, it suggests the opposite.

Huizar's counsel further contorts the record in arguing the coroner testified the condition of DeCasas's body indicated the shooting could be consistent with a struggle. The coroner did not offer any such testimony. Instead, the coroner testified his examination of DeCasas's body did not allow him to determine if DeCasas was struggling with anyone at the time he was shot. He did, however, testify the condition of DeCasas's body was consistent with falling to the ground after being shot.

There simply are no facts that support any type of self-defense instruction, imperfect, defense of others, or otherwise. Eye witnesses testified that as soon as Reyes parked her car, Huizar got out with his gun, took two steps, and started shooting. There is absolutely no evidence that would allow the jury to infer Huizar scuffled with anyone, let alone DeCasas, or felt threatened. The record supports the court's conclusion Huizar

was the aggressor and was not defending himself or others. Thus, a self-defense instruction was not warranted.

III

THE COURT DID NOT ERR IN FAILING TO GIVE AN INVOLUNTARY MANSLAUGHTER INSTRUCTION

Huizar's final argument is the court committed reversible error by failing to give an involuntary manslaughter instruction. We disagree.

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.]" (*People v. Garcia* (2008) 162 Cal.App.4th 18, 24-25.)

Generally, involuntary manslaughter is a lesser included offense of murder. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1145.) 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 or circumspection." (§ 192, subd. (b).)

Citing *People v. Lee* (1999) 20 Cal.4th 47 (*Lee*), Huizar contends the court should have given the involuntary manslaughter instruction because the jury could have found DeCasas's killing unintentionally occurred during the commission of an unlawful offense not amounting to a felony, i.e., brandishing a firearm (§ 417, subd. (a)(2)). We are not persuaded.

Section 417, subdivision (a)(2) provides it is a misdemeanor for any person to, "except in self-defense, in the presence of any other person, [to] draw[] or exhibit[] any firearm, whether loaded or unloaded, in a rude, angry, or threatening manner, or who in any manner, unlawfully uses a firearm in any fight or quarrel . . . ." There is nothing in the record supporting Huizar's argument that he committed the misdemeanor offense of brandishing a firearm. Huizar did not simply brandish the firearm during a dispute: he fired it.

In addition, *Lee*, *supra*, 20 Cal.4th 47 is distinguishable from the instant action. Unlike the defendant in *Lee*, there is no evidence Huizar was severely intoxicated at the time of the shooting. (*Id*. at pp. 52-53.) There is nothing in the record indicating Huizar struggled with DeCasas with the gun between them like the defendant and victim in *Lee*. (*Id.* at p. 53.) Here, eyewitnesses testified that Huizar fired the gun. In *Lee*, there were no eyewitnesses to the shooting. (*Ibid.*) *Lee* therefore is not instructive.

Huizar also argues he was entitled to an involuntary manslaughter instruction because the jury could have found he lacked malice in shooting DeCasas. In support of his position, Huizar argues he might have shot the gun accidently, in self-defense, or in the "heat of a gun battle." While a lack of malice can result in a conviction of voluntary

manslaughter (§ 192, subd. (a); *People v. Garcia*, *supra*, 162 Cal.App.4th at p. 27), it cannot support an instruction for involuntary manslaughter without the commission of a crime that is not a felony or a lawful act which might produce death. (§ 192, subd. (b).) Here, neither exists. Further, the court provided the jury with a voluntary manslaughter instruction.

In addition, we note Huizar's argument is once again based on his attorney's liberal use of the record. There is absolutely no evidence in the record to support Huizar's argument that he might have fired his gun accidently, in self-defense, or in the "heat of a gun battle." While we appreciate an attorney's duty to advocate on behalf of her client, Huizar's counsel's use of the record in this matter exceeds the appropriate bounds of zealous advocacy and borders on misrepresentation to this court. We caution Huizar's counsel to avoid any similar misuse of the record in the future.

DISPOSITION

The judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.