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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN FRANKLIN KENNEY,

Defendant and Appellant.

H033590

(Monterey County
Super. Ct. No. SS081552A)

Defendant John Franklin Kenney was convicted after jury trial of the first degree murder of Elizabeth Ellington Grimes and the second degree murder of Melvin Grimes, Jr. (Pen. Code, § 187, subd. (a)),¹ the husband and wife who were his neighbors.² The jury also found true allegations that defendant intentionally discharged a firearm during the commission of the offenses (§ 12022.53, subd. (d)), and that he committed multiple murders (§ 190.2, subd. (a)(3)). The trial court sentenced him to life without the possibility of parole consecutive to 25 years to life, with a concurrent term of 15 years to life consecutive to 25 years to life. The court also ordered defendant to pay separate

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

² In order to avoid confusion, we will hereafter refer to the victims by their first names.

\$10,000 restitution fines under section 1202.4 and suspended \$10,000 restitution fines under section 1202.45 as to each count.

On appeal, defendant contends that (1) the trial court erred in instructing the jury with CALCRIM Nos. 3471 and 3472; (2) the court erred in failing to define “mutual combat” sua sponte; (3) the court erred in failing to instruct the jury sua sponte with CALCRIM Nos. 3475 and 3476; (4) defense counsel rendered ineffective assistance by agreeing to the withdrawal of CALCRIM No. 3475; (5) the court erred in admitting into evidence a DVD found in his home; (6) the court erred in instructing the jury with CALCRIM No. 362; and (7) the court erred in imposing separate \$10,000 restitution fines and the suspended \$10,000 parole revocation fines on the two counts. We will modify the judgment by reducing the restitution fine to \$10,000, and by striking the suspended parole revocation fines, and affirm the judgment as so modified.

BACKGROUND

Defendant was charged by information with two counts of first degree murder (§ 187, subd. (a)). The information further alleged that defendant personally and intentionally discharged a firearm during the commission of the offenses (§ 12022.53, subd. (d)), that he committed the offenses while lying in wait (§190.2, subd. (a)(15)), and that he committed multiple murders (§ 190.2, subd. (a)(3)).

Defendant moved in limine to exclude all books, tapes, CDs and DVDs seized from his home. The prosecutor opposed the motion as to the DVD titled “First and Finish Moves.” After viewing tracks 2, 3 and 4 of the DVD, the court found those tracks of the DVD admissible.

The People’s Case

Defendant was seen and examined by a psychiatric nurse at a hospital psychiatric unit on June 12, 2005. Defendant reported at that time that he had been assaulted by a neighbor the day before and that he was fearful of going home because he lived alone. He was anxious and irritable. He answered no when he was asked whether he had

firearms in his home. The nurse recommended that defendant be discharged home with anti-anxiety medication, with follow-up therapy at the VA clinic.

Some time in the year before January 2007, defendant contacted the First Alarm security company requesting information about security matters for his home. Michael Morrison, the Monterey County branch manager of First Alarm, met with defendant at his home. Morrison recommended that defendant install motion detectors and cameras outside his home and an alarm system. As far as Morrison knows, defendant did not do any of this.

On October 23, 2006, defendant and his attorney Nick Cvietkovich met with Sheriff John Michael Kanalakis regarding a mutual restraining order defendant had with the Grimeses, and defendant's desire to erect a barrier on his property. Undersheriff Nancy Cuffney was also present during the meeting. Kanalakis testified that he suggested that defendant request a civil standby if he needed to make sure the erection of the barrier occurred without violence. Cuffney testified that defendant asked whether the Grimeses had turned in their weapons as required by the restraining order. Kanalakis testified that he does not remember defendant asking that question, and Cuffney testified that she does not remember what the sheriff told defendant in response to the question.

On January 24, 2007, defendant purchased a boulder from a nursery to be delivered to his home. He told the nurseryman that he wanted the boulder to prevent his neighbors from coming onto his property. He originally said that he wanted the boulder delivered on the morning of January 29, 2007, but he called back later and asked that it be delivered after 3:00 p.m., because police officers were going to be present then. Defendant, Morrison, and Cvietkovich were present when the nursery's driver delivered the boulder, and defendant signed for the delivery. Morrison told defendant and Cvietkovich that Mr. Grimes was going to have a "shit fit" about the placement of the boulder. Morrison told defendant that he should stay inside his home and call Morrison

or for law enforcement help if the Grimeses became upset when they came home.

Morrison left before the Grimeses came home.

Around 2:40 p.m. on January 29, 2007, Deputy Sheriff Mark Flores responded to a request for a civil standby at defendant's address. Around 3:05 p.m., before the deputy reached defendant's driveway, he stopped the delivery truck driver as the driver was leaving the driveway. The deputy asked the driver if anybody had complained about the delivery, or whether there was any disturbance whatsoever, and the driver said no. The deputy advised dispatch that the delivery had been made without any disturbance and then he resumed his patrol duties.

The parties stipulated that "[t]here was a property dispute between Mr. Kenney and the Grimes[es] over the area of land where Mr. Kenney placed the boulder. The Grimes[es] believed they had an easement or right to access their carport across the defendant's property. In this case, who was actually right about this property dispute is not necessary for the jury to decide, and therefore, that issue is not for you, the jurors, to determine."

Elizabeth called 911 at 5:38 p.m. on January 29, 2007. During the first minute of her call, Elizabeth said that her neighbor had blocked her driveway and she asked the dispatcher to "send somebody right away." The dispatcher said okay, and asked Elizabeth to stay on the line. Deputy Sheriff Brian Irons was dispatched at 5:38 p.m., due to the report of a civil dispute over a boulder that had been placed in a driveway. Two minutes into Elizabeth's 911 call, she said that she was going to defendant's house. Defendant is heard on the 911 recording telling Elizabeth to get off his property, and telling Melvin to "[l]eave that alone," and Elizabeth is heard repeatedly asking the dispatcher to send someone out. Three minutes 35 seconds into the call, a female scream is heard, Elizabeth says "Get off," and another female scream is heard. Three minutes 41 seconds into the call, Elizabeth says "He's got a gun." During the following 20 seconds,

five gunshots and male and female screams are heard on the 911 recording. During the next four minutes, the dispatcher repeatedly says hello, but gets no response.

Defendant called 911 at 5:44 p.m. on January 29, 2007. During his call, defendant said that he had been assaulted and battered by his next door neighbors and that he had been injured. When asked if he needed an ambulance, he responded no. When asked what had happened, he said “they rushed at me and tried to assault me.” “Um, that’s as much as I—I think I should say right now.” Defendant hung up the phone as the dispatcher was saying that he needed more information; defendant did not tell the dispatcher that the Grimeses had been shot or that they needed medical assistance. Captain Eric Ulwelling and Firefighter Spencer Reade, paramedics with the Carmel Valley Fire Protection District, were dispatched to defendant’s address for an unknown emergency at 5:45 p.m.

At 5:47 p.m., defendant left a voice mail message for Morrison. At 5:49 p.m., defendant called First Alarm and left another message for Morrison. During the second call, defendant told the person taking the message that “I’ve had major trouble out here. Uh, I’ve been injured. I’ve been assaulted. I defended myself. Um, he needs to come out right away.”

When the paramedics and Deputy Irons arrived at defendant’s address around 5:52 p.m., the paramedics saw defendant standing in his driveway with his arms behind his back, staring straight ahead. Defendant, who Captain Ulwelling described as “approximately six-feet tall [and] relatively heavy set,” did not approach the paramedics or say anything to them. Elizabeth was lying on the ground between the roadway and a boulder, on her left side in a semi-fetal position, facing Melvin and the boulder, and with her back to the passenger side of the ambulance. She had a significant amount of blood on her chest, but she was conscious and talking. Melvin was dead.

A sledgehammer was found at the scene, and there was a cordless phone several feet below Elizabeth’s feet. Her sweater was bunched up, exposing her midriff. Captain

Ulwelling moved her onto her back, and asked her what had happened. She replied, “We were shot.” Ulwelling asked her who did it, and she replied, “My neighbor.” Ulwelling asked her if that was the man standing at the top of the driveway, and she said yes.

Ulwelling told the deputy what he had learned.

Deputy Irons approached defendant and asked him what had happened. Defendant asked Irons if he was the same deputy who had been out earlier, and Irons responded no. Defendant said that Sheriff Kanalakis was going to assign a deputy to handle an ongoing problem between defendant and his neighbors, and that the boulder that had been delivered was on his property. Irons again asked defendant what had happened. Defendant responded that he did not want to say anything until his lawyer arrived, and that his lawyer was on his way. Irons asked defendant if he had any injuries. Defendant did not say anything but he showed Irons an injury to his right thumb. Defendant had no other injuries. Irons told defendant that, unless he told the deputy his side of the story, all the deputy had to go on is what the other people involved had to say. Irons said that there was a woman who had blood on her and he asked defendant how she got that way. Defendant paused and then said calmly, “She did it to herself.” Irons told defendant that he was being detained and would be placed in the patrol car. Defendant said that he wanted to lock his residence, and Irons had to physically block defendant from doing so. Defendant glared at Irons and then walked with him to the patrol car, but he refused to get inside. Irons had to place defendant in a control hold to handcuff him and place him in the patrol car.

Captain Ulwelling rolled Elizabeth back on her side, removed her sweater, and cut off her camisole and bra. Firefighter Reade stripped off Elizabeth’s jeans, boots, and socks. Reade did not see or remove a pearl necklace before he placed a neck brace on Elizabeth. Elizabeth had gunshot wounds in her chest and back. She deteriorated rapidly; although she was transported from the scene in an ambulance and was airlifted to a hospital, she died in flight. Before Elizabeth died, Reade asked her what had happened

and she replied, “My neighbor shot me.” He asked her why and she replied, “Because . . . he’s an ass hole.”

Elizabeth was 55 years old, 5’ tall, and weighed 116 pounds at the time of her death. She had a blood-alcohol level of 0.06 percent. She had been shot once in her upper right arm, and the bullet continued through her arm, entered her body in front of her armpit, and lodged in her small intestine. She would have had to have her shoulder raised and to be hunched forward in order for the bullet to have followed the path it did. The bullet was recovered from her body. Elizabeth had been shot a second time in the center of her mid-back, just right of the spinal column, and the bullet exited her body in her upper abdomen, grazing her breast and bruising her left inner thigh through her jeans. She also had small bruising on the front of her shins. Her jeans had a concentration of dirt or mud in the knee areas which was embedded in the clothing. Based on her injuries and the state of her clothing, it was determined that Elizabeth was hunched forward and her sweater was rolled up when she was shot in the back. A criminalist determined that Elizabeth was probably shot both times from approximately three feet away. The two pieces of a pearl necklace recovered from the scene near Elizabeth’s clothing had blood on them near their frayed ends. It appeared that the necklace had been broken rather than cut.

Melvin was 58 years old, 5’ 9” tall, and weighed 165 pounds at the time of his death. He had had two stents in his coronary arteries due to narrowing of the arteries, but his heart disease did not cause his death. He had been shot once in the back of the left arm near the shoulder, and the bullet exited the arm, entered the chest inside the armpit, and exited the chest below the right armpit without hitting his right arm. He would have had to have his arms raised at the shoulder in order for the bullet to have followed the path it did. Melvin was shot a second time in the right lower chest, and the bullet exited the right back. A criminalist determined that Melvin was probably shot once from approximately three feet away and once from a greater distance. Melvin also had a deep

abrasion on his left cheek that was consistent with being hit in the face by the rear sight of the .45-caliber handgun recovered at the scene.

The .45-caliber handgun containing a magazine, a live round, and a spent casing, was seized from the stairway inside defendant's house. There was blood on the gun. Both Melvin's and defendant's DNA were found on the rear sight area of the gun. A live round of ammunition was found on the ground by Melvin's body, and a spent bullet was found embedded about four inches into the ground under where Elizabeth had been lying. The casings and bullets found at the scene and recovered from Elizabeth's body were fired by the gun. In the bottom drawer of a filing cabinet near defendant's desk, investigators found a .45-caliber magazine clip containing live ammunition, and a DVD titled "First and Finish Moves."

A person can injure his or her thumb when firing a gun like the .45 found at the scene. If a shooter had a thumb on the back of the slide when he or she depressed the trigger, the thumb could be cut when the slide reciprocated backwards. Defendant's blood was found on the front deck of defendant's house and on the driveway, on and near a desk on the first floor of his house, and in his bathroom. His blood was also found on one of his shoes, and on both the front abdomen area and the lower right back of his sweater.

The Defense Case

Defendant testified in his own defense. He was 72 years old on January 29, 2007, and he might have weighed over 200 pounds. As a teenager he served in the army during the Korean conflict and saw combat action. Thereafter, he obtained college and graduate degrees, and was a college professor. His specialty is theoretical physics and he has worked with the petroleum industry and with the United States government. He splits his time between his residences in France and in Carmel Valley, but his wife and two daughters live in France.

Defendant purchased his Carmel Valley home in 1999. He did not realize that the preliminary title report for the property stated that there was an easement on the property for a road “and incidents thereto.” He bought the .45-caliber handgun in 2003 from a neighbor. In 2004, defendant had a flower garden in the disputed area on his property, and the Grimeses destroyed it when they graded the area and built a carport on their property.

On June 11, 2005, defendant was attacked by Elizabeth and received a concussion. Two days earlier, Melvin had poured concrete over the disputed area. Defendant’s lawyer wrote Melvin a letter ordering him to remove the concrete and to not drive across defendant’s property. Melvin broke up the concrete with a sledgehammer. On the morning of June 11, 2005, defendant and a neighbor planted ferns where the concrete had been. That afternoon, as defendant was heading back to the nursery, Elizabeth positioned herself in front of his car. Melvin then ran to the Grimeses car and drove back and forth over the ferns defendant had just planted. Defendant took a camera from his shirt pocket in order to take pictures of what Melvin was doing. Elizabeth first tried to block defendant’s view and then she ran to the side of defendant’s car and grabbed the camera out of his hands. Because the camera’s nylon cord was around defendant’s neck, his head jerked forward and was slammed against the car window. The cord broke and Elizabeth was able to pull the camera away. She said, “How do you like that?” Defendant demanded his camera back. Melvin approached them and said to defendant, “If you ever attack my wife again, I’m going [to] finish you.” He then told Elizabeth to return the camera to defendant, so Elizabeth threw the camera into the back seat of defendant’s car. Defendant returned home and called his attorney and 911. After hearing both Elizabeth’s and defendant’s accounts, the responding deputies refused to arrest Elizabeth. Defendant was treated for trauma injuries and a concussion as a result of the incident and he sued the Grimeses for damages. The suit was still pending at the time of the Grimeses’ deaths.

Defendant requested a restraining order against the Grimeses, and they requested one against him. Defendant was required to turn in any firearms he possessed prior to receiving his restraining order. Although the box was checked on defendant's request form indicating that he did not possess any guns, his attorney had filled out the form and he signed it without reading it.

Three days after the camera incident, defendant went to a bible study class at his church. During the class, Elizabeth barged into the room. She said that defendant is a terrible person who was always harassing them. She said that defendant broke her finger when he attacked her three days earlier. She also said, "If you people call yourself Christians, what are you doing having this fellow." The people in the class told Elizabeth to leave, and somebody escorted her out.

Defendant was advised by his lawyers as early as 2005 to position a barrier in order to keep the Grimeses from driving over the disputed property, but his lawyers advised him to give the Grimeses at least 24-hours notice before he did so. Defendant sent the Grimeses an email notice a couple weeks before the boulder was delivered, but he could not produce a copy of the email because his computer has since crashed. Cvietkovich, Morrison, and a neighbor, Steve Radford, were all present when the boulder was delivered. Defendant had earlier learned that the restraining order he had had against the Grimeses was no longer in effect, so somebody from the sheriff's department was supposed to be present, but was not. Radford, Cvietkovich, and Morrison left shortly after the boulder was delivered.

Later that day, as defendant was preparing his dinner, he heard a noise at his side door. He grabbed from his bedside stand the gun he has kept there since the spring of 2005 and stuck it into his belt. He ran out his front door and saw Elizabeth at the corner of his house. He did not see a phone in her hand, and he did not see Melvin. He asked Elizabeth what she wanted and she used some "foul mouth" language. He approached her and she backed off the deck onto the driveway. He told her to get off his property

while making a sweeping motion with his right arm. As she continued to back up, he continued to step forward towards her.

Defendant then saw Melvin striking the boulder with a sledgehammer. Defendant walked past Elizabeth to Melvin and told him to stop and to get off his property. Melvin kept striking the boulder. As defendant was repeating his command, Elizabeth came up behind him and hit him in the back of the head. Defendant spun around and pushed her away. In his peripheral vision, he saw Melvin coming towards him with the sledgehammer raised “as a battering ram.” Defendant felt trapped. He drew the gun, pointed it at the ground, and drew back the receiver to load a round in the chamber. Because the gun was already loaded, it ejected an unused round. Defendant could see Melvin coming at him so he tried to dodge out of the way, but Melvin slammed into him and the sledgehammer hit him on his left arm. When Melvin pulled the sledgehammer back for a second strike, defendant hit him in the face with the gun.

Melvin was “knocked . . . off his pins” and he dropped the sledgehammer. Defendant then fired once at Melvin and once at Elizabeth. He paused for a moment and then shot Melvin again. After another pause he shot Elizabeth again. Melvin stood up, stepped across Elizabeth, and fell to the ground to the side of her. Defendant’s hands shook so badly that his thumb slipped off the hammer, the gun fired again, the bullet went into the ground, and the slide ripped a big gash in his thumb. While he was returning to his house to call 911, he looked back and saw that both Melvin and Elizabeth were moving and speaking. After calling 911, Morrison, and Cvietkovich, defendant cleaned his thumb in the bathroom and returned outside to wait for the 911 responders.

Deputy Irons asked defendant to tell him what happened, but defendant said that he wanted to wait for his lawyer to arrive before he said anything. The deputy asked him if he was injured and defendant said that he had a cut thumb and had lost a lot of blood. The deputy asked defendant if there was a weapon in the house, and defendant told him about the .45. Defendant denied making any other statements to the deputy. The deputy

told defendant that he was being detained, took him by the elbow, and walked him to the patrol car. When they got to the car, “suddenly, without warning,” the deputy slammed defendant against the car, seized his wrist and threw it into a hammerlock, pressed him up against the car, handcuffed him, and shoved him into the car.

Segolene Kenney, defendant’s daughter; Steve Radford, defendant’s neighbor; Jennifer Garbarino, another neighbor; Stefan Youngs, a former neighbor; Thomas Brattin, defendant’s life-long friend; Rene Burgess, a friend of defendant’s who lived on the east coast; Larry Thurman, a friend of defendant’s who lived in Texas; Richard Petty, a friend of defendant’s who lived in Boston; Dean Koontz, a pastor at defendant’s church; Kim Williams, a member of defendant’s church; David Hughes, a member of defendant’s church’s bible study group; Norman McBride, another member of the bible study group; and three of defendant’s civil attorneys testified about their involvement in and/or what defendant told them about the incidents involving the Grimeses that defendant testified about.

Dr. Daniel Chatel, a clinical neuropsychologist with the Department of Veterans Affairs, testified that he saw defendant between June 2005 and October 2006. Dr. Chatel felt that defendant had an adjustment disorder, and that he had likely suffered a mild concussion and had a post-concussive disorder. During their sessions, defendant intermittently showed apprehension about possible physical harm from the Grimeses, but he never expressed any violent thoughts or plans. Dr. Kris Mohandie, a psychologist, testified about the “fight or flight response,” which is a triggered instinctual reaction that a person may have to a threat or a fear of being harmed by another person. During a fight or flight response, a person may have “tunnel vision” and “tunnel hearing,” so that he or she does not see or hear everything that is happening and he or she may not have an ability to recall certain events. Most people who experience this response will either fight or run, but a small percentage will do nothing.

Steve Rosnack, Elizabeth's brother, testified that he spoke to Elizabeth on the phone at 5:29 p.m. on the evening she was shot. At that time, Elizabeth was relaxed and happy about the results of the appointment Melvin had had earlier that day regarding his heart condition. Dr. Gregory Tapson testified that Elizabeth was the office manager where he worked. In his opinion, Elizabeth had a reputation for dishonesty. Kenneth Allen Marks, a forensic toxicologist, testified that, generally, people with a 0.06 blood-alcohol level talk more loudly than normal and they increase their risk-taking.

Steven Yawn, a former neighbor of defendant's, testified that he sold defendant a .45-caliber automatic handgun in late 2003 or early 2004 because other homes in the neighborhood had been broken into. Magaly Vasquez, who cleaned defendant's house, testified that sometimes when she took the sheets off defendant's bed, she found a gun under a pillow. When defendant had already removed the sheets before her arrival, the gun was in the closet.

Dr. Terri Haddix, a consulting forensic pathologist, testified that in May 2008, she examined the clothing worn by Elizabeth at the time of her death, and the forensic reports. In Dr. Haddix's opinion, the wound on Elizabeth's left leg was not caused by the same bullet that went through Elizabeth's back. She is not sure what caused Elizabeth's leg injury.

Verdicts and Sentencing

On September 17, 2008, the jury found defendant guilty of the second degree murder of Melvin Grimes, Jr. (count 1) and the first degree murder of Elizabeth Ellington Grimes (count 2). The jury further found that defendant intentionally discharged a firearm in the commission of both offenses (§ 12022.53, subd. (d)), and that he committed multiple murders (§ 190.2, subd. (a)(3)). The jury found not true the allegation that the murder of Elizabeth was committed by means of lying in wait (§ 190.2, subd. (a)(15)).

On November 3, 2008, the court sentenced defendant to life in prison without the possibility of parole consecutive to 25 years to life on count 2, with a concurrent sentence of 15 years to life consecutive to 25 years to life on count 1. The court also ordered defendant to pay a \$10,000 restitution fine and a suspended \$10,000 restitution fine under section 1202.45 as to each count.

DISCUSSION

CALCRIM Nos. 3471 and 3472

During the on-the-record discussion of proposed jury instructions, the court stated that it intended to give CALCRIM No. 505 on self-defense or defense of another, but it denied defendant's request to give CALCRIM No. 506 on defense against harm to a person within home or on property. Defense counsel stated that "We accept the Court's ruling." Defendant agreed to the giving of CALCRIM No. 571 on reduction of murder to voluntary manslaughter due to imperfect self-defense, but defense counsel made "a tactical decision" to request that CALCRIM No. 580 on voluntary manslaughter as a lesser included offense to murder not be given. When the court stated that it intended to give CALCRIM No. 3471 on the right to self-defense: mutual combat or initial aggressor, defendant objected "that there has not been any evidence . . . presented in the case that supports the instruction." The court overruled the objection stating: "The instruction, based upon the evidence that has been presented, and the Court's interpretation of that evidence[,] does feel that it comes within the purview of the jury to make some of these decisions concerning the issue of self-defense, and [CALCRIM No.] 3471 is an accurate statement of the law and would apply and would be available for the jury to utilize in their evaluation." Defendant made the same objection, and the court make the same ruling, regarding the giving of CALCRIM No. 3472 on the right to self-defense: may not be contrived. Defendant also objected to the giving of CALCRIM No. 3474, and the court "noted" the objection. The court instructed the jury pursuant to these instructions as follows:

“The defendant is not guilty of murder or manslaughter if he was justified in killing someone in self-defense. The defendant acted in lawful self-defense if (1) the defendant reasonably believed he was in imminent danger of being killed or suffering great bodily injury, (2) the defendant reasonably believed that . . . the immediate use of deadly force was necessary to defend against that danger, and (3) the defendant used no more force than was reasonably necessary to defend against that danger. Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of great bodily injury to himself. The danger must be apparent, present, immediate, and instantly dealt with, or it must so appear at the time to the defendant as a reasonable person, and the killing must be done under a well-founded belief that it is necessary to save one’s self from death or great bodily harm. Defendant’s belief must have been reasonable, and he must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the killing was not justified. When deciding whether the defendant’s beliefs were reasonable, consider all the circumstances, as they were known to and appear[ed] to the defendant, and consider what a reasonable person, in a similar situation, with similar knowledge, would have believed. If the defendant’s beliefs were reasonable, the danger need not have actually existed. The defendant’s belief that he was threatened may be reasonable, even if he relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true. If you find that Elizabeth Grimes or Mel Grimes threatened or harmed the defendant in the past, you, the jurors, may consider that information in deciding whether the defendant’s conduct or beliefs were reasonable. If you find that the defendant knew that Mel Grimes had threatened or harmed others in the past, you may consider that information in deciding whether the defendant’s conduct and beliefs were reasonable. [¶] Someone who has been threatened or harmed by a person in

the past is justified in acting more quickly or taking greater self-defense measures against that person. A Defendant is not required to retreat. He is entitled to stand his ground and defend himself, if reasonably necessary, to pursue the assailant until the danger of death or great bodily injury has passed; that is so even if safety could have been achieved by retreating. [¶] Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm. The People have the burden of proving beyond a reasonable doubt that the killing was not justified. If the People have not met this burden, you must find the defendant not guilty of murder or manslaughter. [CALCRIM No. 505.]

“A person who engages in mutual [combat], or who is the first to use physical force, has a right to use self-defense only if (1) he actually, and in good faith, tries to stop fighting, and (2) he indicates, by word or conduct, to his opponent, in a way that a reasonable person would understand, that he wants to stop fighting and he has stopped fighting, and [(3)] he gives his opponent a chance to stop fighting. If a person meets these requirements, he, then, has a right to self-defense if the opponent continues to fight. If you decide that the defendant started the fight using non deadly force, and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then, the defendant has the right to defend himself with deadly force and was not required to stop fighting. [CALCRIM No. 3471.]

“A person does not have the right to self-defense if he provokes a fight or quarrel with the intent to create an excuse to use force. [CALCRIM No. 3472.]

“The right to use force in self-defense continues only as long as the danger exists or reasonably appears to exist. When the attacker withdraws or no longer appears capable of inflicting any injury, then, the right to use force ends. [CALCRIM No. 3474.]

“A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self-defense. If you conclude that the defendant acted in complete self-defense, . . . his action was lawful, and you must

find him not guilty of any crime. The difference between complete self-defense and imperfect self-defense depends on whether the defendant's belief in the need to use deadly force was reasonable. [¶] The defendant acted in imperfect self-defense if (1) the defendant actually believed he was in [imminent] danger of being killed and suffering great bodily injury, and (2) the defendant actually believed that the immediate use of deadly force was necessary to defend against the danger, but (3) at least one of those beliefs was unreasonable. [¶] Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant. If you find that the Grimeses threatened or harmed the defendant or others in the past, you may consider that information in evaluating the defendant's beliefs. If you find that the defendant knew that the Grimeses had threatened or harmed others in the past, you may consider that information in evaluating the defendant's beliefs. If you find that the defendant received a threat from someone else that he reasonably associated with the Grimeses, you, the jurors, may consider that threat in evaluating the defendant's beliefs. [¶] Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense. If the People have not met this burden, you must find the defendant not guilty of murder. [CALCRIM NO. 571.]”

On appeal, defendant contends that “the trial court failed to perceive the problem created by these instructions. The issue was not whether the instructions were legally correct in the abstract, but whether the concepts described in the instructions applied to the trial evidence and – if not – whether the instructions would mislead the jury.” He argues that instructions on a legal principle are justified only if there is substantial evidence to support them, and that “[o]nly through ‘speculation,’ ‘conjecture,’ or ‘guess work’ does any of [the evidence] indicate that [he] was involved in ‘mutual combat,’ or

had been an ‘initial aggressor,’ or had sought to ‘contrive’ a claim of self-defense.” He separately argues that, given the court’s decision to instruct the jury with CALCRIM No. 3471, the court had a sua sponte duty to define “mutual combat.” He further argues that the error in giving CALCRIM Nos. 3471 and 3472 requires reversal as “the instructions had the unwarranted effect of depriving [him] of the justifiable ability to rely on ‘self-defense’ and ‘imperfect self-defense.’ ”

The People contend that substantial evidence supported the giving of both CALCRIM Nos. 3471 and 3472. The People argue that defendant’s contention “relies almost exclusively on his own testimony . . . while largely ignoring the reasonable inferences that can be drawn from the physical evidence and the recorded 911 call that captured the incident When all the evidence is taken into consideration, [defendant’s] claim fails.”

“ ‘ “It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury’s understanding of the case.” [Citation.] ’ ” (*People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*)). “It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case. [Citation.]” (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129 (*Guiton*)). The error is “one of state law subject to the traditional *Watson* test (*People v. Watson* (1956) 46 Cal.2d 818, 836 [(*Watson*)] applicable to such error. [Citation.] Under *Watson*, reversal is required if it is reasonably probable the result would have been more favorable to the defendant had the error not occurred. [Citation.]” (*Guiton, supra*, at p. 1130.)

CALCRIM No. 3471 is written in the disjunctive; it applies when a person is engaged in mutual combat *or* is the initial aggressor. “Mutual combat” as used in CALCRIM No. 3471 does not simply mean any violent struggle between two people.

Instead, it “applies only to a violent confrontation conducted pursuant to prearrangement, mutual consent, or an express or implied agreement to fight.” (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1036 (*Ross*)). In other words, in order for the mutual combat doctrine to apply, “there must be evidence from which the jury could reasonably find that *both combatants actually consented or intended to fight before the claimed occasion for self-defense arose.*” (*Id.* at p.1047.) In *Ross*, this court held that the trial court erred in instructing the jury on mutual combat without evidence to support the instruction. (*Id.* at p. 1054.) The *Ross* jury, however, was instructed with CALJIC No. 5.56, which does not raise the issue of who is the initial aggressor. (*Ross, supra*, at p. 1042, fns. 8 & 9.)

Here, the record contains substantial evidence that defendant was the initial aggressor. (CALCRIM No. 3471.) Defendant testified that when he saw Elizabeth on his front deck, he approached her and told her to get away, using a sweeping motion with his hand. As she backed up, he continued to move forward towards her. Defendant then walked past Elizabeth, approached Melvin, and told him to stop what he was doing and to get off his property. The recording of Elizabeth’s 911 call indicates that Elizabeth then asked the dispatcher to send someone out just before she screamed, said “Get off,” and screamed again. There was evidence that Elizabeth’s pearl necklace was broken and pulled from her body, and that she may have been kneeling or crouched on the ground when she was shot. Elizabeth said, “He’s got a gun,” just before a gunshot rang out. A reasonable jury could conclude based on this evidence that defendant was the initial aggressor. Thus, it was not error to give CALCRIM No. 3471.

Defendant does not explicitly argue that the trial court should have modified CALCRIM No. 3471 to delete the references to “mutual combat.” Even if we assume that such an argument has been preserved and that there is not substantial evidence that either Grimeses had an “express or implied *agreement to fight*” with defendant before an occasion for self-defense arose (*Ross, supra*, 155 Cal.App.4th at pp. 1046-1047), we conclude that any error in failing to modify CALCRIM No. 3471 was harmless.

Here, the jury was instructed, pursuant to CALCRIM No. 200, that “[s]ome of these instructions may not apply, depending upon your findings about the facts in this case,” and that they should “follow the instructions that do apply to the facts, as you, the jurors, find them.” The prosecutor did not argue mutual combat in closing argument to the jury; the prosecutor argued that defendant was the initial aggressor. The jury was also properly instructed on self-defense and imperfect self-defense. Accordingly, we presume that the jury, heeding the directive of CALCRIM No. 200, disregarded inapplicable portions of CALCRIM No. 3471.

We also find that any error by the trial court in failing to sua sponte define “mutual combat” in CALCRIM No. 3471 was harmless. In *Ross*, this court did not conclude that there exists a sua sponte duty to define “mutual combat” in the absence of a request from counsel, a request from the jury, or some demonstrated need for clarification of the term. (See *Ross, supra*, 155 Cal.App.4th at pp. 1047-1048.) Defendant has not cited, nor have we found, any decision finding the existence of a sua sponte duty to define this term. The prosecution in this case did not contend that defendant had engaged in mutual combat, and the jury did not express any confusion about the meaning of “mutual combat.” In addition, even if the court had defined “mutual combat,” the jury would not have found “mutual combat” on the facts of this case. Therefore, we presume that the jury ignored that portion of CALCRIM No. 3471 discussing mutual combat. Assuming the jury found defendant to be the initial aggressor, as the prosecutor argued, any erroneous inclusion of the discussion of mutual combat in CALCRIM No. 3471 could not have affected the verdict. Any error by the trial court in failing to sua sponte define “mutual combat” was harmless.

We also find that any error by the trial court in including CALCRIM No. 3472 in the instructions to the jury was harmless. The court instructed the jury pursuant to CALCRIM No. 3472 that, “A person does not have the right to self-defense if he provokes a fight or quarrel with the intent to create an excuse to use force.” CALCRIM

No. 3472 was supported by the evidence presented at trial as a reasonable jury could have inferred from the evidence that defendant provoked a fight with the Grimeses with the intent to create an excuse to use force: defendant had previously been assaulted by Elizabeth when he had tried to prevent the Grimeses from using the disputed property; defendant expected the Grimeses to react with physical force against him due to his placing the boulder on the disputed property, which is why he requested a civil standby; and defendant had a gun in his belt when he approached the Grimeses for the first time after placing the boulder. Accordingly, the court did not err in instructing the jury with CALCRIM NO. 3472.

Even if we assume CALCRIM No. 3472 was not supported by the evidence, the error in giving the instruction was harmless. In *People v. Olguin* (1994) 31 Cal.App.4th 1355 (*Olguin*), the appellate court concluded that the giving of CALJIC No. 5.55,³ a pattern instruction similar to CALCRIM No. 3472, when it was inapplicable was harmless error. (*Id.* at p. 1381.) The court reasoned: “[The instruction] was part of a packet of a dozen self-defense instructions, some of which were mutually exclusive. It was obvious to anyone that not all of those instructions could apply to the case, and the jurors were specifically instructed they were to ‘Disregard any instruction which applies to facts determined by you not to exist.’ [Citation.]” (*Ibid.*) For similar reasons, any error in instructing the jury with CALCRIM No. 3472 in this case was also harmless.

Lastly, we reject defendant’s claim that the use of CALCRIM Nos. 3471 and 3472 constitutes federal constitutional error under *Chapman v. California* (1967) 386 U.S. 18, because it left “the definition of malice ‘incomplete’ ” and because of the “ ‘fundamental unfairness’ flowing from the error.” The use of these instructions did not prevent the jury

³ The trial court instructed the jury: “The right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense.” (*Olguin, supra*, 31 Cal.App.4th at p. 1381, fn. 10.)

from considering any evidence relevant to establishing his defense, nor did they lighten the prosecution's burden of proving malice. The jury was properly instructed pursuant to CALCRIM No. 520 on malice and the jury was also properly instructed on self-defense and imperfect self-defense. And, defendant's claim that the giving of CALCRIM Nos. 3471 and 3472 can constitute constitutional error is unsupported by any pertinent legal authority.

CALCRIM Nos. 3475 and 3476

During the on-the-record discussion of proposed instructions, after the court stated the instructions it intended to give, the court stated that the request for it to give CALCRIM Nos. 3475 [right to eject trespasser from real property] and 3476 [right to defend real or personal property] had been "withdrawn." Defense counsel did not contest this statement below, and the court did not instruct the jury with CALCRIM No. 3475. The instruction as originally proposed stated: "The (owner/lawful occupant) of a (home/property) may request that a trespasser leave the (home/property). If the trespasser does not leave within a reasonable time and it would appear to a reasonable person that the trespasser poses a threat to (the (home/property)/ or the (owner/ or occupants)[)], the (owner/lawful occupant) may use reasonable force to make the trespasser leave. [¶] Reasonable force means the amount of force that a reasonable person in the same situation would believe is necessary to make the trespasser leave. [¶] If the trespasser resists, the (owner/lawful occupant) may increase the amount of force he or she uses in proportion to the force used by the trespasser and the threat the trespasser poses to the property. [¶] When deciding whether the defendant used reasonable force, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed. [¶] The People have the burden of proving beyond a reasonable

doubt that the defendant used more force than was reasonable. If the People have not met this burden, you must find the defendant not guilty of _____ <insert crime>.”

On appeal, defendant contends that he “considers this to have reflected both trial court error and ineffective assistance of counsel.” He argues that “the trial court had a duty to instruct [the jury with CALCRIM No. 3475] after it had determined to give CALCRIM [Nos.] 3471 and 3472 over defense objection.” He also argues that “his counsel was ineffective in agreeing to withdraw CALCRIM [No.] 3475 in its entirety” as “there was no reasoned tactical basis to abandon CALCRIM [No.] 3475.”

The People contend that “[d]efense counsel made a reasoned tactical decision not to pursue . . . a claim [based on CALCRIM No. 3475] precisely because counsel did not want the jury making the legal determination of who had a right of access to the challenged strip of land. Moreover, given this tactical decision, the trial court had no sua sponte duty to instruct pursuant to CALCRIM [No.] 3475 because such an instruction would have conflicted with the defense being pursued.”

“[T]he sua sponte duty to instruct on all material issues presented by the evidence extends to defenses as well as to lesser included offenses In the case of defenses, . . . a sua sponte instructional duty arises ‘only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant’s theory of the case.’ [Citation.] Thus, when the trial court believes ‘there is substantial evidence that would support a defense inconsistent with that advanced by a defendant, the court should ascertain from the defendant whether he [or she] wishes instructions on the alternative theory.’ [Citation.]” (*Breverman, supra*, 19 Cal.4th at p. 157, italics omitted.)

“ “[I]n order to demonstrate ineffective assistance of counsel, a defendant must first show counsel’s performance was ‘deficient’ because his ‘representation fell below an objective standard of reasonableness . . . under prevailing professional norms.’ (*Strickland v. Washington* [(1984)] 466 U.S. 668, 687-688) Second, he must also

show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]' [Citation.]' [Citation.]' (*People v. Weaver* (2001) 26 Cal.4th 876, 925 (*Weaver*).

“ ‘Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a “strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.” ’ [Citations.] ‘[W]e accord great deference to counsel's tactical decisions’ [citation], and we have explained that ‘courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight’ [citation]. ‘Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts.’ [Citation.]’ (*Weaver, supra*, 26 Cal.4th at pp. 925-926.)

CALCRIM No. 3475 would have informed the jury that a lawful occupant may use reasonable force to eject a trespasser who poses a threat to the property or occupants, and would have defined reasonable force as that reasonably necessary to protect the property or occupants. However, the record discloses that defense counsel made a tactical decision prior to trial to not present to the jury a defense-of-property theory of defense based on defendant believing that he was the lawful occupant and the Grimeses were the trespassers to the disputed property, but to present instead a defense theory of self-defense or imperfect self-defense.

Defense counsel informed the court that the defense strategy was to show the jury that the disputed property was simply the site of a physical attack on defendant. “You know, this is a fear. This is an attack. This is a self-defense. . . . I don't think that the jury would ever be asked, well, Whose property was it, and did he have a right to protect it? because the jury instruction isn't going to be for protection of property. So I think we

have to keep that in mind, you know, going through this thing.” “[A]t no time will there ever be, in my opinion, or should there ever be, an issue of who had the actual right. What was the actual state of the law? That simply, that is a whole new thing. . . . because I don’t think that that is relevant. It is not relevant. What the actual state of the law is, what the actual rights were” The prosecutor responded, “I have every belief that they [the Grimeses] were in the right, in terms of this property dispute, and I just don’t see how we can even start by drawing the line and describing why we were trying to defend our property without getting into this, in some fashion. You know, . . . there may be a way that we can reach some stipulations.”

The court informed the parties that it wanted the parties to resolve the issue and come to an agreement prior to opening statements. “This entire discussion is a microcosm of what this case is all about. . . . [W]e’re going to put this in the proper perspective of a property dispute. It has been from the very beginning. . . . [but] we are not going to turn this into a real property trial. And that is absolutely not going to happen. It can’t happen. It, it will divert the attention of the jurors from the issues. . . . We need to come to some agreement, okay? So whatever that is, we need to get there, and the Court’s relying upon the professionalism of both of you, with the Court’s assistance, to get there, in some fashion, so that both sides are fairly accurately represented and argue what they feel their positions are.”

The parties ultimately agreed to the stipulation noted above: “There was a property dispute between Mr. Kenney and the Grimes[es] over the area of land where Mr. Kenney placed the boulder. The Grimes[es] believed they had an easement or right to access their carport across the defendant’s property. In this case, who was actually right about this property dispute is not necessary for the jury to decide, and therefore, that issue is not for you, the jurors, to determine.”

“It is not deficient performance for a criminal defendant’s counsel to make a reasonable tactical choice. [Citations.] Reasonableness must be assessed through the

likely perspective of counsel at the time. ‘[I]t is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action “might be considered sound trial strategy.”’ (*Strickland v. Washington*[, *supra*,] 466 U.S. [at p.] 689.)” (*People v. Ochoa* (1998) 19 Cal.4th 353, 445-446, fn. omitted.)

Choosing to defend the murder charges against defendant on a self-defense or imperfect self-defense theory was a reasonable tactical decision. Agreeing to the stipulation was a reasonable tactical decision with regard to the chosen defense strategy. Because of the stipulation, the issue of who was the lawful occupier and who was the trespasser was not before the jury. CALCRIM No. 3475 would only be relevant if the jury had to determine whether defendant was the lawful occupier and the Grimeses were the trespassers. Accordingly, the trial court did not have a sua sponte duty to give CALCRIM No. 3475 and trial counsel did not render ineffective assistance by agreeing to the withdrawal of the instruction.

The “First and Finish Moves” DVD

Prior to trial, the prosecutor informed the court that it wanted to present tracks 2, 3, and 4, of a DVD titled “First and Finish Moves” to the jury, as well as a summary by the DVD’s narrator. The DVD had been found in the bottom drawer of a filing cabinet near defendant’s desk, along with a .45-caliber magazine clip containing live ammunition which fit the .45 gun found at the scene, raising the inference that the gun had been kept

in the cabinet with the DVD. After the court viewed the DVD, the prosecutor argued that the DVD was relevant evidence because defendant's defense was going to be self-defense, and "the fact that this, the verbiage in this, talks about not waiting to defend yourself but moving first." Defendant objected to admission of the DVD, arguing that there was no evidence that defendant had ever listened to the particular portions at issue. "This is, I think, limited to a[n Evidence Code section] 352 analysis. I think it may very well be likely that that material would offend a jury, and I don't think that its probative value here is significant, in any way." "The Prosecution says, very specifically, in its pleading here, that these items are admissible to prove the Defendant's premeditation, deliberation, and intent to kill the victims, and, Your Honor, I certainly think they're not."

The court ruled: "The Court finds, in this particular matter, that this DVD, and this DVD only, does have probative value. The probative value outweighs the prejudicial value, and that's based on the Court's understanding and knowledge of the facts, as have been presented up to this [point], in a particular trial, and the information that the Court has gleaned from listening to the 911 tape, and the understanding that the Defendant, again, from the information the Court has, at this point, did leave the house armed, did approach the Grimeses, and in a very short period of time after approaching the Grimeses used a – the firearm that had been with him and that had been armed. And the Court does find, for the purposes of planning and preparation, that this particular DVD is of a probative value, and it does outweigh any prejudicial value of the very limited DVD and the instructions that are included on the DVD that's being offered, at this time." The prosecutor played the DVD at the close of its case-in-chief, just prior to playing the recording of Elizabeth's 911 call, playing the recording of defendant's 911 call, and reading the stipulation.

The DVD shown to the jury shows a man demonstrating "action versus reaction" by showing how somebody reaching for a gun can get to it before somebody reacting to

the reach, even though the person reacting is closer to it. It also shows a man stating that the best self-defense after an attack is to attack back. It ends with the narrator stating, “Once again, the key to the entire thing is to act first, have a good first move.”

On appeal, defendant contends that the court abused its discretion in admitting the DVD as it was not relevant and was very prejudicial. “In view of the prejudicial impact of such evidence, and the lack of probative value of the evidence in this case, [defendant] submits that this evidence should have been excluded under [Evidence Code] sections 350, 352, and 1101. The effect of the evidence – and indeed its intended effect – was to convince the jury that [defendant] was a dangerous old gunslinger obsessed with firearms and violent defense. The prejudicial effect – that ‘unique tend[ency] to evoke an emotional bias against the defendant’ – was acute. Turning finally to the ‘necessity’ of the additional evidence . . . , there was none.”

The People contend that there was no abuse of discretion. “The excerpted portions of the DVD shown to the jury are notable for being devoid of any actual violence. They are instructional, informing the viewer of the importance of acting first and decisively, before one’s perceived opponent has the opportunity to act.” “The court reasonably concluded that the potential for prejudice was minimal.” “The court also properly concluded the excerpts were relevant to show [defendant’s] planning and premeditation.” “The presence of the video showed that [defendant] took steps to train himself on how to gain the upper hand in just such a confrontation.” “In this regard, finding a training DVD on how to get the upper hand in combat situations in [defendant’s] file drawer is not materially different from finding a book on bomb-making in the home of someone accused of planting a bomb.”

Evidence Code section 350 states that only relevant evidence is admissible. “ ‘Relevant evidence’ means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) The trial court has discretion to exclude relevant evidence if “its

probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.) “ ‘The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.’ [Citations.] ‘Rather, the statute uses the word in its etymological sense of “prejudging” a person or cause on the basis of extraneous factors. [Citation.]’ [Citation.]” (*People v. Zapien* (1993) 4 Cal.4th 929, 958 (*Zapien*)). The undue prejudice justifying exclusion under Evidence Code section 352 “ ‘applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.’ ” (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

The trial court has broad discretion to admit or exclude evidence under Evidence Code section 352, and we will not overturn its ruling absent an abuse of discretion. (*People v. Falsetta* (1999) 21 Cal.4th 903, 917-918.) Moreover, “[w]e do not reverse a judgment for erroneous admission of evidence unless ‘the admitted evidence should have been excluded on the ground stated and . . . the error or errors complained of resulted in a miscarriage of justice.’ (Evid. Code, § 353, subd. (b); [citations].)” (*People v. Earp* (1999) 20 Cal.4th 826, 878; see also *People v. Catlin* (2001) 26 Cal.4th 81, 138, fn. 14 (*Catlin*)).

We have reviewed the portions of the DVD shown to the jury. We agree with the People that these portions are “devoid of any actual violence.” In addition, as we explained, the fact that evidence may be damaging to a defendant’s case does not mean it is inadmissible under Evidence Code section 352. (*Zapien, supra*, 4 Cal.4th at p. 958.) Here, the court properly concluded that any prejudice was outweighed by the probative value of the DVD on the issue of premeditation and deliberation. The DVD was circumstantial evidence that defendant purposefully took his gun with him when he left

his home in order to attempt to have the upper hand when he confronted the Grimeses. The DVD also bolstered the prosecution's claim that defendant was the initial aggressor, and was therefore probative of defendant's guilt on the charges of murder and on his inability to claim self-defense.

Defendant did not object to admission of the DVD pursuant to Evidence Code section 1101, and thus that claim has not been preserved for appeal. (Evid. Code, § 353; *Catlin, supra*, 26 Cal.4th 81 at p. 138, fn. 14.) Moreover, even assuming that the trial court erred in admitting the DVD, we conclude that there is no reasonable probability that a different result would have been reached absent the assumed error. (*People v. Harris* (2005) 37 Cal.4th 310, 336; *Watson, supra*, 46 Cal.2d at p. 836.)

Appellate review under *Watson* "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, supra*, 19 Cal.4th at p. 177.) Other considerations under the *Watson* standard have to do with the impact of the erroneously admitted evidence and include the nature of the evidence. (See *People v. Guerrero* (1976) 16 Cal.3d 719, 730.)

The prejudice arising from admission of the "First and Finish Moves" DVD was minimal compared with the other evidence presented. The jury heard recordings of Elizabeth's call to 911, and defendant's calls to 911, Morrison, and First Alarm. The jury also heard testimony about defendant's conduct at the scene after the deputy sheriff and paramedics arrived, and about the probable defensive positions the Grimeses were in when defendant admittedly shot them both twice. Lastly, the jury heard testimony that one of the gunshots Elizabeth suffered was to her back. The prejudicial impact of the DVD was far less than that of all this other evidence. Accordingly, we conclude that it is

not reasonably probable that defendant would have obtained a more favorable result had the DVD been excluded. (*Breverman, supra*, 19 Cal.4th at p. 177; *Watson, supra*, 46 Cal.2d at p. 836.)

CALCRIM No. 362

During the on-the-record discussion of the proposed jury instructions, defense counsel objected to the giving of CALCRIM No. 362 on consciousness of guilt: false statements. Counsel argued that no evidence had been presented at trial of any false or misleading statements by defendant, and therefore the instruction was inapplicable and potentially confusing. The prosecutor argued that the instruction applied to defendant's response, "she did it to herself," when the responding deputy asked defendant how Elizabeth got blood all over her. The court ruled: "The Court does feel that this instruction and the evidence that has been presented is within the realm of this particular instruction. And the Court does realize, also, the last paragraph: If you conclude that the Defendant made this statement, it is up to you, the jury, to [determine] its meaning and importance."

The court instructed the jury pursuant to CALCRIM No. 362 as follows: "If the defendant made a false or misleading statement relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime, and you, the jurors, may consider it in determining his guilt. You, the jurors, may not consider the statement in deciding any other defendant's guilt. If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

On appeal, defendant contends that "this instruction was severely improper, where the case turned on his credibility. 'She did it to[] herself' was too thin a reed on which to base CALCRIM [No.] 362. The effect was to unfairly burden a testifying defendant, in violation of state law and the United States Constitution."

The People contend that the instruction was properly given because defendant denied at trial that he had said “she did it to herself” when the deputy asked him what had happened. Indeed, defendant testified that he refused to tell the deputy anything other than that he had been injured and that there was a gun in his house. Therefore, defendant presented a factual dispute that the jury had to resolve.

“It is well established that pretrial false statements by a defendant may be admitted to support an inference of consciousness of guilt by the defendant. [Citation.]” (*People v. Edwards* (1992) 8 Cal.App.4th 1092, 1102 (*Edwards*); see also *People v. Hughes* (2002) 27 Cal.4th 287, 335.) “[B]ecause the defendant’s prior statement is not being introduced to prove the truth of the statement but simply to prove that the defendant made it, the jury can properly evaluate the evidence to determine if the prior statement was made, whether or not the defendant takes the stand.” (*People v. Kimble* (1988) 44 Cal.3d 480, 498.) “In many cases, . . . other evidence—which may consist of physical evidence like fingerprints, or the testimony of trustworthy witnesses—will be equally, if not more, reliable than defendant’s own in-court testimony. Of course, the jury need not believe the prosecution’s evidence suggesting that the statement was false, and even if it finds that the statement was false, it need not conclude that defendant deliberately lied to hide his complicity in the crime.” (*Ibid.*)

In *People v. Bacigalupo* (1991) 1 Cal.4th 103, the defendant challenged the giving of CALJIC No. 2.03, a pattern instruction similar to CALCRIM No. 362, “asserting that it invited the jury to draw biased inferences from isolated items of evidence and was impermissibly argumentative. The Supreme Court rejected this argument, finding that the instruction did not suggest to the jurors that they could infer any mental state or degree of culpability from consciousness of guilt. It held the instruction was not biased or argumentative but was a proper instruction advising the jury of inferences that could rationally be drawn from the evidence. (At p. 128.) [¶] In *People v. Kelly* (1992) 1 Cal.4th 495, the Supreme Court again rejected a defendant’s argument that CALJIC

No. 2.03 was favorable to the prosecution. (At p. 531.)” (*Edwards, supra*, 8 Cal.App.4th at p. 1103.) Like CALJIC No. 2.03, CALCRIM No. 362 merely “ ‘advise[s] the jury to determine what significance, if any, should be given to evidence of consciousness of guilt, and caution[s] that such evidence is not sufficient to establish guilt, thereby clearly implying that the evidence is not the equivalent of a confession and is to be evaluated with reason and common sense.’ ” (*People v. San Nicolas* (2004) 34 Cal.4th 614, 666.)

In this case, conflicting evidence was presented to the jury regarding whether or not defendant made the statement “she did it to herself” when asked by the responding deputy what happened to Elizabeth. Defendant’s alleged statement was also ambiguous. As defendant argues here, the jury could have interpreted the statement as showing only that defendant was implying that Elizabeth “bore responsibility for what had occurred, which from [defendant’s] perspective was the absolute truth”; the jury need not have interpreted the statement as false or misleading. As the jury had to determine whether or not defendant actually made the statement attributed to him, and had to determine the meaning of the statement, the trial court properly instructed the jury with CALCRIM No. 362, which informed the jury that it could consider the statement as evidence of defendant’s consciousness of guilt if it determined, based on all of the evidence, that defendant made the statement and that he did so with the intent to mislead. (*Edwards, supra*, 8 Cal.App.4th at p. 1104.)

Restitution Fines

The court imposed separate \$10,000 restitution fines under section 1202.4, and \$10,000 suspended parole revocation restitution fines under section 1202.45, as to counts 1 and 2 in this case. Defendant contends, and the People concede that this was error. Only one \$10,000 restitution fine was properly imposed for the two counts (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1534), and no parole revocation restitution fine was proper as defendant was sentenced to life without the possibility of parole. (§ 1202.45.) Accordingly, we will modify the judgment to reduce the restitution fine

under section 1202.4 to \$10,000, and to strike the suspended restitution fines under section 1202.45.

DISPOSITION

The judgment is ordered modified by reducing the total amount of the ordered restitution fine under Penal Code section 1202.4 to \$10,000, and by striking the ordered restitution fines under section 1202.45. As so modified, the judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

PREMO, ACTING P.J.

ELIA, J.