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

THE PEOPLE,

Plaintiff and Respondent,

v.

YUNG TSAI LAI,

Defendant and Appellant.

H037218

(Santa Clara County

Super. Ct. No. CC806618)

Defendant Yung Tsai Lai appeals after conviction, by jury trial, of first degree murder. (Pen. Code, § 187.)<sup>1</sup> The trial court sentenced defendant to a prison term of 25 years to life, consecutive to a one-year term for the jury's finding that defendant used a deadly weapon in the commission of the murder. (§ 12022, subd. (b)(1).)

On appeal, defendant contends the trial court should have suppressed his post-arrest statements because (1) he made the incriminating statements after insufficient *Miranda* advisements (*Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*)), (2) the police continued interrogating him after he requested an attorney, and (3) he waived his *Miranda* rights involuntarily. Defendant also contends the trial court allowed expert witness testimony about his intent in violation of section 29. He further contends that

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

CALCRIM No. 362 erroneously permitted the jury to find him guilty of first degree murder because he made a false statement.

For reasons that we shall explain, we will affirm the judgment.

## **BACKGROUND**

On May 27, 2008, defendant killed Yi-Wen Chuang, stabbing her nearly 50 times. At trial, defendant testified and did not dispute that he killed Chuang, but he claimed it was not premeditated. Defendant contended he initially planned to hold Chuang hostage. According to defendant, he later decided to kill Chuang because, he believed, she was affiliated with a mafia that was going to harm him or his parents.

### ***A. Prosecution Evidence***

#### **1. Discovery of Victim**

On May 27, 2008, defendant's next-door neighbor, Son Ho, and his girlfriend, Vhuy Van Nguyen, heard a female crying outside. Nguyen looked outside, saw defendant struggling with a woman, and heard the woman "crying or begging for something." Nguyen saw blood and heard the woman call for help. She asked Ho to call the police. Ho called the police a few minutes later, after he saw blood, too. Nguyen saw defendant begin cleaning the car.

When officers arrived, defendant was standing at the front of his car. The hood of the car was up, the trunk was open, the driver's door was open, and the car was running. San Jose Police Detective Russell Chubon approached defendant and asked if he had heard a woman crying. Defendant said he was the one who had been crying, so Detective Chubon asked defendant if he was hurt. Defendant said he had cut his hand while working on his car.

Detective Chubon saw that defendant's injury could not have produced the amount of blood at the scene. Moreover, defendant's hands were clean and there were no tools

present. He asked defendant to tell him “what really happened.” Defendant paused, put his hands up, and said, “I just killed somebody, and she’s inside.”

Officers found Chuang inside defendant’s trailer with multiple stab wounds, and defendant was placed in handcuffs. At that point, he went from being relatively calm to being excited and upset. He began crying.

Detective Chubon turned on a recorder after defendant was handcuffed, before placing him in the patrol car. Defendant told Detective Chubon, “I killed, I killed her,” while crying hysterically. Defendant mentioned the figure 7500 and said, “I couldn’t, I couldn’t, I couldn’t get it. She scared me. And she’s gone, she’s gone and make threat on me to some Mafia.” Defendant stated, “She wanted money so I got it.”

Defendant asked Detective Chubon, “Will my parents know?” When informed that “[t]hey probably will find out,” defendant stated, “I’m 23. I will take my responsibility. I will not drag my parents down.” He also told the detective, “Protect them. They will kill my parents.”

Defendant stated, “She tried to scam me. She was going to do something to me. So I had no choice.” Defendant asked if he could “request police protection for [his] family,” and he asked Detective Chubon, “Can I trust you? Can I trust you?”

Defendant was transported to the hospital for treatment of his injuries. He had two cuts on his fingers that required stitches. He also had some scratches on his chest and redness on his upper body.

Defendant was then transported to the police department, where he was interviewed by San Jose Police Officer Thomas Troy and Sergeant James Randol.<sup>2</sup> Defendant was interviewed twice. The officers intended to videotape the first interview, but afterwards they realized that the recording equipment had malfunctioned. The

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<sup>2</sup> At the time of trial, both Officer Troy and Sergeant Randol had been promoted to the rank of Lieutenant.

officers therefore interviewed defendant a second time, using a different recording method.

## **2. First Interview**

Defendant had been at the police department for about 30 minutes before the first interview, which began at about 4:40 p.m. After obtaining some biographical information from defendant, the officers read him the *Miranda* advisements, and he agreed to talk.

Defendant said he ran a taxi service and that he had met Chuang on April 28, 2008, when she called him for a ride from the San Francisco airport. At that time, Chuang told him she had come to the United States to work as a massage therapist, but defendant believed she was going to work as a prostitute. Defendant gave Chuang rides several more times between April 28 and May 27. He had also taken her grocery shopping and had eaten dinner with her.

Regarding the incident, defendant stated that he had picked Chuang up at about 11:00 a.m. that day. She had a 1:30 p.m. flight out of San Francisco airport. Defendant indicated that he had “tricked” Chuang into going to his house by saying that he had to stop at his house to take care of a problem with his car. When they arrived at his house, he lifted the car’s hood and trunk so no one would see what he was going to do. He went inside the house and brought out a bag he had packed with knives, rope, and other items. He went to the rear passenger area of the car to make it seem like he was putting the bag inside. From the rear seat, he reached over and grabbed Chuang’s mouth, then stabbed her in the chest. He told her, “You made me do this.”

Defendant told the officers that Chuang fought back after defendant stabbed her. She grabbed the knife, stabbed defendant’s hand, and tried to get out of the car. Defendant took the knife back and caught Chuang as she exited the car. He stabbed her again, in the chest and neck, and he tried to suffocate her. Chuang broke free again and moved to the front of the car. Defendant overpowered her again and stabbed her multiple

times. Chuang then managed to break free again and moved to the mobile home. She got inside the mobile home, and she threw a garden tool at defendant. Defendant stabbed her 15 more times. He told the officers, "I finally killed her."

Defendant explained that after killing Chuang, he cleaned up and changed his clothing. He planned to put Chuang's body in a suitcase that belonged to his parents. He was not sure where he would dispose of her body. He went out to the car to take Chuang's luggage from the trunk so there would be room for the suitcase.

Defendant stated that he killed Chuang because she was "scamming him." He explained that he had paid \$900 to rent a hotel room for Chuang, but that she had refused to pay him. In addition, Chuang had given defendant \$5,500 in cash to hold for her, but when he returned the money to her on May 26, she claimed that he actually owed her \$10,000. Defendant claimed to be afraid of Chuang, and he mentioned the Chinese mafia possibly harming him. He explained that Chuang had never made a direct threat, but she said she knew where he lived.

At times during the interview, defendant said that he only planned to kidnap Chuang and hold her hostage. At other times, defendant said that he planned to kill Chuang.

The interview lasted over an hour. After a break, the officers returned and told defendant they wanted to interview him again. They explained that because of his accent and the "language barrier," they wanted to make sure everything was clear.

### **3. Second Interview**

The second interview began at about 7:10 p.m. The officers re-read the *Miranda* advisements to defendant. During the advisements, defendant said that he wanted an attorney. At that point, the officers told defendant they could not talk to him anymore. Defendant responded by saying, "No, no, no. Wait." The officers felt that defendant was initiating further conversation, so they read the *Miranda* advisements once again.

Defendant waived his rights and the interview began. The second interview lasted about 53 minutes.

Defendant's account of the incident was consistent with the account he gave during the first interview. He explained how he went to Chuang's residence to pick her up. He then "lie[d] to her" and "play[ed] [his] trick," telling her something was wrong with his car and that he needed to stop at his house. Defendant stated that when they arrived at his house, he grabbed the knives and other items, then took his "action to kill." Defendant also stated that he initially put the knife to Chuang's chest in order to intimidate her. Defendant described the various stabbings and Chuang's attempts to get away. He described how he stabbed her until she stopped moving.

Defendant stated that he wanted to kill Chuang because of "[t]he money," referring to the \$10,000 she had demanded. Defendant indicated he was concerned because Chuang said she had "a connection with the mafia." He also stated that Chuang had made "[d]eath threats" to him.

Defendant described how he had been shopping for items that would help him immobilize Chuang. He had looked for a stun gun, pepper spray, restraints, and chloroform on the Internet. He had considered keeping Chuang as a hostage to ensure that no one came after him. Defendant stated that he did not want to kill Chuang, but he was willing to "try anything" to stop her from harming his family. He felt that killing her was his "last resort."

## ***B. Defense Evidence***

### **1. Defendant's Trial Testimony**

Defendant was born in Taipei, Taiwan. He moved to the United States with his family in 1999, when he was 14 and a half years old, and he became a naturalized citizen in 2005.

Defendant testified about two traumatic incidents during his childhood. First, when he was 11 or 12 years old, his basketball teammates punished him for an "air

throw” by pulling his pants down. Second, when he was 12 to 14 years old, a tutor touched his genitals and zapped him with an electric flyswatter.

During college, defendant worked as a driver, serving students. He figured out that some of the students were prostitutes. He met a woman named Ho Ling Huang in early 2007. Huang was a “mama-san” for a prostitution house. Defendant began giving Huang rides and helping her with the prostitution business by posting videos online.

Defendant believed he was targeted after he began getting involved with the prostitution business. First, in August 2007, he was hit from behind while driving a car. The driver of the other car got out and told him, “The next time you won’t be so lucky.” Second, in April of 2008, he got flat tires on two different cars on two consecutive days.

Defendant was fearful of people in the prostitution business. Some of “the backers” – people who provided financial support for the organizations – had made it clear that they had access to weapons and “a crew.” He believed that Chuang was associated with people who would use force and intimidation to collect debts. He believed Chuang was involved with “a mafia” and “a snake head” – an immigration attorney who recruits women for prostitution.

During a phone conversation regarding the money that defendant was holding for her, Chuang threatened defendant, saying that his family would be “wiped out.” Chuang told defendant that she knew where he lived and that he lived with his parents.

Defendant denied that he had decided to kill Chuang before May 27, 2008. He had, however, thought about kidnapping her and/or holding her hostage, and thus he had shopped for mace, chloroform, and a stun gun.

When defendant picked her up that morning, Chuang said that he had better pay her or that “the consequences will be followed through.” He tried to negotiate with her, but she was firm. Defendant was fearful “[t]hat eventually [his] family . . . would be killed.” In fact, he thought that someone could be on the way to kill his parents at that time, because Chuang made a call during their argument.

Defendant testified that Chuang was the one who insisted they go to his house. When they got there, Chuang followed him into his residence. He went back outside and took her suitcase out of the car, telling her he would not drive her to the airport. Chuang got angry, but calmed down and sat in the car.

Defendant opened the engine hood, telling Chuang that the car was overheating. Defendant then went into the house and grabbed the bag with the knives. He had packed the knives to scare her; he still was not planning to kill her.

When defendant pulled out the knife, Chuang cursed at him, called him a “wimp,” and said he would not dare to do anything to her. Defendant tried to grab her neck, and stabbed her. He had the knife in his left hand, although he is right-handed. Defendant decided to kill Chuang only after the first stab. He felt he had to “finish it.”

Defendant testified that he believed the mafia was on the way to kill his parents, who were at work. He did not think to call his parents. He felt he could still change Chuang’s mind and stop her from harming them. Defendant claimed he killed Chuang “[t]o protect [his] family,” or to “avenge for them” if his family was already dead.

## **2. Mental Health Expert**

John Chamberlain, M.D., a psychiatrist, testified for the defense. He concluded that defendant had three mental illnesses: major depressive disorder, severe, with psychotic features; post-traumatic stress disorder (PTSD); and alcohol abuse in remission in a controlled environment. In his opinion, defendant was suffering from the first two disorders at the time of the offense.

Defendant exhibited paranoia and delusions. Specifically, defendant believed that Chuang was involved with organized crime and that something bad would happen to his family if he did not pay her what she wanted. Even at the time of Dr. Chamberlain’s interview, defendant was concerned that someone might overhear him. Defendant expressed concern about a sheriff’s deputy who, he believed, was involved in the prostitution ring.

### ***C. Verdicts, Sanity Trial, and Sentencing***

On March 16, 2011, the jury convicted defendant of murder. (§ 187.) The jury found that the murder was of the first degree (§ 189), and it found that he used a deadly weapon in its commission (§ 12022, subd. (b)(1)). The jury found a lying-in-wait special circumstance allegation not true. (§ 190.2, subd. (a)(15).)

A trial on defendant's sanity began on March 21, 2011. The jury returned a verdict on April 1, 2011, finding defendant was sane at the time he committed the offense.

At the sentencing hearing on July 29, 2011, the trial court sentenced defendant to a prison term of 25 years to life, consecutive to a one-year term for the jury's finding that defendant used a deadly weapon in the commission of the murder. (§ 12022, subd. (b)(1).)

## **DISCUSSION**

### ***A. Miranda Admonitions***

Defendant contends the trial court should have suppressed the statements he made during the first and second interviews because the police gave him insufficient *Miranda* advisements. Specifically, defendant contends the officers failed to specify that he had the right to speak to a lawyer *before* being questioned.

#### **1. Factual and Procedural Background**

At the beginning of the first interview, Sergeant Randol read defendant the *Miranda* admonitions from a department-issued notebook. He first advised defendant of "the right to remain silent." Sergeant Randol then told defendant that "anything he said . . . can and will be used against you in a court of law." He next told defendant, "You have the right to talk to a lawyer and have him present while you are being questioned." Finally, Sergeant Randol told defendant, "If you cannot afford to hire a lawyer, . . . one will be appointed to represent you at no expense."

After each admonition, Sergeant Randol asked defendant if he understood. Each time, defendant indicated he did understand. After finishing the advisements, Sergeant Randol also asked defendant if he understood his rights “in total,” and defendant indicated he did. Defendant did not indicate that he wanted a lawyer or that he did not want to answer any questions.

At the beginning of the second interview, the officers read defendant the same *Miranda* admonitions. They again advised defendant, “You have the right to talk to a lawyer and have him present while you are being questioned.”

On February 8, 2011, the trial court held a hearing on the admissibility of defendant’s post-arrest statements. Defendant argued that the *Miranda* advisements were “insufficient” because he was not advised that he had the right to talk to a lawyer before questioning. The prosecutor argued that this right was adequately conveyed by the advisement that defendant had the right to talk to a lawyer and the right to have a lawyer present during questioning.

On February 10, 2011, the trial court issued a written ruling denying defendant’s motion to suppress his statements. Regarding the *Miranda* advisements, the trial court rejected defendant’s argument that the officers were required to expressly advise him of the right to talk to a lawyer before questioning, finding that the advisements he received “adequately conveyed this right.” The trial court found that “by stating that ‘You have the right to talk to a lawyer,’ ” without placing “any conditions” on that right, the officers adequately “communicated to Defendant that he could speak with an attorney immediately, if he so desired.”

## **2. Analysis**

Defendant argues that the trial court erred in denying his motion to suppress his post-arrest interviews. He argues that the *Miranda* advisements were inadequate because “they never conveyed to him his right to consult an attorney before being questioned.”

“In reviewing a trial court’s *Miranda* ruling, we accept the court’s resolution of disputed facts and inferences and its evaluations of credibility, if supported by substantial evidence, and we independently determine, from the undisputed facts and facts properly found by the trial court, whether the challenged statement was illegally obtained. [Citation.]” (*People v. Bacon* (2010) 50 Cal.4th 1082, 1105.)

In *Miranda, supra*, 384 U.S. at pp. 467-471, the United States Supreme Court held that before a suspect may be subjected to a custodial interrogation, he or she must be advised of certain procedural rights, including the right to remain silent, the fact that the suspect’s statements can and will be used against him or her in court, and the right to consult with counsel. “[W]e hold that an individual held for interrogation must be clearly informed that he [or she] has the right to consult with a lawyer and to have the lawyer with him [or her] during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him [or her], this warning is an absolute prerequisite to interrogation.” (*Id.* at p. 471.)

The United States Supreme Court has subsequently stated that *Miranda* requires that a suspect be informed “that he [or she] has the right to an attorney *before and during* questioning.” (*Duckworth v. Eagan* (1989) 492 U.S. 195, 204 (*Duckworth*), italics added.) Other courts have similarly interpreted *Miranda*. (See, e.g., *United States v. San Juan-Cruz* (9th Cir. 2002) 314 F.3d 384, 388 [“In order to be valid, a *Miranda* warning must convey *clearly* to the arrested party that he or she possesses the right to have an attorney present prior to and during questioning.”].) The Ninth Circuit has stated that “it is extremely important that a defendant be adequately warned of this right.” (*People of the Territory of Guam v. Snaer* (9th Cir. 1985) 758 F.2d 1341, 1343 (*Snaer*).) The *Snaer* court explained, “The right to consult with an attorney *before* questioning is significant because counsel can advise the client whether to exercise his [or her] right to remain

completely silent, or, if he [or she] chooses to speak, which questions to answer or how to answer them.” (*Ibid.*)

However, “[t]he United States Supreme Court has well observed that the *Miranda* warnings serve a prophylactic purpose [citation] and therefore need not be presented in any ‘precise formulation’ or ‘talismanic incantation.’ [Citations.] ‘Reviewing courts . . . need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably “conve[y] to [a suspect] his [or her] rights as required by *Miranda*.” ’ [Citation.]” (*People v. Kelly* (1990) 51 Cal.3d 931, 948-949 (*Kelly*).

Defendant relies primarily on *Kelly*, where, as here, the defendant was advised, “ ‘You have the right to talk to a lawyer and have him present while you are being questioned.’ ” (*Kelly, supra*, 51 Cal.3d at p. 948.) The *Kelly* defendant argued that this advisement “was inadequate because it failed to indicate that he had the right to counsel *prior* to questioning.” (*Ibid.*) The California Supreme Court rejected his claim, explaining, “Defendant ignores, however, the officer’s subsequent warning: ‘If you cannot afford to hire a lawyer, one will be appointed to represent you *before* any question if you wish.’ (Italics added.) Although, as defendant notes, it would have been more accurate to say ‘before any questioning,’ we do not doubt that – as given – the advice adequately informed defendant that his right to counsel attached before any questioning commenced.” (*Ibid.*)

Defendant points out that here the police did not give defendant the same “subsequent warning” – that an attorney could be appointed for him “ ‘before any question.’ ” (*Kelly, supra*, 51 Cal.3d at p. 948.) However, *Kelly* cannot be read as requiring that such language be included in the advisements. *Kelly* did not consider the question presented here, and thus it is not dispositive.

The Ninth Circuit has held that a *Miranda* advisement is sufficient even if it fails to “expressly state that one has the right to consult with a lawyer ‘*before* questioning’ or

‘prior to questioning.’ ” (*Snaer, supra*, 758 F.2d at p. 1343.) In *Snaer*, the defendant was advised, “You have a right to consult with a lawyer and to have a lawyer present with you while you are being questioned.” (*Id.* at p. 1342.) The court held that this warning “meets the minimum requirements of the Constitution,” explaining, “We believe that the first part of that sentence read in the context of the latter half of the sentence does adequately convey notice of the right to consult with an attorney before questioning.” (*Id.* at p. 1343, fn. omitted.)

Courts in other states have also held that a *Miranda* advisement is sufficient even if fails to expressly inform the suspect of the right to consult an attorney prior to questioning. For instance, the Washington Supreme Court reached that conclusion in *State v. Brown* (1997) 132 Wash.2d 529 (*Brown*), where the defendant was advised, “You have the right to an attorney and to have him present when you’re being questioned.” (*Id.* at p. 581.) The *Brown* court followed *Snaer*, concluding that the *Miranda* warnings adequately advised the defendant of his constitutional rights. The court noted that the defendant had been told “(1) that he had the right to an attorney and (2) that he had the right to have that attorney present during questioning.” (*Id.* at p. 583.) The court reasoned, “When read with the latter portion of that statement, the first part adequately advised Appellant he had the right to consult with counsel before questioning. Although the actual words ‘before questioning’ were not included in the first part of the statement, the second part which read ‘and to have him present when you’re being questioned’ made that point sufficiently clear.” (*Ibid.*, fn. omitted.)

The Nebraska Supreme Court has also held that a *Miranda* advisement was sufficient despite the fact that the defendant had not been expressly told of his right to consult an attorney before questioning. (*State v. Nave* (2012) 284 Neb. 477 (*Nave*).) In *Nave*, the defendant was advised, “You have the right to consult with a lawyer and have the lawyer with you during the questioning.” (*Id.* at p. 491.) Based in part on *Snaer*, the court concluded “that the officer’s failure to expressly state that Nave was entitled to

appointed counsel before questioning was immaterial. When police told Nave that he had ‘the right to consult with a lawyer and have the lawyer with [him] during the questioning,’ that statement impliedly included the right to consult with the lawyer before the questioning. And that is enough under *Miranda*.” (*Id.* at p. 495.)

We agree with the analysis in *Snaer, Brown, and Nave*. Defendant was advised that he had “the right to talk to a lawyer and have him present while you are being questioned.” As in the cases discussed above, this advisement conveyed to defendant had he had “the right to an attorney before and during questioning.” (*Duckworth, supra*, 492 U.S. at p. 204.) The advisement stated that defendant had “the right to talk to a lawyer” and the right to have that lawyer “present while you are being questioned.” The advisement thus made it clear that defendant could “talk to a lawyer” *before* being questioned.

Defendant further contends that his comments and questions during the second interview show that he did not understand that he had the right to an attorney before questioning. However, defendant’s subjective understanding of the *Miranda* advisements, while relevant to the issue of whether his waiver was valid, is not relevant to the question of whether the *Miranda* advisements were adequate. (Cf. *People v. Clark* (1993) 5 Cal.4th 950, 987 (*Clark*), disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [a valid *Miranda* waiver requires “that the defendant comprehend ‘all of the information that the police are required to convey’ by *Miranda*.”].)

We conclude that the officers provided adequate *Miranda* advisements at both the first and second interviews. Therefore, the trial court did not err by failing to suppress defendant’s statements on this basis.

***B. Defendant’s Request for an Attorney***

Defendant separately challenges the admission of the statements he made during the second interview. He contends that the officers failed to cease the interrogation after

he invoked his right to counsel and that he did not voluntarily initiate further communication with the officers. We review these issues for substantial evidence. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1034; *People v. Waidla* (2000) 22 Cal.4th 690, 731.)

### **1. Factual and Procedural Background**

At the beginning of the second interview, the officers read the *Miranda* admonitions and confirmed that defendant understood each of them. Sergeant Randol then asked whether, “having those rights in mind,” defendant would “answer some more questions for us.”

Defendant responded, “Could I – could I request a lawyer in prison, or – I mean in presence?” Sergeant Troy asked, “In prison, when you go to prison?” Defendant stated, “I mean, this presence – presence, presence, I mean, in here. I mean . . .” Sergeant Troy asked, “Could you?” Defendant asked, “Could I request a lawyer? I mean, like a public – a public –” Sergeant Randol responded, “You can do anything, but uh, we – we just want to advise you of your rights.” Defendant stated, “Oh, yes.”

Sergeant Troy then told defendant, “So, what [we] want to do is clarify; do you want to continue, so we can finish up?” Defendant responded, “Uh, yes. And uh, I’d like to request a lawyer.” Sergeant Randol stated, “Okay.” Defendant stated, “Yeah.”

Sergeant Randol stated, “So we, at this point, can’t talk to you anymore. We just want you to be clear on that, okay?” Sergeant Troy added, “Yeah, we can’t talk to you anymore.” Sergeant Randol explained, “Because that’s – that’s your right and that’s – you’re – you’re protected that’s (inaudible). . . .” Defendant stated, “Oh. Oh, Oh.” Sergeant Troy reiterated, “Okay. We can’t talk to you.”

Defendant told the officers, “So, so, no, no, no. Uh, you – you have my permission to continue the talk.” Sergeant Troy responded, “Okay. So, I’m going to read them again to you, okay?” Defendant agreed, “Yeah.” Sergeant Randol stated, “Right. You’re confused on this so let’s just – we want to take our time.” Defendant stated,

“Okay. Because really that’s rights, so I’m just saying; can I just use my – I mean, exercise my right, a lawyer so –”

Sergeant Troy stated, “Right. And then we can’t talk to you, we’re going to have to walk out.” Sergeant Randol agreed, “Right, that’s it.” Defendant responded, “Oh, no, no, no.” Sergeant Troy asked, “Which one do you want?” Defendant replied, “No, okay. I’ll continue talking.”

Sergeant Troy then re-read the *Miranda* admonitions and asked if defendant understood them. Afterwards, he asked, “Do you want to talk to us?” Defendant responded, “Yes,” then confirmed that the officers “are with the police, right?” After the officers responded affirmatively, Sergeant Randol again asked defendant if he was “willing to talk to us?” Defendant stated, “Yes, I’m willing.” Sergeant Troy confirmed that defendant wanted “to talk to us, right now” “about what happened.” Defendant stated, “Yes.” The interview then proceeded.

At the February 8, 2011 hearing, defendant sought to exclude his statements during the second interview, contending that the officers failed to stop interrogating him and “refused to get him a lawyer when he requested a lawyer.” Defendant also argued that the officers “misled him and falsely represented the situation to him,” resulting in his subsequent waiver.

The prosecutor argued that after defendant unequivocally invoked his right to counsel, the officers “did exactly the right thing and which the law allows them to do, which is they explained to the defendant that they – what would happen next; they couldn’t talk to him, and that’s correct.” The prosecutor argued that defendant then initiated further discussions by telling the officers that they had his permission to continue the interview.

In its written ruling, the trial court found that defendant “unequivocally invoked his right to an attorney during the interrogation when he stated, ‘I’d like to request a lawyer.’” However, the trial court also found that defendant “clearly initiated further

communication with the officers.” The trial court found “no evidence to suggest that Defendant’s initiation was induced by anything other than his desire to speak to the officers.”

## 2. Analysis

When an accused asserts the right to counsel during a police interrogation, “ ‘the interrogation must cease until an attorney is present.’ ” (*Edwards v. Arizona* (1981) 451 U.S. 477, 485 (*Edwards*)). An accused who has “expressed his desire to deal with the police only through counsel[] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.” (*Id.* at pp. 484-485.) If the accused does initiate further communication, the police may question him if he validly waives his *Miranda* rights. (*Id.* at p. 486, fn. 9.)

Defendant claims that the officers violated *Edwards* by continuing to interrogate him after he requested an attorney. We do not agree that the officers’ responses to defendant’s request constituted interrogation.

“[N]ot all conversation between an officer and a suspect constitutes interrogation.” (*Clark, supra*, 5 Cal.4th at p. 985.) “Interrogation has a specific meaning as used in *Miranda* and *Edwards*. Interrogation ‘refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.’ [Citations.]” (*Ibid.*, quoting *Rhode Island v. Innis* (1980) 446 U.S. 291, 301.)

Here, the officers did not question defendant after he requested an attorney. They also did not say or do anything that was reasonably likely to elicit an incriminating response from defendant. The officers responded by telling defendant, “So we, at this point, can’t talk to you anymore,” “Yeah, we can’t talk to you anymore,” and “We can’t talk to you.” As respondent points out, the officers were not required to “turn mute and say absolutely nothing.” It was permissible for the officers to advise defendant that

because he had requested an attorney they could not talk to him anymore. (See *People v. Sapp* (2003) 31 Cal.4th 240, 268 [after defendant requested an attorney, officer “stopped his questioning and properly advised defendant that none of the homicide investigators could question him unless defendant initiated contact with them”].)

Defendant also contends that he did not initiate further communication with the officers following his request for an attorney. He claims that instead, the officers “ ‘badgered’ him into changing his mind and waiving the right to counsel he had just asserted.” He compares the officers’ conduct here to that in two cases: *Smith v. Illinois* (1984) 469 U.S. 91 (*Smith*) and *Collazo v. Estelle* (9th Cir. 1991) 940 F.2d 411 (*Collazo*).

In *Smith*, the defendant said, “ ‘I’d like to do that’ ” after an officer told him he had the right to consult with a lawyer and have the lawyer present during questioning. (*Smith, supra*, 469 U.S. at p. 93, italics omitted.) “Instead of terminating the questioning at this point, the interrogating officers proceeded to finish reading Smith his *Miranda* rights.” (*Ibid.*) When they subsequently asked him if he wanted to talk “ ‘without a lawyer being present,’ ” the defendant responded, “ ‘Yeah and no, uh, I don’t know what’s what, really.’ ” (*Ibid.*, italics omitted.) An officer told him, “ ‘Well. You either have [to agree] to talk to me this time without a lawyer being present and if you do agree to talk with me without a lawyer being present you can stop at any time you want to.’ ” (*Ibid.*, italics omitted.) The defendant then agreed to talk.

The issue before the *Smith* court was “whether Smith invoked his right to counsel in the first instance.” (*Smith, supra*, 469 U.S. at p. 95.) The court explained that the defendant’s subsequent equivocation could not be used “to cast doubt on the adequacy of the initial request.” (*Id.* at p. 99.) “ ‘No authority, and no logic, permits the interrogator to proceed . . . on his own terms and as if the defendant had requested nothing, in the hope that the defendant might be induced to say something casting retrospective doubt on his initial statement that he wished to speak through an attorney or not at all.’ [Citation.]”

(*Ibid.*) The court also noted that the officers had acted improperly by indicating that the defendant had no choice but to talk to them. (*Ibid.*, fn. 8.)

This case is distinguishable from *Smith* in several important respects. First, here the officers did not ignore defendant's request for counsel – the officers immediately responded. Second, the officers did not tell defendant that he had no choice but to talk to them. Instead, they told defendant that they could *not* talk to him.

The *Collazo* case is also distinguishable. There, the defendant requested that he be permitted to “talk to a lawyer.” (*Collazo, supra*, 940 F.2d at p. 414.) The officer responded – using an “ ‘insistent’ ” tone – by saying, “It’s up to you. This is your last chance to talk to us, though.” (*Id.* at pp. 416, 414.) The officer then told the defendant that an attorney would tell him not to talk to the police, which might make it “worse” for him. (*Id.* at p. 414.) The interview stopped shortly thereafter, but the defendant later initiated further communication and made incriminating statements.

The Ninth Circuit held that *Collazo*'s incriminating statements should have been suppressed. The court noted, “At a point where the law required him to back off, he did not ‘scrupulously honor’ *Collazo*'s right to cut off questioning; he stepped on it.” (*Collazo, supra*, 940 F.2d at p. 417.) The court called the officer's conduct “a textbook violation of *Edwards*.” (*Id.* at pp. 417-418.) The court held that “*Collazo* had not initiated further communication with the officers” and that what the officer did “can only be seen as badgering *Collazo* in the precise manner that concerned the *Edwards* Court.” (*Id.* at p. 418.)

In this case, the officers did not tell defendant that he would have no other chances to talk to them. Nor did they suggest that having a lawyer would make things worse for him. The officers told defendant only that they could not talk to him anymore. Thus, the officers here did not engage in the kind of badgering found in *Collazo*.

Defendant's final claim is that “[t]he video recording of the waiver vividly documents the coercive nature of the officers' conduct.” We have reviewed the video

recording and disagree. The officers did not speak to defendant using a “tone and presentation” that could be called “ ‘insistent’ ” or in any other coercive manner. (*Collazo, supra*, 940 F.2d at p. 416.)

We conclude that substantial evidence supports the trial court’s findings: that the officers did not continue to interrogate defendant after he invoked his right to counsel in violation of *Miranda* and *Edwards*, and that defendant initiated further communication without coercion from the officers. The trial court did not err by declining to suppress defendant’s statements on this basis.

### ***C. Involuntariness of Miranda Waiver***

Defendant claims his statements during the second interview were inadmissible because “the totality of the circumstances demonstrate that his [*Miranda*] waiver was not knowing, intelligent, or voluntary.” Respondent contends this claim is forfeited because defendant did not raise it below.

Below, defendant argued that his confession was involuntary. He argued that the officers misled defendant and “falsely represented the situation to him.” He reminded the trial court that defendant had been hysterically crying earlier in the day and was fearful for his parents, and he argued that the officers implied they would take care of his parents if he talked to them. He argued that the prosecution had not shown “that his statement was freely and voluntarily given.”

Defendant did not specifically argue that his *Miranda* waiver was involuntary, and the trial court did not address this issue in its written ruling. However, we will assume that defendant did preserve the issue.

As noted above, if the accused initiates further communication following an invocation of the right to counsel, the police may question him if he validly waives his *Miranda* rights. (*Edwards, supra*, 451 U.S. at p. 486, fn. 9.) A waiver of *Miranda* rights is valid if it “ ‘was knowing and intelligent and found to be so under the totality of the circumstances.’ ” (*Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1046 (*Bradshaw*).

“[T]his determination depends upon ‘the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused.’ [Citations.]” (*Ibid.*) A knowing and intelligent waiver will be found where the totality of the circumstances establish that “ ‘the police made no threats, promises or inducements to talk, that defendant was properly advised of his rights and understood them and that within a short time after requesting an attorney he changed his mind without any impropriety on the part of the police.’ ” (*Ibid.*)

Here, the officers “ ‘made no threats, promises or inducements to talk.’ ” (*Bradshaw, supra*, 462 U.S. at p. 1046.) As we previously concluded, “ ‘defendant was properly advised of his rights.’ ” (*Ibid.*) It appears, from our review of the video recording, that defendant understood those rights. And, “within a short time after requesting an attorney,” defendant “changed his mind without any impropriety on the part of the police.” (*Ibid.*) Contrary to defendant’s argument, the officers did not impliedly tell defendant that he could not speak to them with an attorney at a later time. Thus, we conclude that defendant knowingly and intelligently waived his *Miranda* rights before making incriminating statements during the second interview.

#### ***D. Expert Witness Testimony***

Defendant contends the trial court allowed expert witness testimony about his intent, in violation of section 29. He complains that Dr. Chamberlain was permitted to testify that defendant’s “conduct was consistent with his having a ‘specific intent’ to commit a ‘murder,’ and having . . . planned and taken actions to commit a murder.”

##### **1. Proceedings Below**

On cross-examination, the prosecutor asked Dr. Chamberlain if a mentally ill person is “still capable of forming specific intent to harm someone.” Dr. Chamberlain replied, “Yes.” He also agreed that a mentally ill person – including someone suffering from PTSD and someone suffering from major depression with psychotic symptoms – is still capable of planning a murder.

The prosecutor asked Dr. Chamberlain how someone could tell whether a person is acting under the influence of a mental illness. Dr. Chamberlain explained that it is “very complicated and difficult,” but that the person’s behavior and statements can be revealing. He stated that in determining whether a person is planning a murder, it would be helpful to know whether he or she was obtaining a weapon, putting the victim in a vulnerable or isolate position, incapacitating the victim, or sneaking up on the victim. At that point, defendant objected on the grounds that “this is now an improper subject matter for this witness.” The trial court overruled the objection.

The prosecutor summarized Dr. Chamberlain’s response, asking, “So there’s a diagnosis, but it’s still important to look at the person’s actions, behaviors, and the things that they said about the crime to determine whether they . . . had formed specific intent or had planned and intentionally executed a murder?” Defendant again objected, saying, “The Penal Code specifically prohibits him from testifying on that issue.” After the trial court overruled the objection, Dr. Chamberlain answered the prosecution’s question, saying, “Yes.” He explained that “the diagnosis can be useful,” but that it is more important to look at “what symptoms does the person have and what impairment comes from that.”

The prosecutor then asked, “So in this case, just because the defendant, you’ve diagnosed him with these certain mental illnesses, that doesn’t mean that he’s not capable of forming specific intent?” Dr. Chamberlain responded, “No.” The prosecutor asked, “And it doesn’t mean he’s not capable of planning and taking steps to execute an intentional murder?” Dr. Chamberlain responded, “That is correct.”

After an unreported bench conference, the prosecutor asked, “So . . . , when the defendant told the police that he’d been thinking about taking action against Yi Wen Chuang for three days, been researching – doing research on the internet, going to stores to look for chemicals and chloroform and things like that, and when he told the police that on the morning of May 27th, 2008, he thought to himself, you know, ‘This could be

the day. This is the day that I do it,' is that consistent with planning?" Dr. Chamberlain replied, "Yes."

The prosecutor then asked, "When the defendant lied to Ms. Chuang, telling her he needed to go back to his house either because his car was – there was something wrong with the car or he needed to get a map, is that action consistent with taking steps in furtherance of a plan to harm Ms. Chuang?" Dr. Chamberlain responded, "I think either one of those would be – would be consistent with what you're describing."

The prosecutor asked, "And then if when he got to the house, he puts up the hood of the car and puts up the trunk lid of the car, and explains that he does that so that no one will see what he's about to do; is that consistent with someone being able to – basically being in charge of their faculties, understanding what it is that their actions are doing?" Dr. Chamberlain replied, "Yes, that would be my opinion."

The prosecutor continued asking similar questions based on the facts of the offense, with Dr. Chamberlain agreeing that defendant's actions were consistent with planning a murder and having the specific intent to kill.

On redirect, defendant asked Dr. Chamberlain "the exact opposite hypotheticals." He asked, "[I]s the fact that [defendant], when he was on the internet in the days – last couple days before the homicide, checked for tools of restraint, such as stun guns and mace, as opposed to tools of killing, such as firearms or poison; is that consistent with the possibility that he was planning to restrain the woman or hold her hostage or somehow kidnap her as opposed to intending to kill her?" Dr. Chamberlain replied, "Yes."

Defendant next asked, "Is the fact that he investigated tools of restraint, is that consistent with the possibility that what he wanted to do was kidnap her, hold her hostage, and force her to tell the mafia snake head that she was connected with that everything's okay, the debt's taken care of, there's no longer any reason to threaten him or his family?" Dr. Chamberlain replied, "Yes."

Defendant then asked, “Is the fact that he only killed her after she refused to withdraw the threats when she – when he was with her on the morning of May 27th; is that consistent with the possibility that he killed her only as the last resort out of his fear that he had to do that in order to protect his parents and himself?” After the prosecutor’s objection was overruled, Dr. Chamberlain replied, “Yes.”

## **2. Analysis**

We review the trial court’s decision to admit or exclude evidence – including expert opinion testimony – for abuse of discretion. (See *People v. Cortes* (2011) 192 Cal.App.4th 873, 908 (*Cortes*).

The relevant statutes concerning expert testimony about a defendant’s mental state are sections 25, 28, and 29. In section 25, the Legislature abolished the defense of diminished capacity. In section 28, the Legislature specified that “[e]vidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.” In section 29, the Legislature restricted expert testimony as follows: “[A]ny expert testifying about a defendant’s mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged.”

This court reviewed the scope of expert testimony concerning a criminal defendant’s mental state in *Cortes, supra*, 192 Cal.App.4th 873. This court explained that a defendant “cannot put on an expert to testify that, because of his mental disorder or condition . . . , he or she did not have the ability, or capacity, to form or harbor whatever mental state is a required element of the charged offense, such as intent to kill, or malice aforethought, or premeditation, or deliberation.” (*Id.* at p. 908.) However, an expert can testify that the defendant had a mental disorder or condition “as long as that testimony

tends to show that the defendant did or did not in actuality” have the required mental state, and as long as the expert does not “offer the opinion that the defendant actually did, or did not, harbor the specific intent at issue.” (*Ibid.*)

The defendant in *Cortes* was convicted of first degree murder after he stabbed the victim 13 times during a fight. The trial court barred the defendant from presenting expert opinion testimony that the defendant had likely “entered a dissociated state” prior to the stabbing. (*Cortes, supra*, 192 Cal.App.4th at p. 893.) This court held that the expert should have been able to give that opinion. (*Id.* at p. 911.) This court noted that the expert also could have testified that dissociation “*can* cause the person to act without conscious volition.” (*Ibid.*) Such testimony would only “have given the jury a basis *to infer*” that the defendant did not actually have the mental state required for first degree murder, and thus it would have fallen short of expressing an opinion that the defendant actually lacked the required mental state. (*Id.* at p. 912.)

Similar issues were addressed in *People v. Nunn* (1996) 50 Cal.App.4th 1357 (*Nunn*), where the defendant was convicted of attempted murder after shooting at a group of men. There, the defendant was precluded from presenting a clinical psychologist’s opinion that due to inebriation and past traumatic experiences, the defendant had “fired his rifle impulsively.” (*Id.* at p. 1362.) On appeal, the *Nunn* court upheld the trial court’s ruling, explaining that “[a]n expert may not evade the restrictions of section 29 by couching an opinion in words which are or would be taken as synonyms for the mental states involved.” (*Id.* at p. 1364.)

The court in *People v. Bordelon* (2008) 162 Cal.App.4th 1311 (*Bordelon*) followed *Nunn* in holding that an expert could not be asked hypothetical questions that would be the “functional equivalent” of asking whether the defendant had a particular intent. (*Id.* at p. 1327.) In *Bordelon*, the defendant was charged with committing a robbery shortly after being released from prison. He presented “expert testimony on ‘institutionalization,’ a dependence on life in an institutional setting that made living

outside the institution akin to adjusting to a new culture” (*id.* at p. 1315), and he proposed to ask the expert whether an individual in the defendant’s circumstances would have the intent to commit robbery. The court held that the defendant was properly precluded from asking such a hypothetical question, noting that the defendant “was simply planning by means of the hypothetical to do indirectly what he could not do directly under the statute, namely, elicit an opinion from [the expert] regarding defendant’s specific intent . . . .” (*Id.* at p. 1327.)

In this case, the trial court’s rulings did not run afoul of section 29. Dr. Chamberlain did not offer the opinion that defendant “actually did” have the specific intent to kill Chuang or that he “actually did” plan her murder. (*Cortes, supra*, 192 Cal.App.4th at p. 908.) Dr. Chamberlain testified only that defendant’s conduct was “consistent with” having such intent and having planned the murder. His testimony thus “fell short” of expressing an opinion that the defendant actually had those particular mental states. (*Id.* at p. 912.) Dr. Chamberlain’s testimony also did not couch an opinion about defendant’s actual mental state in a hypothetical. He was not asked whether a hypothetical person in defendant’s circumstances would actually have had the specific intent to kill Chuang or that such a person would actually have planned her murder. (Compare *Bordelon, supra*, 162 Cal.App.4th at p. 1327.)

Defendant contends the prosecutor’s questions here were “almost identical to those asked by the prosecutor” in *People v. Smithey* (1999) 20 Cal.4th 936 (*Smithey*). In *Smithey*, the defendant argued that the prosecutor had committed misconduct during cross-examination of his psychiatric expert by “persistently ask[ing] the expert questions concerning whether defendant could form or did form the intent to commit the crimes with which he was charged.” (*Id.* at p. 958.) The California Supreme Court distinguished between the prosecutor’s questions about the defendant’s capacity to form a particular intent, which were “improper,” and “the prosecutor’s questions concerning how defendant could perform certain acts without intending to do them,” which were

“not inappropriate.” (*Id.* at p. 961.) In fact, the defendant in *Smithey* conceded “that the prosecutor legitimately could attempt to show intent by emphasizing defendant’s acts, and that his cross-examination in this regard was not ‘technically objectionable.’ ” (*Ibid.*)

In this case, defendant is not arguing that the prosecutor asked improper questions about his capacity to form a particular intent. Defendant essentially claims that the prosecutor should not have been permitted to ask “how defendant could perform certain acts without intending to do them” or “show intent by emphasizing defendant’s acts.” (*Smithey, supra*, 20 Cal.4th at p. 961.) The questions that defendant complains about are thus more like those found “not inappropriate” in *Smithey*. (*Ibid.*)

### **3. Harmless Error**

Even if we were to conclude that the trial court erred by allowing the prosecutor to ask the challenged questions about intent and planning, we would find the error harmless, because it is not reasonably probable that the jury would have reached a different result but for the admission of that testimony. (See *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); *Cortes, supra*, 192 Cal.App.4th at p. 912; *Nunn, supra*, 50 Cal.App.4th at p. 1363 [the admission or exclusion of evidence pursuant to section 29 does not “ ‘deprive a defendant of his or her right to present a defense’ ”].)

First, as noted above, defendant was able to ask Dr. Chamberlain “the exact opposite hypotheticals” on redirect. Thus, defendant elicited Dr. Chamberlain’s opinion that his conduct was also consistent with a plan to restrain Chuang and hold her hostage without killing her, and his opinion that defendant killed Chuang “only as the last resort out of his fear that he had to do that in order to protect his parents and himself.” (See *People v. Blacksher* (2011) 52 Cal.4th 769, 823 [prejudice of testimony elicited by prosecutor on cross-examination was minimized where, on redirect examination, expert provided testimony favorable to defense].)

Second, the prosecutor did not discuss the challenged testimony during closing argument. Although she mentioned Dr. Chamberlain’s testimony that people who suffer

from defendant's mental disorders "can form specific intent" and "can plan and execute a murder," she did not rely on Dr. Chamberlain's testimony about defendant's conduct being consistent with intent to kill and planning a murder. Prejudice is minimized where "the prosecutor did not exploit the evidence in closing argument." (*People v. Lewis* (2008) 43 Cal.4th 415, 531.)

Third, there was very strong evidence that the murder was premeditated. Defendant brought Chuang to his house rather than to the airport, brought out a bag containing knives, went into the back of the car, and then grabbed her and stabbed her. He took no steps to merely hold her hostage. Although there was evidence that he suffered from mental illnesses that caused him to be paranoid and believe he and his family were at risk, there was no evidence that these mental illnesses interfered with his specific intent to kill or his planning.

Fourth, the trial court instructed the jury on expert witness testimony pursuant to CALCRIM No. 332. That instruction stated that the jury was "not required to accept [the expert's opinions] as true or correct," that the "meaning and importance of any [expert] opinion are for you to decide," and that the jury could "disregard any [expert] opinion that you find unbelievable, unreasonable, or unsupported by the evidence." Thus, the jury was well aware that it was not required to accept Dr. Chamberlain's opinion that defendant's conduct was "consistent with" having the specific intent to kill Chuang and having planned the murder.

In sum, it is not reasonably probable that the jury would have reached a different result but for the admission of the challenged expert opinion testimony. (See *Watson*, *supra*, 46 Cal.2d at p. 836.)

***E. CALCRIM No. 362***

Defendant contends that CALCRIM No. 362 erroneously permitted the jury to find him guilty of first degree murder because he made a false statement about the crime. He contends this permissive inference was irrational and therefore violated due process.

## 1. Proceedings Below

The trial court instructed the jury pursuant to CALCRIM No. 362 as follows: “If the defendant made a false or a misleading statement before this trial relating to *the charged crime*, knowing the statement was false or intending to mislead, that conduct may show that he was aware of his guilt of *the crime* and you may consider it in determining his 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.” (Italics added.)

Defendant did not object to the instruction or request any modifications.

## 2. Analysis

Defendant acknowledges that the above instruction was “arguably supported by evidence that when the police approached [him] at the scene, he lied that he was the one who had been screaming because he cut his hand.” However, he contends that the jury should not have been permitted to infer his guilt of “the charged crime” based on that evidence. He claims “the charged crime” was premeditated murder, and that the jury should only have been permitted to infer that he was aware of his guilt of “some form of homicide.”

Respondent points out that defendant failed to object or request the instruction be modified, and respondent argues that defendant thereby forfeited this claim. (See *People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012 [“ ‘Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.’ ”]; *People v. Daya* (1994) 29 Cal.App.4th 697, 714 [a defendant “is not entitled to remain mute at trial and scream foul on appeal for the court’s failure to expand, modify, and refine standardized jury instructions”].) Respondent acknowledges, however, that we may review a claim of instructional error that affects the defendant’s “substantial rights,” with or without a trial objection. (§ 1259.)

Both parties rely on *People v. Crandell* (1988) 46 Cal.3d 833 (*Crandell*), abrogated on other grounds by *People v. Crayton* (2002) 28 Cal.4th 346, 364-365. In *Crandell*, the court addressed a challenge to CALJIC No. 2.03. CALJIC No. 2.03 provided: “If you find that before this trial [a] [the] defendant made a willfully false or deliberately misleading statement concerning the crime[s] for which [he] [she] is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.”

The defendant in *Crandell* argued that the instruction permitted the jury to infer his guilt of first degree murder. He argued that the jury would interpret “ ‘consciousness of guilt’ ” as referring to “all elements of the charged murder offenses, including premeditation and deliberation,” even though the defendant might have been “conscious only of having committed some form of unlawful homicide.” (*Crandell, supra*, 46 Cal.3d at p. 871.) The Supreme Court rejected this claim, explaining, “A reasonable juror would understand ‘consciousness of guilt’ to mean ‘consciousness of some wrongdoing’ rather than ‘consciousness of having committed the specific offense charged.’ The instructions advise the jury to determine what significance, if any, should be given to evidence of consciousness of guilt, and caution 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. The instructions do not address the defendant’s mental state at the time of the offense and do not direct or compel the drawing of impermissible inferences in regard thereto.” (*Ibid.*)

Defendant points out that CALJIC No. 2.03 provided that the jury may consider false statements regarding the charged crime “as a circumstance tending to prove a *consciousness of guilt*,” whereas CALCRIM No. 362 provides that the jury may consider such false statements as showing the defendant “was *aware of his guilt of the crime*.” (Italics added.) Defendant argues that the replacement of the phrase

“consciousness of guilt” (CALJIC No. 2.03) with the phrase “aware of his guilt of the crime” (CALCRIM No. 362) permitted the jury to make the irrational inference that he was guilty of “the charged crime” – first degree murder – based solely on his false statements.

We do not believe there is any meaningful difference between CALJIC No. 2.03 and CALCRIM No. 362. Reasonable jurors would understand that “aware of his guilt of the crime” means awareness that the defendant committed *a* crime, not necessarily the specifically charged crime to the exclusion of all lesser-included offenses. As respondent argues, a reasonable jury would interpret both phrases (“consciousness of guilt,” and “aware of his guilt of the crime”) as referring to “a defendant’s psychological, not legal, guilt.”

“A defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant.” (*People v. Cross* (2008) 45 Cal.4th 58, 67-68.) Here, the jury was told that the charged crime was “murder, in violation of Penal Code section 187.” The jury was instructed on both degrees of murder as well as voluntary manslaughter and both forms of self-defense. During argument, the prosecutor did not rely on CALCRIM No. 362 in arguing that defendant was guilty of first degree murder. In sum, there is no reasonable likelihood that the jury believed it could find defendant guilty of first degree murder based on his false statements, and thus the trial court did not err by giving the challenged instruction.

**DISPOSITION**

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MÁRQUEZ, J.