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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CORVELLE McDANIELS, Defendant and Appellant.	A127484 (Alameda County Super. Ct. No. C155894)

This is an appeal from final judgment after defendant Corvelle McDaniels was convicted by a jury of first degree murder with enhancements for personal use of a firearm. After receiving a total prison sentence of 50 years to life, defendant filed a timely appeal, challenging the judgment on grounds of erroneous admission of certain evidence relating to narcotics and ineffective assistance of counsel for failing to request a jury instruction on provocation. For reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On July 12, 2007, an information was filed charging defendant with murder in violation of Penal Code section 187, subdivision (a), and alleging enhancements for using a firearm within the meaning of Penal Code sections 12022.5, subdivision (a), 12022.7, subdivision (a), and 12022.53, subdivisions (b) through (d).[1] A second charge for attempted murder was initially included in the information, but was later dismissed on the

[1] Unless otherwise stated, all statutory citations herein are to the Penal Code.

prosecutor's motion. Following entry of defendant's not guilty plea, a jury trial was held, at which the following evidence was presented.

On November 15, 2005, between 10 p.m. and 11 p.m., a group of about five men were congregated on the 800 block of Mead Avenue in West Oakland. Among those present were defendant (nicknamed "Scoot"), Omar Smith (nicknamed "Conditioner") and Terrance Oliver. Defendant had a rifle with a bayonet strapped to his back. The men were smoking marijuana and drinking alcohol. Oliver had been selling rock cocaine in that location all day.

According to Oliver, a thrice convicted felon who testified at trial, on the night of November 15, 2005, the men were engaged in a discussion about violence in Oakland and in their particular neighborhood, and "all the drama that was going on in the area and people getting shot and how the defense mechanism would be put up for that." Not caring to become victims of this violence, the men discussed ways to protect themselves, as well as to protect their "turf" from outsiders, including "certain individuals trying to come over [to Mead Avenue] and sell dope, and they're not from over there, or people that just don't like certain areas because of that area." Around November 2005, this neighborhood of Mead Avenue was known as the Killer 20's, and tension existed between its residents and those of other nearby neighborhoods, which included Ghost Town, the Acorn Projects and Dog Town.

Oliver, in particular, voiced concern that "too many people were allowed to come over [to their neighborhood] anyway and do what they wanted to do" and to "leach off the block." Oliver warned the others to be careful about "anybody that might try to come over there and sell dope that's not from over there."

About 15 minutes into the men's discussion, Christopher Barze approached on a bicycle and someone from the group called him over. Barze, initially straddling his bicycle, listened as the group continued to talk. He then let the bicycle drop to the

ground and approached the group.[2] Five minutes later, defendant asked Barze where he was from, to which Barze responded "Acorn." Barze's response surprised the other men because they had just been discussing Acorn and they believed Barze had been listening. According to defendant, Barze spoke brazenly, as if he were "representing" Acorn and "wasn't going to be no punk about where he was from."

Defendant told Barze that he had to leave, as Oliver began backing away, sensing something was about to occur. Defendant then moved his rifle from his back to the front of his body, and everyone began to disperse. Barze mounted his bicycle and began pedaling away, advising one of the men to "Tell your folks to be cool." However, after just about one full revolution of his bicycle pedal, a gun fired.

Oliver, who had already begun walking away, heard three or four shots from defendant's rifle. At that point, Oliver, as well as others in the group, began running away. Oliver headed towards the nearby residence of the mother of his children. When he turned around, still running, Oliver saw defendant standing over Barze, continuing to fire the gun. Oliver heard a total of about six shots. He never saw a gun in Barze's possession.

A subsequent autopsy of Barze revealed that he died from multiple gunshot wounds. Barze sustained a total of nine or ten gunshot entry wounds, including three to the back of his head and others to his right upper arm, right torso, left thigh and left hand. Barze also had grazing wounds to his back and left side of his face. Any of the three wounds to Barze's head could have been fatal.

The forensic pathologist who conducted the autopsy was able to recover bullet fragments. In addition, an evidence technician recovered eight shell casings, all the same caliber, from the crime scene. An empty ammunition box recovered from a stairwell

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[2] Oliver testified at the preliminary hearing that Barze bought drugs on the 800 block of Mead Avenue that night. At trial, Oliver first testified Barze did not buy drugs that night, but later acknowledged his earlier inconsistent statement, adding that he did not know who sold Barze the drugs.

across the street from the crime scene was designed by the same manufacturer as the casings and for the same caliber of bullet.

About a month after Barze's murder, Oliver was arrested for selling drugs in the 800 block of Mead Avenue. In hopes of negotiating a more favorable position with prosecutors, Oliver provided law enforcement with information regarding Barze's murder, including identifying defendant in a photographic lineup as a possible suspect. After providing this information, Oliver avoided criminal charges and revocation of his parole and, with financial assistance from a witness protection program, was relocated outside the Bay Area.

On January 4, 2006, a few weeks after Oliver identified defendant as a possible suspect to police, defendant was arrested while driving away from his residence with another man, Ephram Jones. Both men had outstanding warrants and were taken to the Oakland Police Department.

A valid search of defendant's residence after his arrest uncovered a loaded SKS rifle with bayonet in a closet and eight live rounds in a pot in the kitchen. A criminalist later testified that the eight live rounds found in the kitchen pot were suitable for use in the SKS rifle found in the closet. Further, the eight casings from the crime scene were all fired from a single firearm, a SKS rifle like the one recovered from defendant's residence; however, the criminalist could not positively identify the bullet fragments found in Barze's body as coming from the recovered SKS rifle.

Later on the day of his arrest, defendant was interviewed by Sergeant Longmire and Sergeant Nolan after hearing and waiving his *Miranda* rights. According to the subsequently-prepared police statement, which was partially recorded and played for the jury, defendant initially denied being in Oakland on the day of Barze's murder. Then, when confronted with evidence regarding the SKS rifle found in his residence, defendant

acknowledged owning the rifle, while still denying knowledge of the murder. Eventually, however, defendant admitted shooting Barze, telling the officers: "I did it."[3]

Defendant told the officers that Barze approached him "talking smack." Defendant, whose nickname was "Scoot," warned Barze to leave, but Barze began "disrespecting" him and threatening him with "some nasty words." Defendant told him to stop, but Barze "kept coming, so I fired, because I was scared." Defendant acknowledged firing the gun 10 times, including firing two shots into the back of Barze's head after he fell to the ground because he "was scared [Barze] was going to come back if he was alive and kill me." Defendant never actually saw Barze with a gun but told police it "[l]ooked like he did." Defendant threw away the rifle he used to kill Barze; the rifle found in his residence was a different firearm, purchased "for protection."

Defendant also told the officers he had consumed four marijuana joints and about a pint of alcohol (Hennessy) before the shooting. He described himself as under the influence when it occurred.

The next day, January 5, 2006, defendant was interviewed by the Deputy District Attorney, a recording of which was also played for the jury. Defendant again admitted shooting Barze about 10 times, explaining Barze "was cussing me out. Told me he was going to do something to me." Defendant had no intentions to kill anyone that day and did not know Barze, but he was "in fear for my life" and had to "defend[]" himself as Barze approached him with his hands in his pockets, appearing as if he could be armed. Defendant fired two of the 10 shots in the back of Barze's head after he had fallen to the ground because defendant did not want to "have to look over my shoulder for the rest of my life." Nonetheless, defendant acknowledged knowing he would have "to do a lot of time" for his crime.

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[3] On April 29, 2009, defendant filed a *Pitchess* motion alleging that his statement to police on January 4, 2006, was involuntary because of coercive tactics employed by the officers. The trial court denied his motion on June 5, 2009, a ruling not at issue in this appeal.

At trial, in his defense, defendant relied on testimony from Kanem Ayers, a four-time prior felon still on probation, and Anton Bullock, a felon on probation for sale of rock cocaine. According to Ayers, he witnessed his friend, Barze, having an argument about two months before his murder with Omar (aka "Conditioner") in Omar's front yard on Mead Avenue over a gambling debt. This argument escalated, and Omar retreated into his house, returning with a gun. Omar then chased Barze and fired shots at him. Barze left the scene holding his head, and Ayers saw him a few days later with a bandage on his head.

On November 15, 2005, Ayers was on Mead Avenue working on a car. Ayers saw a group of men congregated down the block, and assumed Omar was one of them because it was his "usual crowd." Although Ayers did not actually see Omar among the group, when Barze later stopped by, he warned Barze to stay away from the group because Omar, who had recently shot him, lived nearby. Barze did not heed this warning and, a few minutes later, Ayers heard shots fired and saw Barze fall to the ground.

Bullock, in turn, testified that, on the day in question, he was on Mead Avenue with some friends when Barze approached on a bicycle. Omar called to Barze to "[c]heck it out." As Bullock crossed the street to urinate on the side of a vacant house, he heard Omar and Barze arguing. Omar then ran past Bullock to the backyard of the vacant house, returning with a big gun. As Bullock ran away, he saw Omar fire the gun about seven times across the street. He never saw Omar again.

On cross-examination, Sergeant Longmire acknowledged failing to try to find Omar even though there were some rumors that he was the murderer. In addition, Oliver told Sergeant Longmire that Omar might have been present at the time of Barze's shooting. Sergeant Longmire also acknowledged that defendant remained in the police department's interview room for a total of 13 hours the day he was arrested, and that the interview did not begin for over six hours of that time. Sergeant Longmire explained that he was waiting for completion of the search of defendant's residence. Sergeant Longmire also made a trip to defendant's residence during this time to determine whether the SKS

rifle found in the closet matched the description of the murder weapon provided by Oliver.

Oliver, in turn, testified on cross examination that he was ordered by higher authorities in Kumi, the prison gang of which he was a member, to do something violent to defendant or else risk bringing violence upon himself. Barze, like Oliver, was a member of Kumi, although Oliver did not realize this fact on the day of his murder. Oliver later recalled being familiar with Barze, although he had not personally met him before the day of the murder. Oliver chose to bring harm to defendant by informing police of his role in Barze's murder rather than through violence because defendant had never harmed him.

Following the trial, on October 13, 2009, the jury found defendant guilty as charged and found true the firearm use enhancements. On January 28, 2010, the trial court sentenced defendant to 25 years to life for the first degree murder offense, with an additional 25 years to life for one firearm enhancement, for a total prison term of 50 years to life. Sentences on the other firearm enhancements were stayed. Defendant was also ordered to pay a restitution fine in the amount of $1,000, and an identical parole revocation restitution fine was stayed pursuant to 1202.45. Defendant thereafter filed a timely appeal.

DISCUSSION

Defendant raises two issues on appeal. First, defendant contends he was prejudiced by the trial court's admission of evidence relating to the sale of cocaine on Mead Avenue and his possession of cocaine at the time of his arrest. Second, defendant contends he received ineffective assistance from counsel based upon his attorney's failure to request a jury instruction relating to the defense of provocation, which he claims could have resulted in a conviction for second degree murder rather than first degree murder. We address each contention in turn.

I. Admission of Drug-Related Evidence.

At trial, the prosecution sought to admit evidence in the form of testimony from Officer Martinez that defendant was in possession of rock cocaine when arrested. Defense counsel objected to admission of this evidence under Evidence Code section 352, arguing it was not relevant and, even if it were, the relevance would be "far outweighed by the prejudice."[4]

The prosecutor responded to defense counsel's objection as follows: "[T]he People's theory of the case is that the defendant killed the victim in part over turf wars, which had to do with both violence as well as drug dealing, And there has been some discussion by Mr. Oliver about drug dealing and that that was the business at 800 Mead . . . . [¶] We did not get to this with Sergeant Longmire yesterday, but the defendant also said . . . he sells drugs . . . . [¶] The fact that the defendant is in possession of 21 rocks of crack cocaine about four blocks from the murder location is, I believe, highly relevant to substantiate what Mr. Oliver is saying and also to corroborate the idea of the motive being partially involved with drug territory."

When the trial court asked for a reply, defense counsel responded: "Submitted." The trial court thereafter sided with the prosecutor, ruling that the challenged evidence would be admitted.

Following this ruling, Officer Martinez, the arresting officer, testified that, just after defendant was taken to the police station for booking, defendant admitted having 21 pieces of rock cocaine individually wrapped in plastic hidden inside his pant leg. A search of defendant's person confirmed his admission. The parties subsequently offered a stipulation that one of the 21 plastic-wrapped packages found inside defendant's pant leg was randomly chosen for testing and found to contain .23 grams of cocaine base.

Thereafter, Officer Valle was accepted at trial as an expert witness qualified to give an opinion as to whether cocaine base is possessed for sale or personal use. Officer

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[4] On appeal, defendant adds a claim that admission of this evidence violated his constitutional right to due process under the Fifth Amendment of the United States Constitution.

Valle then offered his expert opinion that defendant possessed this cocaine for sale based on its packaging and defendant's sobriety. Defense counsel objected to Officer Valle's opinion as irrelevant. While overruling this objection, the trial court later granted defendant's request for a jury instruction limiting consideration of all evidence relating to defendant's cocaine possession to the issue of motive.[5]

Officer Valle also testified, over another defense objection, that the 800 block of Mead Avenue was known for narcotics sales. Sergeant Longmire, in turn, testified that, when he first spoke with defendant after his arrest, defendant admitted occasionally selling drugs in the area of 19th Street and San Pablo.

On appeal, defendant claims the trial court's ruling to admit this evidence relating to narcotics sales in the Mead Avenue vicinity and his cocaine possession at the time of his arrest was an abuse of discretion. Defendant reasons that there is "no evidence that [he] was motivated by some aspect of the drug trade when he killed Barze." In particular, no drug charges were brought against defendant in this case and, at the time of the murder, there was no evidence that Barze or defendant was engaged in a drug transaction, or that defendant was in possession of crack cocaine for sale or personal use. Finally, defendant claims his possession of cocaine at the time of his arrest proves nothing of relevance with respect to the murder itself.

In addressing defendant's contentions, the following legal principles apply. Generally, all relevant evidence is admissible. (*People v. Champion* (1995) 9 Cal.4th 879, 922.) Relevant evidence is that which has any tendency in reason to prove or disprove any disputed fact material to the outcome of the case. (Evid. Code, § 210.) "The test of relevance is whether the evidence tends ' "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive. [Citations.]' [Citation.] The trial court has broad discretion in determining the relevance

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[5] The trial court instructed the jury that the evidence of defendant's cocaine possession at the time of his arrest could be considered "for the limited purpose of deciding whether or not the defendant had a motive to commit the charged offense or any lesser offense."

of evidence [citations] but lacks discretion to admit irrelevant evidence. [Citations.]' [Citation.]" (*People v. Hamilton* (2009) 45 Cal.4th 863, 940.) Moreover, even if relevant, evidence may nonetheless be excluded if the trial courts finds that its probative value is substantially outweighed by its prejudicial effect. (*People v. Champion*, *supra*, 9 Cal.4th at p. 922; Evid. Code, § 352.)

On appeal, a trial court's decision to admit or exclude evidence is reviewed solely for abuse of discretion. (*People v. Brown* (2003) 31 Cal.4th 518, 547; *People v. Avitia* (2005) 127 Cal.App.4th 185, 193.) "The trial court's ruling will not be disturbed in the absence of a showing it exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice. [Citation.]" (*People v. Avitia, supra,* 127 Cal.App.4th at p. 193. See also *People v. Dyer* (1988) 45 Cal.3d 26, 73.)

Having considered the record at hand, we find nothing arbitrary, capricious, or patently absurd about the trial court's admission of the challenged evidence for the limited purpose of proving defendant's state of mind. (*People v. Avitia, supra,* 127 Cal.App.4th at p. 193.) Without a doubt, a defendant's state of mind is relevant to whether he committed first or second degree murder, or a lesser included offense. In this case, Oliver, a key eyewitness for the prosecution, provided unchallenged testimony relevant to defendant's state of mind when killing Barze that also related to narcotics sales, particularly on Mead Avenue.

Specifically, Oliver explained his presence at the scene of the crime as follows: He went to the 800 block of Mead Avenue, where he remained all day, to sell rock cocaine on the street. Oliver then explained what precipitated the murder: The men were in a heated discussion about growing violence in the area and the need to protect themselves and their "turf" from outsiders, including "certain individuals trying to come over [to Mead Avenue] and sell dope, and they're not from over there, or people that just don't like certain areas because of that area." Oliver also explained that "too many people were allowed to come over [to their neighborhood] anyway and do what they wanted to do" and to "leach off the block." Oliver then warned the others, including defendant, to be careful of "anything that might happen, anybody that might try to come

or rob, or *anybody that might try to come over there and sell dope that's not from over there*." Further, at the preliminary hearing, Oliver testified that Barze in fact bought drugs at the 800 block of Mead just before his murder, although at trial he denied knowing who sold Barze the drugs.

Despite this evidence, defendant insists "[t]he group was concerned solely with protecting themselves from the violence that was occurring in their neighborhood." In doing so, defendant ignores the rules of appellate review, which require us to consider the evidence, and reasonable inferences that may be drawn from it, in a light most favorable to affirming the judgment. (*People v. Pelayo* (1999) 69 Cal.App.4th 115, 120-121.) Applying this standard, we accept Oliver's testimony that the group, including defendant, was concerned with outsiders coming into their neighborhood to "sell dope," not just with violence. Moreover, given that Barze, a self-described Acorn, was an outsider to Mead Avenue who Oliver claimed bought drugs just before his death, we have no trouble concluding the challenged evidence was probative of defendant's state of mind when firing the gun. (*People v. Garceau* (1993) 6 Cal.4th 140, 177; see also *Estelle v. McGuire* (1991) 502 U.S. 62, 70 [where evidence is relevant to a material issue, its admission does not violate due process].)

In any event, even assuming the trial court erred by admitting evidence relating to Mead Avenue's drug trade or defendant's drug possession, there is simply no reasonable probability he would have obtained a more favorable result had the evidence been excluded. (*People v. Avitia, supra,* 127 Cal.App.4th at p. 194 [erroneous admission of evidence requires reversal only if it is reasonably probable the defendant would have obtained a more favorable result had the evidence been excluded].) Defendant repeatedly admitted to law enforcement that he shot Barze about ten times, including twice fatally in the back of the head after Barze had fallen to the ground so that he would not have to "look over [his] shoulder" the rest of his life. Based on these admissions alone, the jury more than likely would have reached the same verdict even without knowing that defendant possessed cocaine for sale when arrested or that Mead Avenue is known for

drug activity. Accordingly, the trial court's ruling stands. (*People v. Hamilton, supra*, 45 Cal.4th at pp. 940-941; *People v. Avitia, supra*, 127 Cal.App.4th at p. 193.)

II. Effectiveness of Assistance from Counsel.

Defendant also raises a constitutional claim of ineffective assistance of counsel based upon his trial counsel's failure to request a jury instruction on the defense of provocation. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) According to defendant, if a provocation instruction had been given, the jury may have returned a verdict for second degree murder rather than first degree murder. Defendant acknowledges that the provocation instruction, CALCRIM No. 522, is a so-called pinpoint instruction relating particular facts to a legal issue, and that the trial court had no sua sponte duty to give it in the absence of a request.[6] (See *People v. Rogers* (2006) 39 Cal.4th 826, 878.)

To prevail on his claim of ineffective assistance of counsel, defendant must prove more than a failure by counsel to request a particular jury instruction. Rather, "defendant must show counsel's performance fell below a standard of reasonable competence, and that prejudice resulted." (*People v. Anderson* (2001) 25 Cal.4th 543, 569.) "Prejudice" in this context occurs only where defense counsel's deficient performance " 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " (*People v. Kipp* (1998) 18 Cal.4th 349, 366, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 686.) Further, if "a defendant has failed to show that the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient." (*People v. Kipp, supra,* 18 Cal.4th at p. 366.)

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[6] CALCRIM No. 522 provides in relevant part:
"Provocation may reduce a murder from first degree to second degree . . . . The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder."

In addition, "[i]f the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal." (*People v. Kraft* (2000) 23 Cal.4th 978, 1068-1069.) In applying this standard, the defendant must overcome a strong presumption that counsel's conduct was sound trial strategy or otherwise within the wide range of reasonable professional assistance. (*People v. Burnett* (1999) 71 Cal.App.4th 151, 180; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1215.)

As previously stated, defendant in our case challenges his counsel's failure to request a provocation instruction. "Provocation means ' "something that provokes, arouses, or stimulates;" ' provoke means to ' "arouse to a feeling or action [:] . . . to incite to anger." ' " (*People v. Hernandez* (2001) 183 Cal.App.4th 1327, 1334.) In the legal context, "provocation . . . is the defendant's emotional reaction to the conduct of another, which emotion may negate a requisite mental state." (*People v. Ward* (2005) 36 Cal.4th 186, 215.) According to defendant, the jury should have been instructed on provocation based on the evidence that, just before the shooting began, Barze said threatening and disrespectful things to defendant, and aggressively approached him with his hands concealed in his pockets. According to defendant, and consistent with his statements to law enforcement, Barze's conduct and demeanor put him "in fear for [his] life," prompting the shooting.

As an initial matter, we find no explanation in the record for defense counsel's failure to request a jury instruction on provocation. Nor is there anything in the record indicating that defense counsel was asked to explain his failure. As such, under the standards set forth above, we must reject defendant's claim of ineffective assistance of counsel on direct appeal " 'unless there simply could be no satisfactory explanation.' (*People v. Pope* (1979) 23 Cal.3d 412, 426.)" (*People v. Kipp, supra,* 18 Cal.4th at p. 367.)

Having reviewed the record, we conclude a plausible tactical explanation does in fact exist for defense counsel's failure to request a provocation instruction, such that

defendant's ineffective assistance claim must fail. Specifically, defendant's primary defense at trial was that he simply did not commit the crime. He offered testimony from two eyewitnesses that another man, Omar, who had "bad blood" with Barze stemming from an unpaid gambling debt, committed the murder. In fact, as defendant admits in his brief, "[i]n his closing argument, defense counsel emphasized evidence which suggested Omar Smith was the person who killed Christopher Barze." Under these circumstances, we conclude defense counsel, acting within the wide range of reasonable professional assistance, could have reasonably concluded that it made tactical sense to focus the jury's attention on evidence linking Omar to the crime rather than on evidence explaining defendant's state of mind when firing the murder weapon. (*People v. Burnett, supra,* 71 Cal.App.4th at p. 180.) While defendant may in hindsight have preferred defense counsel pursue another strategy, it is not our role on appeal to second guess an attorney's tactical reasoning at trial.

Moreover, even if we were to accept defendant's claim that his counsel lacked a satisfactory explanation for failing to request a provocation instruction, we could not conclude on this record that he sustained any prejudice. Defendant accurately cites evidence that he shot Barze out of fear for his life. However, consistent with that evidence, the trial court instructed the jury on both first and second degree murder, as well as the lesser included offense of voluntary manslaughter based on imperfect self defense. In particular, the trial court clearly explained that, unless the prosecution proved beyond a reasonable doubt that defendant acted willfully, deliberately and with premeditation, he could not be convicted of first degree murder. The trial court then added: "A decision to kill made rashly, impulsively and without careful consideration is not deliberate and premeditated." The trial court also instructed the jury to find that defendant acted in imperfect self defense if he "actually believed" he was in imminent danger of being killed or suffering great bodily injury, and that the immediate use of deadly force was required to defend against the danger. However, the trial court advised, "[b]elief in future harm is not sufficient no matter how great or how likely the harm is believed to be."

Undisputedly, the defense of imperfect self defense, which, if accepted by the jury, would have reduced defendant's crime to manslaughter, was based on nearly all, if not all, the same evidence underlying defendant's belated provocation theory. Indeed, in admitting the crime, defendant told the deputy district attorney at the time of his arrest: "I defended myself. [¶] . . . [¶] [I] didn't mean to kill nobody though." Nonetheless, after hearing this evidence and receiving the aforementioned instructions, the jury found that defendant did have the requisite state of mind for a first degree murder conviction. Under these circumstances, we cannot conclude that the jury's failure to receive instruction on provocation " 'so undermined the proper functioning of the adversarial process' that its finding in this regard should be deemed unreliable." (*People v. Kipp, supra*, 18 Cal.4th at pp. 366, 380; *People v. Diggs* (1986) 177 Cal.App.3d 958, 969 [to prove ineffective assistance of counsel, defendant must show counsel's acts or omissions resulted in the withdrawal of a "potentially meritorious" defense].) Accordingly, the jury's verdict must stand.

DISPOSITION

The judgment is affirmed.

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Jenkins, J.

We concur:

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McGuiness, P. J.

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Pollak, J.

People v. Corvelle McDaniels, A127484