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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER DANIEL CASTANEDA,

Defendant and Appellant.

E053861

(Super.Ct.No. FMB1000161)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Rodney A. Cortez, Judge. Affirmed.

Michelle May, 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, and Melissa Mandel and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

## I. INTRODUCTION

A jury convicted defendant and appellant Christopher Daniel Castaneda of second degree murder. (Pen. Code, § 187.)<sup>1</sup> The jury also found true certain enhancement allegations based upon defendant's personal use and discharge of a firearm in committing the murder. (§ 12022.53, subds. (b), (c), (d).) He was sentenced to a term of 40 years to life in prison.

Defendant makes the following contentions on appeal: (1) there is no substantial evidence of malice aforethought, an element of murder; (2) there is no substantial evidence of the corpus delicti of murder independent of defendant's out-of-court statements; (3) the court's corpus delicti instruction erroneously permitted the jury to convict defendant of murder if the jury found there was independent evidence of involuntary manslaughter; (4) the court erred in failing to instruct the jury sua sponte on the lesser included offense of voluntary manslaughter; and (5) there is no substantial evidence that defendant intentionally discharged the gun, a requirement of two firearm enhancements. We reject these arguments and affirm the judgment.

## II. FACTUAL SUMMARY

### A. *Events Leading Up to Defendant's Shooting of Nick Fuller*

Four or five weeks prior to the shooting of Nick Fuller, defendant, Sarah Leeds, and Fuller were at Amanda Mansfield's apartment. According to Mansfield, Leeds got

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

into a confrontation with Fuller. Leeds and defendant called Fuller a snitch and “started rapping about killing the snitch.”

One or two weeks later, defendant, Leeds, and “Richie” were at Mansfield’s apartment. Richie and Leeds brought a gun with them and gave it to defendant. Defendant loaded a clip of bullets into the gun, left the house, returned a while later, and gave the gun back to Leeds and Richie.

At some point, defendant regained possession of the gun.

On April 22, 2010, defendant, Jermaine Scott, R.L., and Fuller met up in Mansfield’s garage to drink and smoke cigarettes and marijuana.<sup>2</sup> Defendant had the gun. They talked about selling the gun or trading it to someone for some marijuana. They left the garage and walked to a friend’s house about three blocks away to see if the friend would buy the gun.

The friend did not want the gun. On the way back to the garage, Fuller pointed out the home of someone who had previously confronted him and given him some problems. Defendant got mad and, as Scott put it, “hyped up about it.” Defendant “wanted to do something to the guy that gave [Fuller] problems.” He lifted up his shirt, held the gun, and said, “I want to do this.” Scott agreed with the prosecutor’s characterization that defendant wanted to “settle the score . . . with that gun[.]” However,

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<sup>2</sup> The evidence of the events leading up to the shooting of Fuller consisted primarily of the testimony of Scott and R.L.

Scott and Fuller calmed defendant down, and the three of them continued on their way back to the garage.

When they returned to the garage, they smoked marijuana and tried to figure out a way they could get more.

Leeds and Richie came to the garage with some marijuana. At some point, they left and R.L. rejoined defendant, Scott, and Fuller in the garage.

Defendant became upset with Fuller because he believed that Fuller had been flirting with Leeds. According to Scott, defendant told Fuller that Leeds was his girl and that Fuller needed to “chill out, like, leave it alone. Don’t flirt. Don’t talk to her as much.” Fuller told defendant, “I’ll leave it alone. Like, don’t worry about it.”

Defendant, however, continued to tell Fuller not to flirt with Leeds.

Defendant pulled the gun out of a pocket and pointed it at Fuller. According to R.L., defendant held the gun six inches away from Fuller. It looked to R.L. and Scott like defendant was trying to intimidate Fuller. Fuller told defendant to get the gun out of his face. R.L. saw Fuller swat at the gun three times to push it away from him, but defendant kept turning the gun back toward Fuller. Fuller also moved his head away from the direction of the gun and scooted away from the gun.

To R.L., defendant seemed “mad” and had an angry tone in his voice. He was talking loudly, but not yelling. Although defendant “sound[ed] serious,” R.L. believed it was “nothing too big to worry about.”

At one point, defendant told Fuller, “I’m going to shoot you,” or “Don’t make me shoot you.” R.L. said, “You’re not going to shoot him. He’s your cousin.” Defendant responded, “I’m not going to shoot him.”

Scott, meanwhile, was focused more on preparing the marijuana for smoking than he was on the argument between defendant and Fuller. He did not think the argument between defendant and Fuller sounded serious, and did not believe that defendant was mad or angry. According to Scott, defendant and Fuller were laughing and Fuller did not seem to believe defendant would shoot him intentionally.<sup>3</sup> It was “like, they were cousins” having a “regular argument.”

Scott did not believe that Fuller was close enough to the gun to touch it. He said defendant waved the gun around and pointed it towards Fuller. He saw Fuller put his hand up in front of the gun as if to protect himself, but did not see Fuller physically touch the gun or knock it away.

At the moment defendant fired the gun, Scott was looking down; R.L. was “just trying to smoke” and not “really paying attention.” A bullet hit Fuller in the neck, behind his left ear.

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<sup>3</sup> R.L. told a detective that defendant and Fuller were laughing. At trial, R.L. testified that they were not laughing and if she told a detective otherwise, it was because she had been drinking.

No one said anything.<sup>4</sup> R.L. ran into the house. Defendant and Scott ran outside. As Scott ran up the street toward a friend's house, he looked back and saw defendant either putting the gun in, or pulling it out of, his pants.

Someone called 911. An officer arrived and performed cardiopulmonary resuscitation on Fuller. Fuller was brain dead and maintained on life support until he died three days after the shooting.

Scott testified that he believed the shooting was “an accident.” He explained that defendant “wasn't angry. . . . [I]f [defendant] really had a problem with [Fuller] to where he was that serious, he could . . . have treated him like a big cousin would have, like beat him up, like my older cousins would have did me.”

R.L. told an investigating officer that the shooting “was accidental.” At trial, she was reminded of what she told the officer and was asked how she currently perceived the shooting. She said, “I don't really know. It . . . could have been an accident or it couldn't have been.” When asked to elaborate, she added, “I don't know if it was an accident or not, and I have no reason to believe that it wasn't or it was.”

#### *B. Defendant's Arrest and Interview*

Defendant was apprehended following a traffic stop approximately two hours after the shooting. When defendant resisted arrest, officers pulled him from the vehicle and laid him on the ground. Defendant had a gun under his sweatshirt. There were no bullets

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<sup>4</sup> R.L. told detectives that defendant had said, “[o]h, shit,” immediately after the shooting. At trial, she admitted saying that to the detective, but testified that “it didn't happen.”

in the gun. After he was handcuffed and picked up off the ground, a magazine of bullets was found on the ground where he had been lying.

The gun recovered from defendant was the gun that fired the bullet that killed Fuller and that Mansfield saw Leeds give to defendant three weeks earlier. It is a semiautomatic .22-caliber pistol. The magazine for the gun had a window that allowed one to see whether there were bullets inside. To load a bullet from the magazine into the gun's chamber, the shooter needed to pull the slide back and release it. The gun has a safety button, which, if switched on, will prevent the trigger from being pulled. The trigger pull weight—i.e., the pressure required to pull the trigger—is three pounds. The manufacturer's specifications for the weapon indicate the trigger weight for that type of gun ranges from three to five pounds.

Defendant was interviewed by a sheriff's detective following his arrest. Initially, defendant indicated that Richie shot Fuller and "dumped" the "heater" on him. When the detective informed him that "we've talked to people" and told defendant he was being untruthful, defendant admitted shooting Fuller.

Defendant repeatedly described the shooting as an accident and said he did not intend to shoot Fuller. He "meant to scare him," "to fuck with him just cause he was always talking shit to me," but not hurt him.

He gave different explanations for the incident. At times, he said he did not know the gun was loaded. He said Richie had given him the gun only 30 minutes before the shooting. Someone told him the gun was loaded and to not pull the trigger. However, he

checked the gun by pulling the hammer back and saw there was no bullet in the chamber. He admitted that he meant to fire the gun, but only “to make it go click,” not “go boom.” He explained that when he cocked the gun back, a new bullet entered the chamber; he, however, still thought the chamber was empty.

At one point, defendant said he pulled the clip out of the gun and put it back in; later, he said he did not know how to load the gun or put a clip in.

In addition to saying he did not know the gun was loaded, defendant stated repeatedly that he intended to shoot and hit the wall of the garage, not Fuller. Defendant stated, for example: “I meant to hit the fucking wall”; “I shot directly towards the wall thinking that I was gonna hit the wall”; the shot “was suppose[d] to hit the wall and it hit him”; “when I aimed it at the wall I was thinking that I was gonna hit the wall”; “I didn’t point it, point it directly at him. I pointed it at the wall”; and “I was all about to pop at . . . the garage . . . [a]nd when I popped off at the garage, [Fuller] moves.” He also explained that he aimed to the right of Fuller, but Fuller moved into the shot.

Defendant also suggested that his aim was off because he was under the influence of alcohol. He also said he thought the safety was switched on, and was unaware that the gun had a “hair trigger.”

### III. ANALYSIS

#### A. *Substantial Evidence of Malice*

Defendant contends there is insufficient evidence in the record to establish the element of malice for the crime of murder.

“In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.]” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) “[O]ur power begins and ends with a determination as to whether there is *any* substantial evidence to support [the jury’s findings]; . . . we have no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom.’ [Citations.]” (*Leff v. Gunter* (1983) 33 Cal.3d 508, 518.)

“Murder is the unlawful killing of a human being . . . with malice aforethought.” (§ 187, subd. (a).) Malice aforethought can be express or implied. (§ 188.) Express malice is, in essence, the intent to unlawfully kill. (*People v. Perez* (2010) 50 Cal.4th 222, 233, fn. 7; *People v. Turk* (2008) 164 Cal.App.4th 1361, 1382.) Malice is implied “when a killing results from an intentional act, the natural consequences of which are dangerous to human life, and the act is deliberately performed with knowledge of the

danger to, and with conscious disregard for, human life.” (*People v. Cook* (2006) 39 Cal.4th 566, 596.)

There is substantial evidence in the record of implied malice. Defendant pointed a loaded gun at Fuller, as close as six inches away. When Fuller pushed the gun away three times, each time defendant turned the gun back on Fuller. He pulled the trigger. The natural consequences of such actions are dangerous to human life.

Defendant argues there is no substantial evidence he had actual knowledge the gun was loaded and ready to fire. We disagree. Three weeks before the shooting, Mansfield saw defendant load a clip of bullets into the gun. This indicates some familiarity with the gun and knowledge of how to load the gun. In his postarrest interview, he admitted he was told, just 30 minutes before the shooting, that the gun was loaded. He also told the detective that he removed the clip and put it back shortly before shooting. The clip has a window through which defendant could see the bullets inside. Although he said he pulled the hammer back and did not see a bullet, the jury could have easily rejected this statement because defendant repeatedly stated he intended to shoot at a wall; one cannot shoot a wall with an unloaded gun.

In addition, Scott’s testimony regarding the walk back to the garage on the day of the shooting supports an inference that defendant knew the gun was loaded. When Fuller pointed out the house of the person who had been giving him problems, defendant wanted to settle the score with the gun. He reached under his shirt for the gun saying, “I want to do this.” Defendant was prevented from confronting Fuller’s foe only because

the others calmed him down. This testimony indicates that defendant intended to use the gun against another and would have done so if the others did not stop him. The jurors could reasonably conclude that if defendant was going to use a gun to settle the score against someone, he would do so only if he knew the gun was loaded.

Because there is substantial evidence to support reasonable inferences that defendant knew the gun he was pointing at Fuller was loaded, the jury could find that defendant deliberately pulled the trigger with knowledge of the danger to, and with conscious disregard for, human life. There was thus sufficient evidence of implied malice to support the conviction of second degree murder.<sup>5</sup>

#### B. *Sufficiency of the Evidence of the Corpus Delicti*

Defendant next argues that there is no substantial evidence of the corpus delicti of murder independent of defendant's statements to the police.

“In every criminal trial, the prosecution must prove the corpus delicti, or the body of the crime itself—i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. In California, it has traditionally been held, the prosecution cannot satisfy this burden by relying *exclusively* upon the extrajudicial statements, confessions, or admissions of the defendant.” (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168-1169 (*Alvarez*)). This corpus delicti rule “is neither a rule of constitutional magnitude nor statutorily mandated. It is a common law rule of evidence the purpose of which is to

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<sup>5</sup> The People also contend there is substantial evidence of express malice. Because we find sufficient evidence of implied malice, we need not address the question of express malice.

‘ensure that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened.’ [Citation.]” (*People v. Jablonski* (2006) 37 Cal.4th 774, 826-827.)

“[T]he modicum of necessary independent evidence of the corpus delicti, and thus the jury’s duty to find such independent proof, is not great. The independent evidence may be circumstantial, and need only be ‘a slight or prima facie showing’ permitting an inference of injury, loss, or harm from a criminal agency, after which the defendant’s statements may be considered to strengthen the case on all issues.” (*Alvarez, supra*, 27 Cal.4th at p. 1181.)

The corpus delicti of murder is death caused by a criminal agency. (*People v. Towler* (1982) 31 Cal.3d 105, 115; *People v. Malfavon* (2002) 102 Cal.App.4th 727, 734.) “Neither the identity nor the intent of the perpetrator—much less the degree of the crime—is necessary for the corpus delicti.” (*People v. Malfavon, supra*, at p. 734.) The rule does not require that the possibility of an accidental death “be eliminated. ‘Rather, the foundation may be laid by the introduction of evidence which creates a reasonable inference that the death could have been caused by a criminal agency [citation], even in the presence of an equally plausible noncriminal explanation of the event.’ [Citation.]” (*People v. Ochoa* (1998) 19 Cal.4th 353, 451.)

Here, defendant does not dispute that there is sufficient evidence, independent of his extrajudicial statements, that a criminal homicide occurred. After all, Fuller died because someone shot him in the head. Rather, he asserts that, except for proof of the

identity of the perpetrator and the degree of the crime, the corpus delicti rule requires independent evidence of each element of the charged crime; in this case, murder. Because malice aforethought is an element of murder, he contends there must be independent evidence that the shooter acted with express or implied malice.

Defendant refers us to his previous arguments regarding the sufficiency of the evidence of malice and argues that if his own statements are excluded, there is insufficient evidence that he acted with express or implied malice.

Defendant does not cite to any case in which proof of the corpus delicti of murder required evidence of malice or the perpetrator's mental state. Indeed, there is ample authority to the contrary. (See, e.g., *People v. Daly* (1992) 8 Cal.App.4th 47, 59 [for attempted murder conviction, defendant's state of mind is not an element of the corpus delicti]; *People v. McGlothen* (1987) 190 Cal.App.3d 1005, 1014 [same]; *Ureta v. Superior Court* (1962) 199 Cal.App.2d 672, 676 [proof of malice aforethought not required to establish corpus delicti of murder]; 1 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Elements, § 50, p. 331 [not "necessary to show malice aforethought as a part of the corpus delicti in a prosecution for murder"]; see also *Alvarez, supra*, 27 Cal.4th at p. 1183 (conc. opn. of Brown, J.) [while the People must corroborate the act of an unlawful killing, "a defendant's statements may alone establish the malice element of murder"].)

The question was addressed in *Ureta*: "Petitioner contends that to establish the corpus delicti of murder there must be evidence that the death be shown to have been

caused by the criminal agency of a person with malice aforethought. Petitioner cites no cases to support this contention. While conviction of the crime of murder either in the first or second degree requires malice aforethought [citations], logically it is not required for proof of the corpus delicti, as malice aforethought as required by section 187 and defined in section 188 clearly relates to the state of mind of the person committing it. As the establishment of the corpus delicti does not require proof of the identity of the perpetrator of the crime [citation], it necessarily follows that malice aforethought, which relates to the mind of the perpetrator, cannot be an essential element of the corpus delicti. [Citation.] Thus, to prove the corpus delicti, it is only necessary to show by prima facie evidence that death was caused by a criminal agency.” (*Ureta v. Superior Court, supra*, 199 Cal.App.2d at p. 676.)

In light of these authorities, we reject defendant’s argument that the corpus delicti of murder requires proof that the perpetrator acted with malice; it is enough to show that Fuller’s death was caused by a criminal agency. (See *Alvarez, supra*, 27 Cal.4th at p. 1171.) Although malice must be proved to support a conviction for murder, evidence of malice may be supplied by the defendant’s own statements.

Even if independent evidence of malice was required, such evidence is present in this case for two reasons. First, there is undisputed independent evidence that defendant pulled out a gun, pointed it at Fuller repeatedly, and shot Fuller in the head at close range. Even without defendant’s statements about how he was told the gun was loaded, he loaded the clip into the gun, or his intent to shoot at a wall, jurors could reasonably infer

from the independent evidence that defendant could have acted with the intent to kill (express malice) or with knowledge of the danger to, and with conscious disregard for, human life (implied malice). The fact that there might be another explanation (i.e., that he did not know the gun was loaded), which might reduce the crime to manslaughter, does not mean that inference of malice is unreasonable. (Cf. *People v. Jacobson* (1965) 63 Cal.2d 319, 327 [to make a prima facie showing of the corpus delicti of murder, “the prosecution need not eliminate all inferences tending to show a noncriminal cause of death”].)

Second, with respect to implied malice, the specific question raised by defendant is whether there is sufficient independent evidence that he had knowledge the gun was loaded. As discussed in the preceding part, Scott’s testimony of defendant’s actions regarding Fuller’s enemy—reaching for his gun and saying, “I want to do this”—indicates that defendant was aware the gun was loaded when he pointed it at Fuller and pulled the trigger. Such testimony constitutes the modicum of evidence necessary to establish that defendant knew the gun was loaded.

For all the foregoing reasons, we reject defendant’s argument that there was insufficient evidence of the corpus delicti of murder.

### *C. Corpus Delicti Instruction*

Defendant contends the court erred prejudicially in its corpus delicti instructions. We disagree.

The trial court gave a version of CALCRIM No. 359 as follows:

“The defendant may not be convicted of any crime based on his out-of-court statements alone. You may only rely on the defendant’s out-of-court statements to convict him if you conclude that other evidence shows that the charged crime was committed. [¶] That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed. [¶] The identity of the person who committed the crime may be proved by the defendant’s statements alone. [¶] You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt.”

Defendant contends the court erred by failing to insert the words, “or a lesser included offense,” following the reference to “the charged crime” in the first paragraph of the instruction. If this had been done, he asserts, jurors would have understood that the phrase, “a crime was committed,” in the second paragraph could refer to either the charged crime (murder) or the lesser included offense (involuntary manslaughter). Without the additional words, he contends, the jury could believe they could convict defendant of murder based upon independent evidence that established only involuntary manslaughter.

Defendant’s argument is predicated upon the argument he asserted, and we addressed, in the preceding part—that the corpus delicti of murder requires independent evidence of malice. Defendant offers no additional authority for this argument. Because we reject his argument in the preceding part, this argument fails as well.

Even if the instruction was erroneous, the error is harmless “if there appears no reasonable probability the jury would have reached a result more favorable to the defendant had the instruction been given. [Citations.]” (*Alvarez, supra*, 27 Cal.4th at p. 1181, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) There was ample evidence, independent of defendant’s statements, that Fuller’s death was caused by a criminal agency. In particular, and as set forth above, there was independent evidence that defendant knew the gun was loaded before they returned to the garage (he was ready to use the gun to settle the score with Fuller’s foe), bullets could be seen through the gun clip’s window, he pointed the gun at Fuller’s head, and pulled the trigger. Even if the jury was given the instruction with the additional language defendant contends should have been given, there is no reasonable probability the jury would have reached a result more favorable to defendant.

*D. Failure to Sua Sponte Instruct on Voluntary Manslaughter*

The court instructed the jury on second degree murder and the lesser included offense of involuntary manslaughter. The involuntary manslaughter instruction was predicated on the alleged crime of brandishing a firearm and the lawful act of handling a loaded firearm with criminal negligence. Counsel did not request an instruction on voluntary manslaughter and none was given.

Defendant contends the court erred in failing to sua sponte instruct the jury as to voluntary manslaughter. He argues there is substantial evidence that he knew the gun was loaded and ready to fire, and that he intentionally fired the gun, just not at Fuller; he

intended to shoot the garage wall. Such facts, he continues, would support the crimes of assault with a deadly weapon (§ 245) and discharging a firearm in a grossly negligent manner (§ 246.3). Because there is also evidence that these inherently dangerous felonies were committed without the express or implied malice necessary to convict him of murder, he concludes, it was possible for the jury to convict him of voluntary manslaughter.

We reject defendant's contention for two reasons. First, although a court must sua sponte instruct on general principles of law, it is not required, in the absence of a request, to instruct on a theory "that has been referred to only infrequently," and with "inadequate elucidation." (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 126, quoting *People v. Flannel* (1979) 25 Cal.3d 668, 681.) Defendant's theory of voluntary manslaughter, asserted for the first time on appeal, is based on dictum in one recent Court of Appeal decision—*People v. Garcia* (2008) 162 Cal.App.4th 18 (*Garcia*). It is not a general principle of law for which the jury must be instructed in the absence of a request. Second, if the court erred in failing to give the instruction, it was harmless.

Voluntary manslaughter has traditionally been limited to two scenarios: (1) when the killer acts in a sudden quarrel or heat of passion (*People v. Lasko* (2000) 23 Cal.4th 101, 109; § 192, subd. (a)); and (2) the theory of imperfect self-defense; i.e., when the killer acts with an honest but unreasonable belief that it is necessary to defend oneself from imminent peril to life or great bodily injury (*People v. Flannel, supra*, 25 Cal.3d at p. 674; *People v. Blakeley* (2000) 23 Cal.4th 82, 88-89).

In *Garcia*, the Second Appellate District suggested a third possible scenario for voluntary manslaughter: an unlawful killing, committed without malice aforethought, that occurs during the commission of an inherently dangerous felony. (*Garcia, supra*, 162 Cal.App.4th at pp. 31-32.) In that case, the defendant struck the victim in the face with the butt of a shotgun, causing the victim to fall, hit his head on the sidewalk, and die. (*Id.* at p. 22.) The defendant said that the victim lunged at him and “he ‘just reacted’” by jabbing or swinging the shotgun at the victim; he did not intend to hit the victim or to kill him. (*Id.* at p. 25.) The trial court instructed the jury on the crimes of murder and voluntary manslaughter (based on sudden quarrel or heat of passion and imperfect self-defense), but refused to instruct on involuntary manslaughter. (*Id.* at pp. 25-26.) He was found guilty of voluntary manslaughter. (*Id.* at p. 23.) On appeal, the defendant argued that the court erred in denying his request for an instruction on involuntary manslaughter. (*Id.* at p. 24.) The Court of Appeal disagreed. (*Id.* at pp. 22, 32.) The court concluded that because the victim’s “death did not occur in the commission of either a dangerous misdemeanor [citation], or a lawful act in an unlawful manner or without due caution and circumspection, it does not fall within the statutory definition of involuntary manslaughter [citation.]” (*Id.* at p. 32.) The court added that the killing was “properly classified as voluntary manslaughter . . . .” (*Id.* at p. 32.)

The statements in *Garcia* regarding voluntary manslaughter must be understood in accordance with the facts and issues before the court. (See *People v. Knoller* (2007) 41 Cal.4th 139, 154-155; *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.) ““An appellate

decision is not authority for everything said in the court’s opinion but only “for the points actually involved and actually decided.” [Citation.]” (*People v. Knoller, supra*, at p. 155.) Significantly, the defendant in *Garcia* did not challenge the decision to give the voluntary manslaughter instruction or the sufficiency of the evidence to support the verdict of voluntary manslaughter. The question of whether the defendant’s actions constituted voluntary manslaughter was simply not presented to the Court of Appeal or necessary to its decision. It was enough to conclude, as the court did, that there was no substantial evidence to support the giving of an instruction on involuntary manslaughter. (*Garcia, supra*, 162 Cal.App.4th at pp. 32-33.) To the extent the court’s statements suggest that an unlawful killing, without malice, during the commission of an inherently dangerous felony is voluntary manslaughter, the suggestion is dictum and not binding on the trial court. Moreover, it has not been followed on this point in any decision that has remained published.<sup>6</sup> We conclude, therefore, that the *Garcia* theory of voluntary manslaughter was not a general principle of law of which the trial court was required to instruct the jury in the absence of a request to do so.<sup>7</sup>

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<sup>6</sup> *Garcia* was followed in *People v. Bryant* (2011) 198 Cal.App.4th 134, review granted November 16, 2011, S196365. However, the California Supreme Court granted a petition for review in *Bryant* to consider the question whether voluntary manslaughter may be premised on a killing without malice that occurs during the commission of an inherently dangerous assaultive felony.

<sup>7</sup> We do not express any view as to whether the *Garcia* theory of voluntary manslaughter is a valid theory. Our discussion on this point is limited to the question of whether the trial court in this case was required to instruct as to that theory sua sponte.

The second reason why we reject defendant's argument is that any error in failing to instruct the jury as to the *Garcia* theory of voluntary manslaughter was harmless. The erroneous failure to instruct on a lesser included offense generally is subject to harmless error review under the standard of *Watson*. (*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." (*People v. Breverman, supra*, at p. 177.)

Defendant's theory of voluntary manslaughter is based on the factual argument that he intended to fire a loaded gun at the garage wall, but that Fuller "move[d] into the path of the shot." This scenario is supported primarily by statements defendant made in his postarrest interview. These statements, however, conflicted with other versions of the events he described. In addition to intending to fire the gun at the wall (which might support a *Garcia* theory of voluntary manslaughter), defendant gave other explanations that would not support a *Garcia* theory of voluntary manslaughter: he said someone else shot Fuller; he admitted shooting Fuller, but did not know the gun was loaded and thought it would "go click," not "boom"; he did not mean to pull the trigger; and he "didn't mean to aim at [Fuller]." The multiple conflicting explanations weaken the

strength of the one explanation he now relies on—that he intended to shoot at the wall. By contrast, the circumstances indicate strong evidence that defendant acted with implied malice; i.e., that he knew the gun was dangerous and acted with conscious disregard for human life. As discussed above, there was ample evidence that he knew the gun was loaded and yet repeatedly pointed the gun at Fuller with his finger on the trigger, eventually pulling it. Based on our review of the record, even if the jury had been presented with an instruction on voluntary manslaughter based on *Garcia*, it is not reasonably probable defendant would have obtained a more favorable result.

*E. Substantial Evidence to Support the Firearm Enhancement*

The jury found true three enhancement allegations that in the commission of the murder defendant (1) personally used a firearm, (2) personally and intentionally discharged a firearm, and (3) that such intentional discharge caused great bodily injury. (§ 12022.53, subs. (b), (c), (d).) Defendant contends that if the murder conviction stands, there is substantial evidence to support only the personal use allegation, not the two allegations that require an intentional discharge of the firearm. This argument is based upon the argument we addressed in part III.A., *ante*, that there is no substantial evidence that defendant knew the gun was loaded and ready to fire. As explained above, there is substantial evidence that defendant knew the gun was loaded. Therefore, this argument fails.

IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING  
J.

We concur:

HOLLENHORST  
Acting P. J.

CODRINGTON  
J.