

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

GERARD JOHN GALLO,

Defendant and Appellant.

E052538

(Super.Ct.No. SWF013298)

OPINION

APPEAL from the Superior Court of Riverside County. Helios (Joe) Hernandez, Judge. Affirmed.

Gordon S. Brownell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Kristen Kinnaird Chenelia, Deputy Attorney General, for Plaintiff and Respondent.

This is the second time that defendant Gerard John Gallo is before this court. In a prior trial, defendant was convicted of the second degree murder of his father, who died

after defendant had punched him in the face. This court reversed defendant's conviction due to the trial court's failure to instruct on involuntary manslaughter and the reasonable probability that the jury would find him guilty of the lesser offense had the jury been so instructed. The People chose to retry defendant for second degree murder, and the jury was instructed on involuntary manslaughter. Defendant was ultimately convicted again of second degree murder.

Defendant now contends on appeal as follows:

1. The trial court committed reversible error when it denied the defense motion to acquit defendant of second degree murder at the conclusion of the People's case-in-chief pursuant to his Penal Code section 1118.1 motion.
2. The trial court had a sua sponte duty to instruct the jury that an unintentional killing committed without malice during the course of an inherently dangerous assaultive felony constitutes voluntary manslaughter, a lesser included offense to the charge of second degree murder.
3. The trial court's failure to instruct the jury on the lesser included offense of voluntary manslaughter violated defendant's rights to trial by jury and due process of law under the Sixth and Fourteenth Amendments to the federal Constitution.

We affirm the judgment.

I

PROCEDURAL BACKGROUND

Defendant was originally charged in a felony complaint with elder abuse under circumstances likely to cause great bodily injury or death (Pen. Code, § 368, subd.

(b)(1)).¹ Defendant pleaded guilty to the charge. The People were then allowed to amend the felony complaint adding a charge of second degree murder pursuant to section 187, subdivision (a), and the information was filed with the same charges. Defendant was convicted of second degree murder and appealed. In an unpublished opinion, this court reversed defendant's second degree murder conviction on the ground that it was reasonably probable he would have been found guilty of only involuntary manslaughter had the jury been so instructed. This court directed remand to the trial court in order for the People to retry defendant or accept a modification of the judgment to involuntary manslaughter.

Upon remand, the People chose to retry defendant on the charge of second degree murder pursuant to section 187, subdivision (a). Defendant's previous plea of guilty to the elder abuse charge remained valid and was not before the jury. Defendant was found guilty of second degree murder. He was sentenced to 15 years to life in state prison for that conviction.

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

II

FACTUAL BACKGROUND

A. *People's Case-in-Chief*

1. *Joseph Gallo's disappearance*

Joseph Gallo (Joe), defendant's father, was born on May 10, 1915. In August 2005, Joe lived at the Rubidoux Manor (the Manor) located at 3993 10th Street in Riverside. Joe usually used a cane or walker and was unstable in walking.

On August 18, 2005, Rachelle James was working at the front desk of the Manor. Defendant came to James and told her that he was going to take Joe to his house for a few days. Defendant estimated that Joe would be with him until August 23. Joe was with defendant at that time. James said hello to Joe, but he did not respond. Joe did not seem to be acting like himself.

Rita Burr² and Jesus Tarango also lived at the Manor on August 18, 2005. Burr described Joe as "[h]appy-go-lucky." Burr and Tarango saw Joe with defendant on that day in the parking lot. Joe and defendant appeared to be arguing, and Joe had an angry look on his face. They observed Joe say, "Oh shit," and slam his walker on the pavement. Joe mentioned something about money. He did not appear to want to go with defendant and was agitated. Several days later, Burr observed Joe's walker in the back of a pickup truck that Joe had parked at the Manor.

² Burr's testimony from the prior trial was read to the jury because she had died since the first trial.

Janet Gilmore was the resident manager at the Manor in August 2005. Gilmore indicated that Joe was afraid of defendant. Joe normally carried large amounts of cash (as much as \$2,000) with him because he “played the ponies.” Joe had directed Gilmore that if he was ever taken to the hospital, she was to take the money out of his front pocket. Joe always used a walker. Gilmore also saw Joe’s walker in his pickup truck after he was missing from the Manor.

Bernadene Brown lived on the same floor as Joe at the Manor. In August 2005, Brown knocked on Joe’s door to check on him. Defendant answered the door. Joe’s apartment was normally very clean. When defendant opened the door, she could see Joe’s papers strewn on the floor on the apartment. Brown asked defendant about Joe, and he responded that Joe was not coming back to the Manor. Defendant explained that Joe was going to live with him.

Sometime later, defendant started moving Joe’s belongings out of the apartment. On August 25, defendant turned in a form for Joe to vacate the Manor. It was signed by “J. Gallo.” When defendant turned in the form, he told James that Joe was doing fine and was going to live with him.

Toni Marie DiDominicus was married to Joe’s grandson. She was very close to Joe. She spent every Sunday with him, and he called her if he needed something. She spoke with him every few days.

DiDominicus became concerned about Joe in August 2005. Joe had told her that he was going to visit defendant. Defendant left a message for her on August 18, 2005, at 4:58 p.m. advising her that he had picked Joe up from the care facility and that Joe was

staying with him. Defendant advised her not to call over to the facility because defendant was taking care of Joe, and Joe would not be there. Defendant assured her that Joe was fine, that he had taken Joe to the doctor, and that he might be having Joe live with him. DiDominicus left several messages for Joe at defendant's house but never received a call back.

2. *Events at defendant's house*

Heather Castaneda lived at 27745 Vanilla Court in Romoland. Defendant lived in a house to the left of Castaneda. Sometime prior to August 27, 2005, Castaneda heard two or possibly three people arguing in the back yard area of defendant's home.³ One had a higher-pitch voice that she thought might be a female or someone screaming. She heard arguing and then heard a glass or a pot breaking. The arguing lasted a few minutes. She did not call the police.

In August 2005, Karolee Espe worked at a mortuary located in Sun City, which was about four miles from Romoland. During that time (she could not recall the date) she received a phone call in the afternoon around 1:30 p.m. from a man who identified himself as "Jerry" inquiring as to the procedure when a person had passed away. Espe asked him if he had called the coroner or sheriff's department. Jerry responded that he could not, stating that his friend would not want him to. Jerry also told Espe that the dead person was in his back yard. Jerry asked if he could drop off the body at the mortuary, but Espe told him he could not. Jerry also commented that the deceased was "sitting in a

³ On cross-examination, she was not positive the arguing was coming from defendant's house, but it came from that direction.

chair outside with a drink in his hand and a smile on his face.” He said, “What away [*sic*] to go; don’t you think?”

Thomas Bloom was Espe’s manager; Espe transferred the call from Jerry to him. Jerry told Bloom that his father had passed away and was sitting in the back yard with a beer in his hand. Jerry asked Bloom to come pick up his father, but Bloom told him to call the police. Jerry did not want to call the police, claiming that his father did not like the police. He again asked to drop off his father. Bloom offered to call the police for Jerry, but Jerry refused. Jerry then asked if he could bury his father in the back yard.

On August 27, 2005, defendant called the police to report that his father had died and gave his name and address in Romoland. Defendant reported that his father had died a week earlier. Defendant explained that he had been in a “panic” and did not know what to do. He told the dispatcher, “[W]e had an argument here he was breathing deeply well he couldn’t breathe.” Defendant told the dispatcher he had not called for an ambulance because he was panicked.

Riverside County Sheriff’s Department Sergeant Stephen Brown was called to 27721 Vanilla Court in Romoland, defendant’s house. When he arrived, he was met by defendant. Defendant told Sergeant Brown that about one week before, he and his father had been in a “heated” argument over money. Defendant claimed the argument was not physical. During the argument, Joe had “gasp[ed]” and fallen backward onto the floor, striking his elbow on the counter. Joe continued to gasp for a short period while laying on the floor. Defendant panicked and did not call for help. Joe eventually died.

Defendant initially put Joe in two chairs on his back patio, then buried him in a shallow grave in the back yard. Sergeant Brown went to the area where defendant indicated he had dug the grave. As Sergeant Brown got closer, he could smell a decomposing human body and immediately secured the area.

Riverside County Sheriff's Sergeant Michael Lujan was assigned to investigate Joe's death. Checks bearing Joe's name were found in defendant's residence. Joe's body was covered with only 12 to 14 inches of dirt. A photograph of the grave showing Joe's body was shown to the jury. His body had been covered with blankets. He was laying face up. He had only a couple of dollars in his pocket.

3. *Subsequent investigation and defendant's interview*

Joe was the only person on the signature card on his bank account and the only person who was authorized to write checks. DiDominicus was the beneficiary of the account. A check was made out to defendant in the amount of \$2,000 that had a different signature than that on the signature card. Under the signature was the words "Attorney in Fact," although there was no record on the account that defendant had a power of attorney. Two calls were made to Joe's bank in the afternoon of August 18, 2005. Defendant's own bank account was overdrawn by over \$10,000 on March 7, 2005. The amount had been written off by the bank, and the account was closed on May 5, 2005.

Dr. Mark Scott McCormick was a forensic pathologist employed by the Riverside County Sheriff's Department. Dr. McCormick performed the autopsy on Joe on August 30, 2005. Joe's body was in a state of decomposition. Dr. McCormick could only estimate that Joe had been dead for a few days.

Dr. McCormick noted that there were three areas of trauma to Joe's face and neck. He examined the tissue under a microscope and confirmed the areas were bruising. Based on the condition of the bruises, they appeared to have been sustained at or around the time of death. Since the body was in a face-up position when found, it was unlikely these discolorations were caused by lividity or pooling of blood. Dr. McCormick concluded, "I think that these represent blunt impact injuries to the body, either the body striking some surface, or something striking the body."

Joe had evidence of coronary artery disease; he had 70 percent blockage of an artery leading to the heart. Dr. McCormick indicated that if Joe had a heart attack and died immediately, it would not show up in the autopsy. There was no obvious evidence of lung, gastrointestinal, or other tissue or organ disease. There was no evidence of any trauma to the brain. Dr. McCormick listed the cause of death as "undetermined."

There were no fractures on the body. Dr. McCormick believed that the most likely cause of death was a heart attack. A heated argument or stress could bring on a heart attack based on the condition of Joe's heart. The injuries to the face would not have been fatal. The injuries combined with something that could have raised Joe's blood pressure could cause a heart attack or a stroke. Joe, due to his age, could have been suffocated, and there would be no evidence.

Joe was seen by a family physician on August 17, 2005, because he was complaining of an eye infection. He appeared to be in good health and had no obvious medical problems. His lungs were clear and his heart rate was normal. Joe did not have any bruising on his face or neck. He was taking blood pressure medication. He had a

history of strokes and was hospitalized on March 15, 2005, complaining of dizziness. He was taking aspirin every day to help prevent strokes and would have bruised easily.

Defendant was interviewed on August 27, 2005. Joe had moved in and out of the Manor because of strokes and had to move on occasion to assisted living. Defendant was aware that Joe had had at least two strokes and was aware that he had a heart condition.

On August 18, 2005, defendant got to the Manor at about 10:00 a.m. He told Joe he was going to surprise him and that they were going to take a drive. Defendant drove Joe to his house, and they arrived around 11:30 p.m. This was the first time that Joe had seen defendant's new house. Defendant and Joe discussed money. Defendant owed some money and wanted to borrow \$1,600 from Joe. Defendant then talked to Joe about moving into the house and paying rent to help him and his wife out. Joe refused to give defendant any money.

Defendant explained the discussion then became "heated." Joe started gasping. He fell back and hit his arm on the counter. He started bleeding and fell on the floor. Defendant got down on the ground to try to help him. Defendant touched his face to help him to breathe. Joe eventually stopped breathing after a few minutes. Defendant panicked and did not call the police because he thought the police would think he killed Joe. Defendant repeatedly denied that he hit Joe.

Defendant estimated that Joe died around 12:00 p.m. He carried Joe outside and put him on two chairs. He decided he had to hide Joe from everyone, including his wife. He dug the shallow grave and put Joe in it. He then cleaned up the blood and had a drink.

Defendant's wife came home, but he said nothing to her about what had happened. He finally told his wife prior to calling the sheriff's department.

Defendant started getting calls from DiDominicus checking on Joe. Defendant took Joe's wallet and keys. He also had Joe's checkbook. Defendant admitted to cashing the \$2,000 check on Joe's bank account after Joe died; it was cashed on August 19.

Defendant had also taken some papers from Joe's apartment.

B. *Defense*

Defendant's family testified that defendant had never been violent with Joe. Defendant voluntarily told his wife, Lucia, what had happened to Joe. He denied that he had pushed or hurt Joe. He then called the police.

Joe spent a lot of money at the race track. Defendant did not like that Joe spent his money on gambling.

Defendant testified on his own behalf. Joe on occasion gave defendant money to give to his children. Defendant complained that Joe spent a lot of time at the race track that he could have spent with defendant as a child. Defendant was aware that Joe used a cane or a walker. Joe also had a history of a heart condition and was taking medication. Joe had previously been hospitalized.

Defendant claimed that Joe was using a cane that day that he died. The incident involving Joe using the walker and smashing it on the ground had actually happened a week prior to Joe's death.

Defendant took Joe to his house on August 18 to show him the new house and see if he would be interested in staying there. Defendant intended that he would stay for

several days. Defendant had asked to borrow \$2,000 from Joe prior to leaving the Manor. They had an argument over the money, but Joe had agreed to give it to him. Defendant wrote the check in Joe's presence.

When they left the Manor that day, Joe was using a cane, and the walker was in his apartment. When they arrived at defendant's house, defendant had a shot of vodka. They started discussing the amount of money Joe was losing at the track. Defendant started complaining that Joe was spending his money at the track rather than giving the money to his grandchildren. They got in a loud argument and were standing close to each other.

Defendant admitted that he had lied about not touching Joe. He stated that he and Joe got closer and closer to each other, and he struck him twice in the face but that he did not strike him intentionally. After further questioning, defendant admitted it was not an accident and that he had hit Joe twice in the face with a closed fist.

Defendant hit Joe because he was "pissed . . . off." After he hit Joe, Joe fell to the ground and started gasping for air. Blood came from a preexisting injury he had on his elbow that was opened up when he fell and hit his elbow on the counter. Defendant would not have expected the blows to kill Joe.

Defendant "freaked" out. He did not think the police would believe that he did not kill Joe. After Joe died, defendant took about \$200 from Joe's wallet.

Defendant told one of the sheriff's deputies when he was being transported to court, "I killed my dad, but they don't know the circumstances." Defendant meant that he felt responsible for Joe's death but that he did not intend for him to die. Defendant

admitted that he killed Joe “by hitting him and causing his death.” Defendant was not “pissed off” at Joe to the point that he wanted to murder him.

III

PENAL CODE SECTION 1118.1 MOTION

Defendant contends that the trial court erred by failing to grant his section 1118.1 motion in regards to the charge of second degree murder as the evidence presented in the People’s case-in-chief was insufficient to support the charge.

A. *Additional Factual Background*

At the end of the People’s case-in-chief, defendant brought a section 1118.1⁴ motion on the ground that second degree murder was not supported by the evidence presented by the People.

In arguing for dismissal of the second degree murder charge, defendant stated that the medical evidence showed that the cause of death was undetermined but was most likely a heart attack. Joe had only minor bruises on his face. Even assuming that defendant hit Joe prior to his death, Joe was not struck hard enough to break any bones. Even though defendant acted badly after the murder by hiding Joe’s death and taking \$2,000 from his checking account, such activity did not amount to second degree murder.

⁴ Section 1118.1 provides in pertinent part, “In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment or acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal.”

The People responded that that Joe was 90 years old with a heart condition and high blood pressure. “How do you hit him and that not be a[n assault] with force likely to cause great bodily injury, which can’t be the basis of involuntary manslaughter. By its nature it is implied malice, because of who the victim is.” He continued, “[Y]ou just cannot do that to a 90 year old man in that condition and not have that constitute a murder as opposed to involuntary manslaughter.”

The trial court denied the motion, finding, “What this brings to mind is something that we all learned in law school, and you’ll recognize the phrase, ‘The Thin Egg Shell Doctrine.’ Somebody who has an exceptionally thin skull gets a slap, you know, a regular person gets a slap and nothing happens, maybe, a black eye. A person with an extra thin skull, skull fractures imposed on the brain, person dies. And then that’s the DA argument. The gentlemen was 90 years old and he was fragile compared to a 50 year old person who would be more vigorous. [¶] So there are ways it could have happened, which weren’t a crime. There are ways it could have happened there was a crime. If the jury believes that the defendant pushed him and that precipitated the heart attack, that would qualify. For that reason, the motion is denied.”

B. *Analysis*

“In ruling on a motion for judgment of acquittal pursuant to section 1118.1, a trial court applies the same standard an appellate court applies in reviewing the sufficiency of the evidence to support a conviction, that is, “whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged.” [Citations.] [Citation.] ‘Where the

section 1118.1 motion is made at the close of the prosecution’s case-in-chief, the sufficiency of the evidence is tested as it stood at that point.’ [Citation.] [¶] . . . [¶] We review independently a trial court’s ruling . . . that the evidence is sufficient to support a conviction. [Citations.]” (*People v. Cole* (2004) 33 Cal.4th 1158, 1212–1213; see also *People v. Stevens* (2007) 41 Cal.4th 182, 200.)⁵

“In reviewing a challenge to the sufficiency of the evidence . . . , we review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. [Citations.]” (*People v. Cole, supra*, 33 Cal.4th at p. 1212.)

Second degree murder is the unlawful killing of a human being with malice aforethought but without the elements of willfulness, deliberation, and premeditation that would support a conviction of first degree murder. (*People v. Robertson* (2004) 34 Cal.4th 156, 164.) “Malice may be express or implied. Malice is express ‘when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature.’ [Citation.] It is implied ‘when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.’ [Citation.] More specifically, ‘malice is implied “when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately

⁵ In his opening brief, defendant complains that the trial court’s stated reasons for denying his motion were flawed. However, since we independently review the trial court’s ruling, we need not address the reasons given by the trial court.

performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.” [Citation.]’ [Citation.]” (*Ibid.*)

In *People v. Chun* (2009) 45 Cal.4th 1172, the Supreme Court observed, ““The statutory definition of implied malice has never proved of much assistance in defining the concept in concrete terms.’ [Citation.] Accordingly, the statutory definition permits, even requires, judicial interpretation. We have interpreted implied malice as having ‘both a physical and a mental component. The physical component is satisfied by the performance of “an act, the natural consequences of which are dangerous to life.” [Citation.] The mental component is the requirement that the defendant “knows that his conduct endangers the life of another and . . . acts with a conscious disregard for life.” [Citation.]’ [Citation.]” (*Id.* at p. 1181, fn. omitted.)

In the present case, there was substantial evidence that defendant was aware of the risk to human life and consciously disregarded that risk. Defendant was intimately acquainted with Joe’s fragile physical condition and, as a result, aware of the risk that hitting him in the face could kill him. On this record there is ample evidence of at least implied malice presented in the People’s case-in-chief.

Defendant took Joe from the Manor on the day of his death and advised the staff Joe would be gone for a couple of days. Joe and defendant were seen arguing about money when they left the Manor. Defendant admitted that he asked Joe for money, but Joe would not give it to him.

Defendant explained to the sheriff’s detectives that, once they got to his house, he had not touched Joe but that they had been in a heated argument. He claimed that Joe

started to gasp and stopped breathing. He panicked and did not call the police. He stated that Joe remained upright and did not fall on his face. He adamantly denied that he hit Joe in the face. Defendant buried Joe and cleaned up blood that was on the floor.

The medical evidence belied that defendant did not touch Joe. Joe had three areas that the medical examiner determined were bruises. The injuries were caused either by Joe striking something or a person striking him. The evidence established that Joe was 90 years old and had numerous health problems, including having a stroke and high blood pressure. Defendant told the sheriff's detectives that he was aware of Joe's medical conditions. Dr. McCormick testified that hitting Joe in the face could cause stress that would cause a heart attack. He also testified that if Joe had been suffocated, it would not have shown in the autopsy.

After Joe's death, defendant was seen in Joe's apartment going through his papers. He callously called a mortuary asking essentially to drop off Joe's body and get rid of the problem. He buried him in a shallow grave. He also cashed a check on Joe's account immediately after Joe's death and was clearly having money trouble as evidenced by his overdrawn account.

This case is similar to the recent case of *People v. Cravens* (2012) 53 Cal.4th 500. In *Cravens*, defendant and his cohorts confronted the victim, and a fight ensued. Defendant's friend fought the victim first, and then all of the men kicked the victim. The victim was able to get up but was unsteady. He said something to defendant about jumping him at his house. Defendant "coldcocked" the victim while he was looking the other way and the victim went immediately unconscious, fell, and his head hit the

concrete. (*Id.* at p. 504-505.) Defendant bragged to friends after the fight that he had not fought the victim but, rather, had “punched him out” and “put him to sleep.” (*Id.* at p. 506.) The victim died of a skull fracture. (*Id.* at p. 505.) The Court of Appeal reversed defendant’s second degree murder conviction, finding that there was insufficient evidence of implied malice because “[a] single fist blow to the head does not involve a high probability of death simply because it occurs on pavement, and awareness that the recipient of such a blow might fall and hit his or her head on the pavement is merely awareness of a risk of serious bodily injury, not conscious disregard for life.” (*Id.* at p. 507.)

The California Supreme Court reversed the Court of Appeal. It found both the physical and mental components of implied malice. First, it concluded that the manner of the assault and the circumstances under which it was made rendered the natural consequences of defendant’s conduct dangerous to life. It relied on the fact that defendant was taller and bigger than the victim, the victim was intoxicated, the victim was exhausted from the altercation, and the victim was vulnerable. Further, defendant inflicted a hard punch that was a “sucker punch.” (*People v. Cravens, supra*, 53 Cal.4th at pp. 508-509.) As for the mental component of implied malice, the California Supreme Court found that the actions of the defendant prior to (he had a history of punching people in this manner) and after the punch (bragging to his friends) showed that defendant committed second degree murder. (*Id.* at pp. 510-511.)

Based on our review of the entire record at the conclusion of the People’s case-in-chief, viewed in the light most favorable to the judgment, there was reasonable and

credible evidence from which a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt of second degree murder in this case. (*People v. Cole, supra*, 33 Cal.4th at p. 1212.) The evidence established, even without defendant's admission that he hit Joe during his testimony, that defendant likely hit Joe in the face, aware of the fact that Joe was 90 years old and had serious medical conditions. A person striking a 90-year-old man certainly does so knowing that such action can be life threatening. Further, the jury could have questioned defendant's credibility based on his initial statements that he never touched Joe but the evidence showed some blow to Joe's face. The surrounding circumstantial evidence -- that defendant had been arguing over money with Joe then immediately cashed the \$2,000 check, he tried to hide the body, and lied about Joe's whereabouts -- also supported that defendant was guilty of second degree murder.

Based on the foregoing, the trial court properly denied defendant's section 1118.1 motion.

IV

VOLUNTARY MANSLAUGHTER INSTRUCTION

Defendant contends that the trial court erred by failing to sua sponte instruct the jury with a voluntary manslaughter instruction judicially created in *People v. Garcia* (2008) 162 Cal.App.4th 18 (*Garcia*). In *Garcia*, the court found that "an unlawful killing during the commission of an inherently dangerous felony, even if unintentional, is at least

voluntary manslaughter.” (*Id.* at p. 31.)⁶ Defendant contends reversal is required because it is reasonably probable that the jury would have found him guilty of voluntary manslaughter instead of second degree murder had they been given the *Garcia* voluntary manslaughter instruction.

In *Garcia*, the defendant struck the victim in the face with the butt of a shotgun, causing the victim to fall and hit his head on the sidewalk. The victim died. The court concluded that “[b]ecause an assault with a deadly weapon or with a firearm is inherently dangerous, the trial court properly concluded the evidence would not support Garcia’s conviction for involuntary manslaughter and, therefore, did not err in declining to instruct the jury on involuntary manslaughter as a lesser included offense or murder.” (*Garcia, supra*, 162 Cal.App.4th at p. 22.) *Garcia* thus holds that “an unlawful killing during the commission of an inherently dangerous felony, even if unintentional, is at least voluntary manslaughter.” (*Id.* at p. 31.) As noted by defendant in his reply brief, this particular theory of voluntary manslaughter is at issue in cases currently pending before the California Supreme Court. (See, e.g., *People v. Bryant* (2011) 198 Cal.App.4th 134, review granted, Nov. 16, 2011 (S196365).)

The People contend in response that there is no sua sponte duty to instruct on this theory of voluntary manslaughter as it is not an established rule of law; since the Legislature has carved out separate crimes for such assaultive felonies on elders and children, it did not intend that this type of voluntary manslaughter should exist; and, even

⁶ Defendant contends that the inherently dangerous felony was the elder abuse charge under section 368 to which he pleaded guilty prior to trial.

if such a theory of voluntary manslaughter is supported by the law, there was no evidence supporting such an instruction in this case. We need not resolve these issues that will be forthcoming from the California Supreme Court, as any failure to so instruct the jury in accordance with the theory espoused in *Garcia* in the instant case was harmless.

“The erroneous failure to instruct on a lesser included offense generally is subject to harmless error review” under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836-837. (*People v. Rogers* (2006) 39 Cal.4th 826, 867-868; *People v. Breverman* (1998) 19 Cal.4th 142, 177-178.) “Such posttrial review focuses not on what a reasonable jury could do, but what such a jury is likely to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so relatively strong, and the evidence supporting a different outcome is so comparatively weak, that there is no reasonable probability the error of which the defendant complains affected the result.” (*Breverman*, at p. 177, italics omitted.)

Here, the jury was instructed on second degree murder, voluntary manslaughter based on a theory of heat of passion, and involuntary manslaughter. The jury was instructed with CALCRIM No. 520 that provided a definition of implied malice that “[t]he defendant acted with implied malice, if one, he intentionally committed an act; two, the natural and probable consequences of the act were dangerous to human life; three, at the time he acted he knew the act was dangerous to human life; and four, he deliberately acted with conscious disregard for human life.” The jury was also instructed with CALCRIM No. 570, voluntary manslaughter under a heat of passion or sudden

quarrel theory. Finally, the jury was instructed with CALCRIM No. 580, regarding involuntary manslaughter, that “[w]hen a person commits an unlawful killing but does not intend to kill, does not act with conscious disregard for human life, then the crime is involuntary manslaughter.”

Here, the jury was properly instructed on the role that malice played in the instant crime. The People argued in closing that there was no dispute that defendant hit Joe and that such stress caused Joe to have a heart attack. The People argued express malice due to defendant’s being in an argument with Joe, that Joe took nothing to defendant’s house, and that defendant punched Joe twice in the face. Defendant intended to kill Joe. He had the intent to kill based on not calling 911. Further, he took Joe’s money after he died. The People also argued there was evidence of implied malice in that punching a 90-year-old man is dangerous to human life, and defendant consciously disregarded that risk.

Defendant conceded in argument that he intentionally hit Joe in the face, and that constituted a simple battery. He conceded that he committed involuntary manslaughter. He asked that the jury consider that he did not act with conscious disregard for Joe’s life.

The jury, presented with the evidence in this case, rejected that defendant was unaware that punching his 90-year-old father in the face would result in his death. They found that he was guilty of implied or express malice second degree murder rather than involuntary manslaughter. As set forth above, there was ample evidence of second degree murder in this case. The jury was presented with the option of finding that defendant did not act with malice but rejected it. (See *People v. Elliot* (2005) 37 Cal.4th

453, 475 [““the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions””].)

Defendant has not adequately explained how an instruction on the *Garcia* theory of voluntary manslaughter would have changed the results of this case. He states that “if the jury had properly been instructed that it could find [defendant] guilty of voluntary manslaughter based on a felonious, fatal assault on Joseph *without* implied malice, there is at least a reasonable chance that the jury would have chosen that option.” However, the jury was given the option of finding that defendant committed battery on Joe without malice, i.e. involuntary manslaughter. It was instructed, “An unlawful killing caused by a willful act done with full knowledge and awareness that the person is endangering the life of another, and done in conscious disregard of that risk, is voluntary manslaughter or murder. An unlawful killing resulting from a willful act committed without intent to kill and without conscious disregard of the risk to human life is involuntary manslaughter.” The jury rejected that defendant was guilty of the lesser crime and found that he either intended to kill Joe or that he acted in conscious disregard of the danger to Joe’s life. The instruction on voluntary manslaughter would not have changed that result.

Based on these circumstances, we confidently conclude there is no reasonable probability a different jury verdict would have been rendered had the trial court instructed on voluntary manslaughter. Consequently, any error in the trial court’s failure to instruct on voluntary manslaughter was harmless.

V

CONSTITUTIONAL VIOLATION

Defendant’s final argument is that the trial court’s failure to instruct on *Garcia’s* voluntary manslaughter violated his federal due process rights. He acknowledges that he is raising this argument merely to preserve his federal constitutional rights. It is well settled that the duty to instruct on lesser included offenses has not been extended by the California Supreme Court beyond capital cases. (*People v. Breverman, supra*, 19 Cal.4th at p. 165 [“the failure to instruct sua sponte on a lesser included offense in a noncapital case is, at most, an error of California law alone, and is thus subject only to state standards of reversibility. . . . [S]uch misdirection of the jury is not subject to reversal unless an examination of the entire record establishes a reasonable probability that the error affected the outcome”].) We are bound by this decision and reject defendant’s federal constitutional claim. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456.)

VI

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
Acting P.J.

We concur:

KING
J.

MILLER
J.