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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RASHEEDAH SMITH,

Defendant and Appellant.

D065611

(Super. Ct. No. FBA1000326)

APPEAL from a judgment of the Superior Court of San Bernardino, Victor Roy Stull, Judge. Affirmed.

Carl Fabian, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Michael T. Murphy, Deputy Attorneys General, for Plaintiff and Respondent.

During the trial of this homicide case, in which defendant and appellant Rasheedah Smith was convicted of second degree murder growing out of an altercation in

which she stabbed the victim to death, the jury asked the trial court for assistance with respect to an instruction on second degree murder. In particular, the jury asked the trial court if a reference in the court's second degree instruction to "[r]easonable [p]erson" referred to "the defendant or just any person that is considered 'Reasonable?'" After consulting with counsel and getting their agreement, the trial court responded: "All persons subject to being evaluated on the reasonable person's standard are including the defendant. For help in understanding how to apply the reasonable person standard in this case, refer to [CALCRIM] instructions 505, 520, 521, 570, and 571." We find no abuse of discretion in the trial court's response.

By way of a supplemental brief, Smith also argues that the trial court erred in failing to give sua sponte instructions on involuntary manslaughter and that her trial counsel was ineffective in failing to object to a statement the prosecutor made during closing arguments. We reject these contentions as well. As the Attorney General points out, there is nothing in the record that would suggest Smith acted without an intent to kill or conscious disregard for life. As we explain, given that record the trial court had no sua sponte duty to instruct on involuntary manslaughter. Moreover, the jury's murder verdict shows fairly conclusively the jury determined Smith intended to kill the victim or was acting with conscious disregard for life. Under these circumstances, there is no basis upon which to conclude the jury would have nonetheless decided the death was in any sense unintentional and returned a verdict of involuntary manslaughter.

We reject Smith's ineffective assistance of counsel contention because the record shows that, contrary to her argument, the prosecutor did not misstate the law.

Accordingly we affirm Smith's conviction.

## FACTUAL AND PROCEDURAL BACKGROUND

Smith, who was then 15 years old, went to a party in the City of Barstow on May 21, 2010. Smith walked to the party with her sister Charnisha Smith, her cousin Anthony Terry and Keshawn Smith, a friend who is not related to Smith or her sister.<sup>1</sup>

The victim in this case, Chawnteera Harrod, who was 16 years old, walked to the party with her best friend, Chemari Gaines, and two other friends.

According to one witness, at the party Smith and Keshawn were acting like a couple in a romantic relationship. However, at some point during the party, Keshawn was also seen dancing with Harrod.

After 11:00 p.m., a number of arguments and fights broke out inside the house where the party was being held. One of the arguments was between Smith's sister, Charnisha, and Harrod. The host, Darnell Cleveland, told everyone to leave and the guests started filtering out of Cleveland's house.

In the street, in front of Cleveland's house, Charnisha and Harrod continued their argument. A crowd gathered around them, and it appeared to witnesses as if Charnisha and Harrod were going to get into a physical fight. Smith was standing next to her sister and, at one point, pulled out a knife and stabbed Harrod in the chest. Smith then ran from the scene with Charnisha, Anthony and Keshawn.

At the time of the stabbing, Smith was 4 feet 7 inches tall and weighed 80 pounds; Harrod was 5 feet 11 inches and weighed 223 pounds. Harrod was taken to a nearby hospital where she died as the result of a knife wound. A postmortem examination

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<sup>1</sup> To avoid confusion, we refer to Smith's companions by their first names.

showed the knife entered the upper portion of Harrod's left breast, penetrated to a depth of about four inches, and pierced Harrod's pulmonary artery.

At 5:00 a.m. on the morning following the attack on Harrod, Smith was interviewed by police and admitted cutting Harrod with a knife after Harrod had punched both Charnisha and Smith. Charnisha was also interviewed by police and said she saw Smith swing the knife at Harrod's chest.

Smith was charged with a single count of murder. (Pen. Code, § 187, subd. (a).)<sup>2</sup> At trial, Charnisha testified on Smith's behalf and, contrary to her own earlier statement and Smith's, stated that Smith only held the knife and did not do anything with it. The jury found Smith guilty of second degree murder, and the trial court sentenced her to an indeterminate term of 15 years to life.<sup>3</sup>

## DISCUSSION

### I

As we indicated, on appeal Smith contends the trial court abused its discretion in responding to a question from the jury.

#### A. Second Degree Jury Instructions and Jury Questions

The trial court instructed the jury with a version of CALCRIM No. 520, which stated in pertinent part: "The defendant acted with express malice if she unlawfully intended to kill.

"The defendant acted with implied malice if:

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<sup>2</sup> All further statutory references are to the Penal Code.

<sup>3</sup> In separate proceedings, Charnisha pled guilty to being an accessory. (§ 32.)

"1. She intentionally committed an act;

"2. The natural and probable consequences of the act were dangerous to human life;

"3. At the time she acted, she knew her act was dangerous to human life;

"AND

"4. She deliberately acted with conscious disregard for human life.

"Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time.

"An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence."

During the course of its deliberations, the jury sent the trial court a series of notes and, at one point during the deliberations, the trial court excused two of the jurors, seated the alternates and directed the jury to begin deliberations anew. The trial court further instructed the reconstituted jury that it could rely on answers the trial court had given the jury. Two of the jury's earlier questions concerned second degree murder.

In its second question to the trial court, the jury simply asked the trial court for an explanation of second degree murder. With the agreement of counsel, the trial court responded: "Review jury instructions numbered 520 and 521. Murder as defined in instruction #520 is second degree murder. If the killing is also done willfully,

deliberately, and with premeditation as defined in instruction #521, then it is first degree murder." The following morning, the jury gave the trial court its third question, its now disputed request for clarification of the term "[r]easonable [p]erson." As we indicated at the outset, the trial court, with the agreement of counsel, responded by advising the jury all persons are subject to evaluation under a reasonable person standard and referring the jury to instructions that discussed the reasonable person standard, including once again the CALCRIM No. 520 instruction.

### B. Legal Principles

In general, the trial court's response to jury questions is governed by section 1138, which provides in pertinent part: "After the jury have retired for deliberation, . . . if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given . . . ." [Citation.] "This means the trial "court has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] Indeed, comments diverging from the standard are often risky. [Citation.]" [Citation.]' [Citation.]" (*People v. Montero* (2007) 155 Cal.App.4th 1170, 1179.)

"When a trial court decides to respond to a jury's note, counsel's silence waives any objection under section 1138. [Citation.] "The failure of defendant's counsel to object or move for a mistrial upon the court frankly informing him of the court's action

might also be construed to be a tacit approval. Approval of the court's action, even though it might have been a technical violation of section 1138 of the Penal Code, cures any possible error.' [Citations.] We reached a similar conclusion in the analogous situation in which the trial court *declined* to respond to a jury's note pursuant to section 1138. [Citation.]" (*People v. Roldan* (2005) 35 Cal.4th 646, 729.)

### C. Analysis

Here, the record shows Smith's counsel expressly agreed with the trial court's proposed response to the jury's third question. Counsel described it as "excellent." Thus, Smith plainly waived any objection to the trial court's response to the jury's question. (*People v. Roldan, supra*, 35 Cal.4th at p. 729.)

Moreover, even in the absence of any waiver by Smith, the trial court's response to the jury's third question was appropriate and well within its discretion. The parties have apparently assumed that the sequence of questions by the jury and the responses given by the court with respect to second degree murder show the jury's disputed third question was most likely a request for clarification with respect to the CALCRIM No. 520 instruction the jury had been given. In its second question for the court, the jury had asked for an explanation of second degree murder, and the trial court referred the jury to the CALCRIM No. 520 instruction it had provided. After receiving that response, the jury's very next question referred to second degree murder and made the disputed request for clarification of the term "[r]easonable [p]erson."

As we have seen, CALCRIM No. 520, in setting out a definition of implied malice, employs the reasonable person standard to determine whether danger to life was a natural and probable consequence of the defendant's act. In doing so, the instruction

properly calls for an objective determination as to the nature of the act the defendant committed. (See *People v. Knoller* (2007) 41 Cal.4th 149, 153; *People v. Phillips* (1966) 64 Cal.2d 574, 587.) There is, of course, also a subjective element of implied malice: the act committed must not only be objectively dangerous to life, but the defendant must also know the act endangers the life of another and act with conscious disregard for life. (See CALCRIM No. 520; *Knoller*, at p. 153; *Phillips*, at p. 587.)

Contrary to Smith's argument on appeal, in responding to the jury's question about the objective element of implied malice, the court did not in any manner confuse or undermine the subjective element of implied malice. Rather, by carefully referring the jury once again to CALCRIM No. 520, and the other instructions that discussed the term "reasonable person," the trial court's response effectively reiterated the requirement that Smith's act not only be objectively dangerous to life but that Smith subjectively knew that it was dangerous to life. The fact that the trial court did not once again expressly discuss the subjective element of implied malice, *when the jury had no question about that element*, was not in any sense an abuse of its discretion. Indeed, the risks of responding to a question the jury did not ask are self-evident.

The wisdom in the trial court's unwillingness to either extensively elaborate on the standard instructions it had given the jury or provide information that the jury did not request can also be seen in the fact that, although the jury's reference to a "reasonable person" may have been a question about the objective element of implied malice, it may also have been a request for information about the vigorously disputed question of whether Smith acted in reasonable self-defense or the defense of her sister. Given this very real possibility, the trial court's care in developing its response to the jury's question

was plainly appropriate.

In this regard, the record here is readily distinguishable from *People v. Ross* (2007) 155 Cal.App.4th 1033, upon which Smith relies. In *Ross*, the defendant had been slapped by a female acquaintance and responded by repeatedly hitting her with his fists and breaking several bones in her face. At the defendant's trial for assault, the prosecution requested and the trial court instructed the jury on mutual combat. The instruction provided to the jury stated that one engaged in mutual combat may not invoke the right of self-defense unless he or she has taken specific steps to terminate or withdraw from the conflict. During its deliberations, the jury asked the trial court for a definition of mutual combat. In response, the trial court advised the jury that "there is no legal definition. You're going to have to use your common, everyday meaning of those words or that phrase. . . ." (*Id.* at p. 1043.) On appeal, the court found that this response was erroneous and that the type of mutual combat that deprives one of the right to self-defense is fairly narrow and specific. The court criticized the trial court for failing to provide the jury with any assistance when it requested it. In this context, the court stated: "That further guidance may not come easily to hand, or is not supplied by counsel, does not excuse the court from its statutory duty. Reluctance to 'strike out on its own' does not permit the court to 'figuratively throw up its hands and tell the jury it cannot help.'" (*Id.* at p. 1047.)

Here, in response to the jury's question about a "reasonable person," the trial court did not throw up its hands and tell the jury it could not provide any help. The trial court here gave the accurate response that all persons, including Smith, are subject to evaluation under the reasonable person standard and provided the jury appropriate

references to other instructions that discuss the reasonable person standard. In short, unlike the response considered by the court in *People v. Ross*, the trial court's response here was both responsive and accurate.

Finally, we note that CALCRIM No. 520 embodies the preferred description of the elements of implied malice (see *People v. Knoller, supra*, 41 Cal.4th at p. 153) and that the jury here was referred to CALCRIM No. 520 *three times*: once when the trial court instructed the jury prior to its deliberations, again in response to the jury's second question, and again in response to its third question. Given this record, and the absence of any question on the issue, there is no basis upon which we can find that the jury was confused as to the requirement that Smith knew she was engaged in a dangerous act when she stabbed Harrod in the chest.

## II

By way of her supplemental brief, Smith contends the trial court should have sua sponte instructed the jury on three alternative theories of involuntary manslaughter: killing as the result of imperfect self-defense or imperfect defense of another, killing during the commission of a simple assault or brandishing a weapon, or killing during the commission of assault with a deadly weapon. We find no error.

Voluntary manslaughter occurs when a defendant acts either with the intent to kill or with conscious disregard for life. (*People v. Bryant* (2013) 56 Cal.4th 959, 969-970 (*Bryant*).) When an unlawful killing occurs *without* either an intent to kill or conscious disregard for life, a defendant is at most guilty of involuntary manslaughter. (See *People v. Manriquez* (2005) 37 Cal.4th 547, 588 (*Manriquez*); *People v. Guillen* (2014) 227 Cal.App.4th 934, 1027 (*Guillen*); *Bryant*, at p. 974 (conc. opn. of Kennard, J.)) Where,

as here, the manner in which a killing occurred leaves no reasonable doubt the killer in fact acted either with an intent to kill or with a conscious disregard for the life of the victim, no sua sponte instruction on involuntary manslaughter is required. (*Manriquez*, at p. 588; *Guillen*, at pp. 1027-1028.)

#### A. Voluntary and Involuntary Manslaughter

Section 192 defines three types of manslaughter: voluntary, involuntary and vehicular. Section 192, subdivision (a) defines voluntary manslaughter as an unlawful killing "upon a sudden quarrel or heat of passion." Section 192, subdivision (b) defines involuntary manslaughter as the unlawful killing of another "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." Since enactment of section 192 in 1872, the statute's definitions of voluntary and involuntary manslaughter have been subject to a great deal of interpretation by our Supreme Court.

Recently, in *Bryant*, the court made it clear that voluntary manslaughter requires evidence and a finding that a killing was committed with either an intent to kill or a conscious disregard for life. In *Bryant*, the defendant killed her boyfriend during an altercation by stabbing him one time in the chest with a knife. At all times, both when questioned by police and at trial, the defendant claimed that she never intended to kill her boyfriend. After being instructed on first and second degree murder, voluntary manslaughter in the heat of passion and in unreasonable self-defense, and self-defense, the jury convicted the defendant of second degree murder. This court reversed and, based on an earlier holding in *People v. Garcia* (2008) 162 Cal.App.4th 18, we found the trial

court erred in failing to sua sponte instruct the jury that the defendant would be guilty of voluntary manslaughter if, without an intention to kill or conscious disregard for life, and during the course of committing an inherently dangerous felony, the defendant killed her boyfriend. On review, the Attorney General argued the instruction required by the Court of Appeal misstated the law because voluntary manslaughter requires an intent to kill or a conscious disregard for life and, therefore, there was no sua sponte duty to give it. The Supreme Court agreed with the Attorney General and reversed the judgment of the Court of Appeal. "[T]he offenses that constitute voluntary manslaughter—a killing upon a sudden quarrel of heat of passion [citation], a killing in unreasonable self-defense [citation], and, formerly, a killing committed by one with diminished capacity [citation]—are united by the principle that when a defendant acts with an intent to kill or a conscious disregard for life (i.e., the mental state ordinarily sufficient to constitute malice aforethought), other circumstances relating to the defendant's mental state may preclude the jury from finding that the defendant acted with malice aforethought. But in all of these circumstances, a defendant convicted of voluntary manslaughter has acted either with an intent to kill or with conscious disregard for life." (*Bryant, supra*, 56 Cal.4th at pp. 970-971; see *People v. Blakeley* (2000) 23 Cal.4th 82, 91 ["a defendant who, *with the intent to kill or with conscious disregard for life*, unlawfully kills in unreasonable self-defense is guilty of voluntary manslaughter"].)

In *Bryant*, the Supreme Court reversed the judgment of the Court of Appeal without considering the defendant's alternative argument that an instruction on involuntary manslaughter based on a theory recognized in *People v. Burroughs* (1984) 35 Cal.3d 824, 829 (*Burroughs*) should have been given. Under *Burroughs*, a killing that

occurs during the commission of a felony that is not inherently dangerous, and *where there is no intent to kill or conscious disregard for life*, may be involuntary manslaughter. (*Ibid.*) Rather than resolve the *Burroughs* issue, the case was remanded for further proceedings.

However, in her concurring opinion Justice Kennard reached the question of whether a defendant may be found guilty of involuntary manslaughter during the commission of assault with a deadly weapon and concluded that such a conviction was possible. Justice Kennard relied on the fact that under *People v. Chun* (2009) 45 Cal.4th 1172, 1188, 1200 and the majority opinion in *Bryant*, a killing committed during an assault with a deadly weapon is murder or voluntary manslaughter only when there is separate proof of either an intent to kill or conscious disregard for life. (*Bryant, supra*, 56 Cal.4th at pp. 971, 973-974 (conc. opn. of Kennard, J.)) Justice Kennard determined that a killing committed during an assault with a deadly weapon, where there is neither an intent to kill nor conscious disregard for life, must therefore be punishable as involuntary manslaughter. (*Id.* at pp. 973-974.) Justice Kennard reasoned that a contrary conclusion would lead to the absurd result that although an unintentional killing committed during a less serious misdemeanor would be punishable as involuntary manslaughter, an unintentional killing committed during a more serious felony would not be. (*Id.* at p. 974.)<sup>4</sup>

The majority opinion in *Bryant* and Justice Kennard's concurring opinion are

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<sup>4</sup> However, because such a theory of involuntary manslaughter had not yet been clearly and authoritatively adopted, Justice Kennard found it was not a general principle of law that would support a sua sponte duty to instruct. (*Bryant, supra*, 56 Cal.4th at p. 975 (conc. opn. of Kennard, J.))

helpful here because they illustrate that an intent to kill or conscious disregard for life is the circumstance that distinguishes voluntary manslaughter from involuntary manslaughter.

#### B. Sua Sponte Instruction on Involuntary Manslaughter

"In a criminal case, a trial court must instruct on general principles of law relevant to the issues raised by the evidence, even absent a request for such instruction from the parties. [Citation.] The obligation extends to instruction on lesser included offenses when the evidence raises a question as to whether all the elements of the charged offense were present, but not when there is no evidence that the offense committed was less than that charged. [Citation.] [¶] . . . However, the 'substantial' evidence required to trigger the duty to instruct on such lesser offenses 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. [Citations.]" (*People v. Cruz* (2008) 44 Cal.4th 636, 664.)

Given its role as the circumstance that distinguishes voluntary manslaughter from involuntary manslaughter, where the evidence leaves no reasonable doubt the defendant acted with an intent to kill or with a conscious disregard for life, no sua sponte instruction on involuntary manslaughter is required. (See *Manriquez, supra*, 37 Cal.4th at pp. 587-588; *Guillen, supra*, 227 Cal.App.4th at pp. 1026-1028.) In *Manriquez*, the defendant was convicted of the murder of a romantic rival. After his arrest, the defendant told officers that he pulled his gun on the victim and placed the barrel against the victim's stomach and that the gun discharged as he pushed the victim backwards. In finding this evidence insufficient to support an involuntary manslaughter instruction, the court stated:

"The killing of Efrem Baldia can only be characterized as having been intentional. The victim suffered two fatal and three nonfatal gunshot wounds inflicted at close range. Even if we were to accept defendant's statement, made during his hospital interview with Detective Olmedo, that the first shot simply 'discharged' when defendant pushed the victim, the autopsy evidence introduced in the testimony given by Dr. Rogers established that defendant thereafter inflicted a second fatal wound when, by defendant's own admission to Detective Olmedo, he continued shooting the victim as the victim was falling to the ground. Thus, even if defendant unintentionally fired the first shot, the trial court was not required to instruct the jury on involuntary manslaughter in view of the circumstance that defendant intentionally kept firing his weapon, inflicting at least one other fatal wound." (*Manriquez*, at p. 588.)

The court in *Guillen* reached a similar conclusion. In that case, the victim was beaten and kicked to death by other inmates at a local jail who believed he was a child molester. The inmates were convicted of second degree murder and, on appeal, argued that the trial court erred in failing to instruct on a theory of negligent involuntary manslaughter. In rejecting this contention, the court stated: "Here, the record is devoid of evidence from which a reasonable jury could conclude appellants were guilty of involuntary manslaughter on the theory they were criminally negligent. The evidence detailed above demonstrates each appellant committed an act endangering Chamberlain's life, i.e., each appellant participated in the assault by hitting, kicking, or stomping Chamberlain. Additionally, there was evidence each appellant realized the danger and acted in total disregard of that danger. There was evidence each appellant participated in or was sufficiently aware of the CAR system and that child molesters were despised in

jail and there were no rules for taxing child molesters. Based on the record before us, there is no question each appellant knew the risk involved to Chamberlain when they violently attacked him. This was a case where each of the appellants, if he was guilty at all, was guilty of the greater offense of second degree murder and not of the lesser included offense of involuntary manslaughter. Thus, the trial court did not err in failing to instruct the jury sua sponte on the lesser included offense of involuntary manslaughter based on a noninherently dangerous felony assuming that is a legally correct theory of law." (*Guillen, supra*, 227 Cal.App.4th at pp. 1027-1028.)

The duty to give a sua sponte instruction on a lesser included offense not only requires some evidence the defendant is guilty of the lesser offense, but the required instruction must be based on a legal theory that has been accepted as a "general principle" of law commonly applicable in a given circumstance. (*People v. Michaels* (2002) 28 Cal.4th 486, 529; *People v. Flannel* (1979) 25 Cal.3d 668, 681; *People v. Bryant* (2013) 222 Cal.App.4th 1196, 1205 (*Bryant II*)). In *Bryant II*, we recently set forth our disposition of the defendant's appeal following the Supreme Court's remand in *Bryant*. In *Bryant II*, we, like Justice Kennard, considered the defendant's contention, quite similar to ones Smith asserts here, that the trial court should have instructed that unlawful killing that occurs without malice, but during the commission of an assaultive felony, constitutes involuntary manslaughter. The defendant relied on two related theories, one based on the holding in *Burroughs* that an unintentional homicide committed in the course of a noninherently dangerous felony may be involuntary manslaughter and a second that would treat all unlawful homicides committed without malice as involuntary

manslaughter. In finding no sua sponte duty, we agreed with Justice Kennard<sup>5</sup> that the involuntary manslaughter theories advanced by the defendant were not required in the absence of a request because the theories asserted have not yet been accepted as established principles of law. (*Bryant II*, p. 1206.) We stated: "Bryant does not dispute that there is no authority holding that an unlawful killing committed without malice in the course of an assaultive felony constitutes the crime of involuntary manslaughter, pursuant to either theory. In light of the lack of authority in support of either theory of involuntary manslaughter, it is clear that pursuant to the Supreme Court law cited above, the trial court did not have a sua sponte duty to instruct the jury that an unlawful killing committed without malice in the course of an assaultive felony constitutes the crime of involuntary manslaughter. [Citations.]" (*Ibid.*, fns. omitted.)

### C. Analysis

#### 1. *No Sua Sponte Duty*

All three theories of involuntary manslaughter offered by Smith in her supplemental brief suffer from the same defect: the evidentiary record here will not support them. As we have discussed, the killing of another committed with either an intent to kill or conscious disregard for life is at the very least voluntary manslaughter. (See *Manriquez*, *supra*, 37 Cal.4th at p. 588; *Bryant*, *supra*, 56 Cal.4th at pp. 970-971; *Blakeley*, *supra*, 23 Cal.4th at p. 92; *Guillen*, *supra*, 227 Cal.App.4th at pp. 1027-1028.) As the Attorney General suggests, a reasonable jury could not conclude the fatal four-inch wound in the left side of Harrod's chest, which reached her pulmonary artery, was

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<sup>5</sup> See footnote 3, *ante*.

inflicted without an intent to kill or at the very least a conscious disregard for Harrod's life. The circumstances that led up to the fatal attack only reinforce the inference of an act committed with an intent kill or conscious disregard for life. By all accounts, Smith's sister and Harrod were about to engage in a fist fight, when Smith, who was considerably smaller than Harrod, entered the scene with her knife drawn. Those circumstances—especially the difference in height and weight—are only consistent with a knife attack that was meant to quickly disable the much larger victim, who was confronting Smith's sister.

The alternative, that Smith came after the much larger Harrod with a knife, but with no intention of doing Harrod serious harm, is simply not credible. The suggestion Smith made when questioned by police that she thought she had just cut Harrod's arm was not plausible when she made it and is not plausible here on appeal. Both Smith's quick flight from the scene and the fatal four-inch wound in Harrod's chest deprive it of credibility. In short then, there was no evidence from which a reasonable jury could conclude Smith was guilty of the lesser charge of involuntary manslaughter. (See *Manriquez, supra*, 37 Cal.4th at p. 588; *Guillen, supra*, 227 Cal.App.4th at pp. 1027-1028.) She was either guilty of murder, voluntary manslaughter or no crime at all.

While all three of Smith's theories of involuntary manslaughter suffer from lack of evidentiary support, Smith's third theory, that under *Burroughs* an unlawful killing committed without malice in the course of an assaultive felony constitutes the crime of involuntary manslaughter, suffers from the additional defect that it is a theory that has not been adopted as a binding authority by any a court and thus has not been commonly accepted as established law. (*Bryant II, supra*, 222 Cal.App.4th at p. 1205.) As such, it

will not support a sua sponte duty to instruct. (*Ibid.*)

## 2. *Prejudice*

Even if a sua sponte instruction on involuntary manslaughter was required here, the failure to give it did not prejudice Smith. We review the prejudice that arises from the erroneous failure to give a sua sponte instruction under the familiar standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. Such an error requires reversal only if "after an examination of the entire cause, including the evidence' [citation], it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred [citation]." (*People v. Breverman* (1998) 19 Cal.4th 142, 178, fn. omitted; accord, *People v. Blakeley, supra*, 23 Cal.4th at p. 93.)

Given the fairly powerful proof that Smith acted with an intent to kill or conscious disregard for life, we cannot conclude that had an involuntary manslaughter instruction been given the jury would have found her guilty of that crime rather than murder. The fact that the jury, having been fully instructed on murder, self-defense and voluntary manslaughter under theories of imperfect self-defense and self-defense, found Smith guilty of murder confirms this conclusion. Having been instructed that murder requires malice and having been given the approved definition of malice set forth in CALCRIM No. 520, the jury's murder verdict by itself shows that it necessarily found that Smith acted with an intent to kill or a conscious disregard for life. Moreover, in rejecting both the perfect and imperfect self-defense theories asserted at trial, the jury implicitly rejected the defense version of events. (See *Manriquez, supra*, 37 Cal.4th at p. 588.) In this context, there is no reasonable probability an involuntary manslaughter instruction would have given rise to a more favorable result. (*Ibid.*)

### III

The second issue Smith raises in her supplemental brief is her contention that the prosecutor was guilty of misconduct in her argument, and Smith's counsel rendered ineffective assistance in failing to object to it. We reject this argument because it is based on a misinterpretation of the prosecutor's argument.

In his argument, defense counsel argued theories of both perfect defense of another and imperfect defense of another. In response to defense counsel's argument, the prosecutor stated: "The evidence does not support a voluntary manslaughter theory under either theory the Judge read to you. The defendant did not kill only because of imperfect self-defense. In fact, there is no valid self-defense claim at all. It was by Charnisha's own statement, she was not in any danger. She was kneeling on the ground vomiting, and no one was attacking her while she was vulnerable when the defendant decided to kill Chawnteera Harrod. *A reasonable person would not resort to murder.*

"If she saw their boyfriend dancing with another girl or they saw their sister engaged in a fair fistfight, it's not self-defense. The defendant could not have reasonably believed that she or her sister were in danger of death or great bodily injury at the time she stabbed the [victim]. Her sister was vulnerable, on her knees vomiting." (Italics added.)

As we read this argument, to which no objection was made at trial, the prosecutor's statement, "[a] reasonable person would not resort to murder" was a reference to defense counsel's contention Smith acted in *reasonable* self-defense or defense of another and was not guilty of any crime. As such, it was an accurate statement of law to which no valid objection could be made. To read the statement as Smith asserts, as a reference to

the defense of imperfect self-defense or defense of another and therefore inaccurate, is to unfairly take it out of the context in which it was made. Because the statement was an accurate reference to the requirements of perfect self-defense, it will not support a claim of ineffective assistance of counsel.

#### DISPOSITION

The judgment of conviction is affirmed.

BENKE, Acting P. J.

WE CONCUR:

HALLER, J.

O'ROURKE, J.