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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. SHAUN THOMAS TURK, Defendant and Appellant.	D049923 (Super. Ct. No. SCE24582)

APPEAL from a judgment of the Superior Court of San Diego County, William J. McGrath, Judge. Affirmed.

David M. McKinney, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, David Delgado-Rucci and Ronald A. Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of part III C, D and E.

I.

INTRODUCTION

A jury found Shaun Turk not guilty of first-degree murder, and guilty of second-degree murder (Pen. Code § 187, subd. (a)).[1] The jury further found that in the commission of the offense, Turk personally used a deadly and dangerous weapon, i.e., a knife, within the meaning of section 12022, subdivision (b)(1). The trial court sentenced Turk to a total term of 16 years to life in prison, including a sentence of 15 years to life on the second-degree murder conviction and an additional one-year term for the section 12022, subdivision (b)(1) enhancement.[2]

On appeal, Turk claims that the trial court erred in failing to instruct the jury sua sponte regarding involuntary manslaughter stemming from voluntary intoxication, instructing the jury pursuant to CALCRIM No. 625 regarding voluntary intoxication, failing to instruct the jury regarding voluntary manslaughter based on imperfect and perfect self-defense, precluding defense counsel from asking a witness why the witness

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1 Unless otherwise specified, all subsequent statutory references are to the Penal Code.

2 The People concede that the 15 years-to-life sentence for Turk's second-degree murder conviction, as set forth in the court's sentencing minute order and in the abstract of judgment, is correct and must prevail over an incorrect reference to a sentence of 25 years to life contained in the reporter's transcript. We agree with the concession. (§ 190 [except for circumstances not present in this case, "every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 15 years to life"].) In accordance with Turk's request, we declare that the abstract of judgment states Turk's legal sentence.

did not believe that Turk had stabbed the victim, and in admitting hearsay testimony regarding inculpatory statements that Turk made shortly after the killing.

We affirm the judgment.

II.

FACTUAL BACKGROUND

A. *The prosecution's evidence*

In November 2004, Nicholas Cole (Nicholas), one of Turk's friends, hosted a party. Paul Howell, the victim of the killing at issue in this appeal, attended the party. Thomas Hodgins, another friend of Turk's, instigated a fight with Howell at the party. Hodgins sustained injuries from the fight.

On December 3, 2004, Turk, along with several other friends, including Joshua Young[3] and Nicholas, attended a party at a house on Louis Lane in Santee. Howell also attended the Louis Lane party. Sometime prior to 12:30 a.m., Turk asked to borrow Nicholas's knife. Nicholas gave Turk his knife.

At some point later in the evening, Turk dropped a beer in front of Howell, called Howell a derogatory name, and insisted that Howell pick up the beer. Howell refused to pick up the beer and indicated that he did not want to fight. Turk and Howell began to yell at each other. Someone said, "Go outside, take it outside."

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[3] Young was initially a codefendant in the case. Prior to trial, Young agreed to plead guilty to voluntary manslaughter with a knife allegation, with a stipulated seven-year sentence.

Howell and Turk went to the backyard of the residence and began to punch each other. A crowd of people formed around them. Various people intervened in the fight. Additional fights broke out around the yard while Turk and Howell were fighting. After a lull in the fight, Turk and Howell resumed fighting near the fence at the back of the yard. Turk stabbed Howell numerous times with Nicholas's knife. Howell died from the stab wounds.

While leaving the party, Young told Turk, "We got to go. We stabbed him." Turk stated, "I got him six times." Turk and Young were covered in blood when they left the party.

After the stabbing, Nicholas's brother, Chris Cole (Chris), gave Turk and Young a ride from the Louis Lane party to Turk's house in Chris's truck. Turk bragged about the stabbing during the ride. Shortly after arriving at Turk's house, Young took Nicholas's knife from Turk and placed Young's and Turk's clothes in a bag. Young then drove to a pond and threw the knife in the pond. He drove to another location and burned the clothes.[4]

The next day, Turk told Nicholas that he had stabbed Howell in the stomach during the fight. Turk demonstrated to Nicholas the manner in which he had stabbed Howell. Nicholas stated that he believed Turk said he had stabbed Howell eight times.

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[4] Police eventually recovered the knife from the pond. At trial, Nicholas testified that the knife that police recovered from the pond appeared to be the knife that he had allowed Turk to borrow on the night of the killing.

B. *The defense*

Turk's sister, Candace Woolwine, testified that Turk appeared to be intoxicated when he returned home from the Louis Lane party. Woolwine also testified that Young had previously brandished a knife during an incident at a grocery store. Patricia Boice, Turk's mother, testified regarding a separate incident in which Young brandished a knife. Judy Viskoe, a friend of Turk's, and a former friend of Young's, testified that Young had told her that he could not recall whether he had stabbed Howell on the night of the Louis Lane party, because Young had blacked out. Stephanie Matthews testified that in January 2006, she had a conversation with Young during which Young demonstrated how one could stab someone in the stomach in a manner so as to seriously injure the person. Turk did not testify.

During closing argument, defense counsel maintained that Turk had not stabbed anyone. Defense counsel argued that Young and other witnesses had testified falsely, and suggested that some or all of these individuals were responsible for the killing. Defense counsel also stated that Turk was "puking drunk" after the Louis Lane party.

III.

DISCUSSION

A. *The trial court did not err in failing to instruct the jury sua sponte regarding involuntary manslaughter stemming from voluntary intoxication*

Turk claims that the trial court erred in failing to instruct the jury sua sponte that "when a defendant, as a result of voluntary intoxication, kills another human being without premeditation and deliberation and/or without intent to kill (i.e. without express

malice), the resultant crime is involuntary manslaughter." We conclude that the trial court properly did not provide the jury with this instruction because it is an incorrect statement of California law.

1. *Standard of review*

We apply a de novo standard of review to the question whether the trial court should have given an instruction on the lesser included offense of involuntary manslaughter. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.)

2. *Factual and procedural background*

a. *Evidence of Turk's intoxication near the time of the killing*[5]

Maria Ortega, who attended the Louis Lane party and saw Turk there, agreed with defense counsel that she had told a police officer that Turk seemed "a little drunk" at the party. Alan Salinas testified that at the Louis Lane party, he overheard Turk say to someone while on a cell phone, "Paul Howell is here and I am drunk." Salinas also testified that at some later point during the party, he observed Turk "grab[] a few beers" from outside the house, return to the kitchen, and provoke the fight with Howell that resulted in Howell's death.

Young described Turk's demeanor as the two got into Chris's truck to leave the party after the fight as follows: "He was kind of pale. He was real drunk, and kind of

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5 In considering whether the trial court had a sua sponte duty to instruct the jury on the lesser included offense of involuntary manslaughter, we construe the evidence of Turk's intoxication, as cited in his brief, in the light most favorable to Turk. (See *People v. Stewart* (2000) 77 Cal.App.4th 785, 795-796 (*Stewart*).)

still amped up because we were fighting." Young also described Turk's level of intoxication after Chris took Turk and Young to Turk's house: "[Turk] was pretty drunk. He was pretty hammered. Right when we got home, he started turning pale and he was stumbling everywhere and puked in the toilet and stuff." Young also admitted that during the investigation into the killing, he had told investigators that Turk was too drunk to dispose of the clothes Turk had been wearing during the fight with Howell.

Woolwine testified that when Turk returned home from the party, he appeared drunk, "was stumbling into walls," and "went into the bathroom to throw up."

Tricia Boice, Turk's other sister, testified that when she attempted to wake Turk on the morning following the killing, he "reeked of alcohol."

b. *The trial court's jury instructions*

The trial court instructed the jury regarding murder pursuant to a modified version of CALCRIM No. 520. The court instructed the jury in relevant part:

> "The defendant is charged with murder. . . .
>
> "To prove that the defendant is guilty of this crime, the People must prove two things:
>
> "Number one, the defendant committed an act that caused the death of another person; and, number two, when the defendant acted, he had a state of mind called 'malice aforethought.'
>
> "There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder.
>
> "The defendant acted with express malice if he unlawfully intended to kill. The defendant acted with implied malice if he, number one, intentionally committed an act; number two, the natural consequences of the act were dangerous to human life; number three,

> at the time he acted he knew his act was dangerous to human life; and, number four, he deliberately acted with conscious disregard for life."

The trial court instructed the jury regarding voluntary intoxication pursuant to a modified version of CALCRIM No. 625 as follows:

> "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill, or the defendant acted with deliberation and premeditation.
>
> "A person is voluntarily intoxicated if he becomes intoxicated by willingly using an intoxicating drug, drink, or other substance, knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. You may not consider evidence of voluntary intoxication for any other purpose."

The trial court instructed the jury regarding involuntary manslaughter pursuant to a modified version of CALCRIM No. 580 in relevant part as follows:

> "When a person commits an unlawful killing but does not intend to kill and does not act with conscious disregard for human life, then the crime is involuntary manslaughter.
>
> "The difference between other homicide offenses and involuntary manslaughter depends on whether the person was aware of the risk to life that his or her actions created and consciously disregarded that risk.
>
> "An unlawful killing caused by a willful act done with full knowledge and awareness that the person is endangering the life of another, and done in conscious disregard of that risk, is voluntary manslaughter or murder.
>
> "An unlawful killing resulting from a willful act committed without intent to kill and without conscious disregard of the risk to human life is involuntary manslaughter.
>
> "The defendant committed involuntary manslaughter if, number one, the defendant committed a crime that posed a high risk of death or

> great bodily injury because of the way in which it was committed; and, number two, the defendant's acts unlawfully caused the death of another person.
>
> [¶] . . . [¶]
>
> "In order to prove murder or voluntary manslaughter, the People have the burden of proving beyond a reasonable doubt that the defendant acted with intent to kill or with conscious disregard for human life.
>
> "If the People have not met either of those burdens, you must find the defendant not guilty of murder and not guilty of voluntary manslaughter."

3. *Governing law*

a. *Relevant statutory law*

Section 187 provides in relevant part, "(a) Murder is the unlawful killing of a human being . . . with malice aforethought." Section 188 defines malice as follows:

> "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."
>
> "When it is shown that the killing resulted from the intentional doing of an act with express or implied malice as defined above, no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice."

Section 22 governs the admissibility of evidence of the voluntary intoxication of the defendant in a criminal case:

> "(a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be

admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act.

"(b) Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.

"(c) Voluntary intoxication includes the voluntary ingestion, injection, or taking by any other means of any intoxicating liquor, drug, or other substance."

b. *Relevant case law*

(i) *General principles of law regarding jury instructions on involuntary manslaughter as a lesser included offense of murder*

A trial court must instruct the jury sua sponte on involuntary manslaughter as a lesser included offense of murder where, "there is substantial evidence that defendant committed the lesser included offense, which, if accepted by the trier of fact, would exculpate the defendant from guilt of the greater offense." (*People v. Cook* (2006) 39 Cal.4th 566, 596 (*Cook*).) "If the evidence presents a material issue of whether a killing was committed without malice, and if there is substantial evidence the defendant committed involuntary manslaughter, failing to instruct on involuntary manslaughter would violate the defendant's constitutional right to have the jury determine every material issue." (*People v. Abilez* (2007) 41 Cal.4th 472, 515 (*Abilez*).)

(ii) *The duty to instruct on involuntary manslaughter as a lesser included offense of murder based on unconsciousness stemming from voluntary intoxication*

A trial court must instruct the jury "sua sponte on involuntary manslaughter based on unconsciousness" whenever "there is evidence deserving of consideration[6] that the defendant was unconscious due to voluntary intoxication." (*People v. Halvorsen* (2007) 42 Cal.4th 379, 418 (*Halvorsen*); see also *Abilez, supra,* 41 Cal.4th at p. 515; *People v. Ochoa* (1998) 19 Cal.4th 353 (*Ochoa*); CALCRIM No. 626.)

In *Ochoa, supra,* 19 Cal.4th at pages 423-424, the court outlined the law regarding involuntary manslaughter based upon unconsciousness induced by voluntary intoxication:

> "When a person renders himself or herself unconscious through voluntary intoxication and kills in that state, the killing is attributed to his or her negligence in self-intoxicating to that point, and is treated as involuntary manslaughter. 'Unconsciousness is ordinarily a complete defense to a charge of criminal homicide. [Citation.] If the state of unconsciousness results from intoxication voluntarily induced, however, it is not a complete defense. [Citation.] . . . [I]f the intoxication is voluntarily induced, it can never excuse homicide. [Citation.] Thus, the requisite element of criminal negligence is deemed to exist irrespective of unconsciousness, and a defendant stands guilty of involuntary manslaughter if he voluntarily procured his own intoxication.' [Citation.] Unconsciousness for this purpose need not mean that the actor lies still and unresponsive: section 26 describes as '[in]capable of committing crimes . . . [¶] . . . [¶] . . . [p]ersons who *committed the act* . . . without being conscious thereof.' Thus unconsciousness '"can exist . . . where the subject physically acts in fact but is not, at the time, conscious of acting."' [Citations.]"

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6 In *People v. Breverman* (1998) 19 Cal.4th 142, 175, fn. 22 (*Breverman*), the court indicated that this standard is equivalent to the substantial evidence standard for instructing on lesser included offenses generally.

The *Ochoa* court applied this law in concluding that there was insufficient evidence of unconsciousness in that case to warrant an instruction on involuntary manslaughter as a lesser included offense of murder. The *Ochoa* court reasoned that the defendant's actions, including telling the victim to be quiet, displaying a knife, and taking the victim to a secluded location, demonstrated, "a methodical, calculated approach to the crimes." (*Ochoa, supra*, 19 Cal.4th at p. 424.) The *Ochoa* court further concluded that the defendant's statement "that he did not know what was going through his mind," did not necessitate an involuntary manslaughter instruction and could be understood to mean only that "intoxication clouded his judgment and caused him to make foolish choices. . . ." (*Ibid*.)

In *Halvorsen*, *supra*, 42 Cal.4th 379, the court concluded that expert testimony that the defendant's blood alcohol content might have approached .20 at the time of the shootings, and that the defendant "habitually drank to excess with resultant memory losses," did not constitute substantial evidence warranting an involuntary manslaughter instruction premised on unconsciousness. (*Id*. at pp. 418-419.)

The *Abilez* court similarly rejected a defendant's claim that an involuntary manslaughter instruction was required based on evidence of the defendant's intoxication at the time of the killing. The *Abilez* court reasoned:

> "The evidence here shows defendant had consumed some unknown amount of alcohol, but there was no evidence he was so intoxicated that he could be considered unconscious. He went to the victim's home, spoke to his brother Chachi, killed Loza, and then ransacked her and Carlon's bedrooms, loading Loza's car with stolen items before driving away. Later, he tried to sell the stolen goods to Leonard Mercado. Nothing in these facts even hints that defendant

was so grossly intoxicated as to have been considered unconscious." (*Abilez, supra*, 41 Cal.4th at p. 516.)

(iii) *Case law regarding the duty to instruct on involuntary manslaughter as a lesser included offense of murder, based on voluntary intoxication short of unconsciousness*

In claiming that the trial court erred in failing to instruct the jury on involuntary manslaughter, Turk relies primarily on *People v. Ray* (1975) 14 Cal.3d 20 (*Ray*) abrogated on another ground by *People v. Lasko* (2000) 23 Cal.4th 101, in which the Supreme Court held that "an instruction on involuntary manslaughter is required if there is evidence that the accused is unable to entertain an intent to kill even though he has not lapsed into unconsciousness." (*Ray, supra*, 14 Cal.3d at pp. 28-29.) The *Ray* court noted that where there is evidence of a defendant's unconsciousness premised on voluntary intoxication, "such evidence requires an instruction on involuntary manslaughter." (*Id*. at p. 30.) However, the *Ray* court further explained that evidence of unconsciousness is not *required* for such an instruction. (*Ibid*. ["But if an accused is unable to harbor malice and an intent to kill because of voluntary intoxication which does not render him unconscious he cannot be guilty of an unlawful homicide greater than involuntary manslaughter and the jury must be so instructed."].)

The *Ray* court's holding was premised on then existing law regarding malice aforethought and the doctrine of diminished capacity. The *Ray* court summarized that law as follows:

"The unlawful killing of a human being with malice aforethought is murder. [Citation.] If because of diminished capacity the perpetrator is unable to entertain malice but nevertheless is found to be able to form the intent to kill the crime is voluntary manslaughter.

> If because of his diminished capacity he additionally did not intend to kill, his crime, if any, is involuntary manslaughter. [Citation.]" (*Ray, supra*, 14 Cal.3d at p. 28.)

In *People v. Saille* (1991) 54 Cal.3d 1103 (*Saille*), the California Supreme Court considered the effect on the crime of voluntary manslaughter of legislation that abolished the doctrine of diminished capacity, including an amendment to the definition of malice in section 188.[7] The *Saille* court concluded that the law no longer "permits a reduction of what would otherwise be murder to nonstatutory voluntary manslaughter due to voluntary intoxication . . . ." (*Saille, supra,* 54 Cal.3d at p. 1107.) The *Saille* court reasoned in part:

> "In amending section 188 in 1981, the Legislature equated express malice with an intent unlawfully to kill. Since two distinct concepts no longer exist, there has been some narrowing of the mental element included in the statutory definition of express malice. A defendant, however, is still free to show that because of his mental illness or voluntary intoxication, he did not *in fact* form the intent unlawfully to kill (i.e., did not have malice aforethought). [Citation.] In a murder case, if this evidence is believed, the only supportable verdict would be involuntary manslaughter or an acquittal. If such a showing gives rise to a reasonable doubt, the killing (assuming there is no implied malice) can be no greater than involuntary manslaughter. [Citation.]" (*Id*. at pp. 1116-1117.)

In *People v. Webber* (1991) 228 Cal.App.3d 1146, 1162 (*Webber*), the court applied *Ray* and concluded that, notwithstanding the abolition of the diminished capacity doctrine in 1981, the trial court had erred in failing to instruct the jury regarding

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7 The 1981 amendment (stats. 1981, c. 404, § 6, p. 1593) added the second paragraph in section 188. (See part, III.A.3.a., *ante*.)

involuntary manslaughter premised on voluntary intoxication sufficient to negate malice and the intent to kill. The *Webber* court reasoned:

> *"*Although diminished capacity is no longer a complete defense, pursuant to section 22, subdivision (b), rebuttal evidence must still be considered by the trier of fact in determining whether a defendant actually formed malice or the intent to kill. [Citation.] '[W]hether the defendant had or did not have the required mental states shall be decided by the trier of fact.' [Citation.]
>
> "Accordingly, *Ray* is still good law in its holding that where there is substantial evidence that a defendant was unable to entertain, i.e., did not actually form, an intent to kill, the court has a sua sponte duty to instruct on involuntary manslaughter." (*Webber, supra*, 228 Cal.App.3d at p. 1162.)

(iv) *The 1995 amendment to section 22, subdivision (b)*

In *People v. Whitfield* (1994) 7 Cal.4th 437, 451, superseded by statute as stated in *People v. Reyes* (1997) 52 Cal.App.4th 975 (*Reyes*), the Supreme Court held that evidence of voluntary intoxication is admissible to negate implied as well as express malice. In 1995, among other changes to section 22, the Legislature inserted the word "express" before the word "malice" in subdivision (b) of the statute. (Stats. 1995, c. 793 (S.B. 121), § 1.) The legislative history of the amendment unequivocally indicates that the Legislature intended to legislatively supersede *Whitfield*, and make voluntary intoxication inadmissible to negate implied malice in cases in which a defendant is charged with murder:

> "Under existing law, as held by the California Supreme Court in *People v. Whitfield*, [*supra*,] 7 Cal. 4th 437, the phrase 'when a specific intent crime is charged' includes murder even where the prosecution relies on a theory of implied malice. [¶] This bill would provide, instead, that evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant

> actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought." (Legis. Counsel's Dig., Sen. Bill No. 121 (1995-1996 Reg. Sess.), Summary Dig., p. 334.)

In *People v. Timms* (2007) 151 Cal.App.4th 1292, 1298, the court held that, pursuant to the 1995 amendment to section 22, subdivision (b), evidence of a defendant's voluntary intoxication is no longer admissible to negate *implied* malice. (See also *People v. Martin* (2000) 78 Cal.App.4th 1107, 1114-1115; *Reyes, supra*, 52 Cal.App.4th at p. 984, fn. 6 [both stating that due to 1995 amendment to section 22, voluntary intoxication is no longer admissible to negate implied malice].)[8]

(v) *The duty to instruct on involuntary manslaughter as a lesser included offense of murder stemming from voluntary intoxication not resulting in unconsciousness, under current law*

We are aware of no case, and Turk cites none, in which a court has directly addressed whether *Ray* and *Webber* remain good law in the wake of the 1995 amendment to section 22, subdivision (b) making evidence of voluntary intoxication inadmissible to negate implied malice.

The Supreme Court has suggested the potential relevance of the 1995 amendment to this issue, in two cases. In *People v. Hughes* (2002) 27 Cal.4th 287 (*Hughes*), the defendant claimed that the trial court erred in failing to instruct the jury that "voluntary intoxication falling short of unconsciousness also could negate intent to kill and/or malice aforethought . . . ." (*Id.* at p. 345.) The *Hughes* court concluded that the invited error

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8 Turk concedes in his reply brief that "intoxication cannot negate implied malice."

doctrine barred the defendant's claim, and thus did not have to decide whether the instruction "correctly describe[d] the law, in light of the subsequent 1995 amendment to section 22, subdivision (b) . . . ." (*Id*. at p. 345, fn. 10.) In *People v. Boyer* (2006) 38 Cal.4th 412, 469, fn. 40 (*Boyer*), the court stated in dicta that, in light of the 1995 amendment to section 22, subdivision (b), it "now appears that defendant's voluntary intoxication, even to the point of actual unconsciousness, would not prevent his conviction of second degree murder on an implied malice theory . . . ."

In considering whether the trial court had a duty to instruct on involuntary manslaughter stemming from voluntary intoxication, in *Halvorsen*, *supra*, 42 Cal.4th at page 418, *Abilez, supra,* 41 Cal.4th at page 515, and *Ochoa*, *supra*, 19 Cal.4th at page 353, the Supreme Court considered whether the record contained evidence sufficient to support a finding of unconsciousness, without discussing *Ray*'s holding that an instruction on involuntary manslaughter may be required even if the defendant has not lapsed into unconsciousness.

Lacking definitive guidance from the Supreme Court on this issue, we consider the effect of the 1995 amendment to section 22, subdivision (b) on the holdings in *Ray* and *Webber*. Prior to 1981, voluntary intoxication could negate malice, both express and implied, and/or intent to kill. (*Ray, supra*, 14 Cal. 3d at p. 30.) Therefore, voluntary intoxication, even short of unconsciousness, could result in either voluntary manslaughter, where the defendant's intoxication negated malice, or involuntary manslaughter, where the defendant's intoxication negated both malice and intent to kill. (*Ibid*.) After the 1981 abolition of the diminished capacity doctrine, voluntary

intoxication could no longer reduce a killing from murder to voluntary manslaughter. (*Saille, supra,* 54 Cal.3d at pp. 1116-1117.) However, prior to the 1995 amendment to section 22, subdivision (b), voluntary intoxication could still negate malice, both express and implied, and could also negate intent to kill. (*Webber, supra*, 228 Cal.App.3d at p. 1162.) Thus, prior to 1995, voluntary intoxication, short of unconsciousness, could still result in a conviction for involuntary manslaughter. (*Ibid*.)

It is no longer proper to instruct a jury, as Turk suggests, that "when a defendant, as a result of voluntary intoxication, kills another human being without premeditation and deliberation and/or without intent to kill (i.e. without express malice), the resultant crime is involuntary manslaughter." This instruction is incorrect because a defendant who unlawfully kills without express malice due to voluntary intoxication can still act with implied malice, which voluntary intoxication cannot negate, in the wake of the 1995 amendment to section 22, subdivision (b).[9] To the extent that a defendant who is voluntarily intoxicated unlawfully kills with implied malice, the defendant would be guilty of second degree murder.

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9 At another point in his brief, Turk appears to acknowledge that this instruction would not be a correct statement of law in cases in which the jury could find that the defendant acted with implied malice. He notes, "[W]hen the evidence shows a defendant, because of his intoxicated state, may not have had the requisite malice (intent to unlawfully kill), the requisite premeditation, or the requisite deliberation to be a first degree murder, he or she must be found (shy of an all-out acquittal) guilty of involuntary manslaughter ─ *unless implied malice is found*." (Italics added.)

In reaching this conclusion we acknowledge that in *People v. Rogers* (2006) 39 Cal.4th 826, 884 (*Rogers*), the Supreme Court cited *Ray* and *Webber* with apparent approval in considering a similar issue. The *Rogers* court stated:

> "Defendant asserts the trial court erred in failing to instruct on its own motion on the lesser included offense of involuntary manslaughter in relation to count one, the Clark count. Involuntary manslaughter is 'the unlawful killing of a human being without malice aforethought and without an intent to kill.' [Citation.] A verdict of involuntary manslaughter is warranted where the defendant demonstrates 'that because of his mental illness . . . he did not *in fact* form the intent unlawfully to kill (i.e., did not have malice aforethought).' (*People v. Saille, supra,* 54 Cal.3d at p. 1117, 2 Cal.Rptr.2d 364, 820 P.2d 588.) An instruction on involuntary manslaughter is required whenever there is substantial evidence indicating the defendant did not actually form the intent to kill. ([*Webber*, *supra*,] 228 Cal.App.3d 1146; see [*Ray*, *supra*, 14 Cal.3d 20, 28-29.)" (*Rogers*, *supra*, 39 Cal.4th at p. 884.)

However, *Rogers* is not authority for the proposition that the holdings in *Ray* and *Webber* necessitate giving an involuntary manslaughter instruction in a case that involves voluntary intoxication, because *Rogers* did not involve voluntary intoxication.[10] Thus, the *Rogers* court did not consider the potential effect of the 1995 amendment to section 22, subdivision (b) on the holdings in *Ray* and *Webber*.

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10 In *Rogers*, the defendant claimed that an involuntary manslaughter instruction was required because due to a "mental illness resulting from extensive physical and sexual abuse as a child . . . [he] did not form the mental state or states required for the charged crimes." (*Rogers*, *supra*, 39 Cal.4th at p. 835; see *id*. at p. 884.)

4. *The trial court did not in err in failing to instruct the jury sua sponte regarding involuntary manslaughter premised on voluntary intoxication*

a. *The trial court properly refused to instruct the jury that a killing is involuntary manslaughter when committed by a defendant who is voluntarily intoxicated to the degree that intent to kill is negated*

We assume for purposes of this decision that the record contains sufficient evidence from which the jury could have found that, due to voluntary intoxication, Turk did not harbor express malice. The trial court thus properly instructed the jury pursuant to CALCRIM No. 625 that it could consider Turk's voluntary intoxication in determining whether he acted with premeditation or with the intent to kill.[11] (See part III.B., *post*.)

However, the People also presented evidence from which the jury could have found that Turk acted with implied malice in committing the killing. The trial court instructed the jury on this theory of murder. In his brief, Turk fails to identify any evidence, apart from voluntary intoxication, from which the jury could have concluded that he was entitled to an involuntary manslaughter instruction on the ground that he committed the killing, but that he did not act with implied malice.[12] For the reasons

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11 While a trial court has a sua sponte duty to instruct on involuntary manslaughter as a lesser included offense of murder where there is sufficient evidence that the defendant committed the killing in a state of unconsciousness induced by voluntary intoxication (*Halvorsen, supra*, 42 Cal.4th at p. 418), the trial court does not have a sua sponte duty to instruct the jury regarding the manner in which voluntary intoxication may be relevant to an element of a crime. (*Saille, supra*, 54 Cal.3d at p. 1120.)

12 Turk does claim that voluntary intoxication, to the point of unconsciousness, could render a person unable to act with conscious disregard for human life, and therefore, unable to act with implied malice. Turk argues, "Making the question even more complex yet is that even though intoxication cannot negate implied malice, nothing precludes the jury from considering whether an intoxicated state renders an accused

stated above, a defendant who kills without express malice due to voluntary intoxication can still act with implied malice. Turk has thus identified no evidence from which the jury could have found that he committed the lesser offense of involuntary manslaughter, but not the greater offense of murder. Therefore, the court was not required to give a lesser included offense instruction premised on this theory of involuntary manslaughter. (See *Cook, supra*, 39 Cal.4th at p. 596.)

b. *There was insufficient evidence of Turk's unconsciousness to warrant an involuntary manslaughter instruction premised on voluntary intoxication*

Turk's opening brief is ambiguous as to whether he is claiming that the trial court erred in failing to instruct on involuntary manslaughter on the ground that there was substantial evidence that he was unconscious due to voluntary intoxication.[13] To the extent that Turk intends to raise this claim, we reject it because the record does not contain sufficient evidence to warrant this instruction.[14]

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unconscious to the degree he was not fully aware of the nature of his acts and thus did not act in conscious disregard for human life." We consider whether there was sufficient evidence of unconsciousness to warrant an instruction on this theory of involuntary manslaughter in part III.A.4.b., *post*.

13 In his reply brief, Turk claims that the trial court should have instructed the jury regarding involuntary manslaughter pursuant to CALCRIM No. 626, which pertains to a killing committed by a defendant while unconsciousness due to voluntary intoxication.

14 We assume for purposes of this decision that a trial court should provide this instruction in cases in which one could conclude that voluntary intoxication led to unconsciousness. (But see *Boyer*, *supra*, 38 Cal.4th at p. 469, fn. 40.)

Even viewed in the light most favorable to Turk (*Stewart*, *supra*, 77 Cal.App.4th at pp. 795-796), the evidence he cites in his brief regarding his level of intoxication near the time of the killing is insufficient to support a finding that he was unconscious at the time of the killing. Ortega's testimony that Turk was a "little drunk" at the party clearly does not support a finding that Turk was so "grossly intoxicated" so as to be unconscious at the time he stabbed Howell. (*Abilez, supra,* 41 Cal.4th at p. 516.) Salinas's testimony that he overheard Turk tell someone, "I am drunk," is actually evidence that Turk "did *not* lack awareness of his actions." (*Halvorsen, supra*, 42 Cal.4th at p. 418, italics added.) Salinas's testimony regarding Turk's provoking the fight with Howell also suggests that Turk was conscious at the time of the killing. (See *ibid*. ["purposive nature of [defendant's] conduct," prior to killings suggested that defendant was conscious].) Further, Tricia Boice's testimony that on the day *after* the killing, Turk "reeked of alcohol," has little or no evidentiary value in determining Turk's level of intoxication at the time of the killing.

Young's and Woolwine's testimony indicating that Turk appeared highly intoxicated shortly after the killing and that Turk's intoxication resulted in a loss of coordination and nausea suggests that Turk was significantly intoxicated at the time of the killing. However, this testimony does not support the inference that Turk was so intoxicated as to be unconscious at the time of the killing.

Neither Young, Woolwine nor any other eyewitness testified that, prior to the killing, Turk appeared to "lack awareness of his actions" as a result of intoxication. (*Halvorsen, supra*, 42 Cal.4th at p. 418). Turk did not testify at trial and there is no

statement from him therefore that he lacked a recollection of the events preceding the killing. (*Ibid*. [stating that evidence that defendant did not "accurately recall certain details of the shootings does not support an inference he was unconscious when he committed them" and distinguishing cases in which "the defendants testified to a mental state consistent with unconsciousness and with prior statements to police"].)

Further, there was no expert testimony presented suggesting that the symptoms of intoxication that Turk exhibited, as described by Young and Woolwine, indicated unconsciousness stemming from intoxication. (Compare with *Hughes*, *supra*, 27 Cal.4th at p. 322 [noting existence of expert testimony "explain[ing] that most persons whose blood-alcohol level is between .25 and .35 percent would be 'stuporous' ─ that is, the person would have great difficulty getting up and moving about, and be very unsteady, incoherent, and disoriented ─ and that most persons with a blood-alcohol level above .35 percent would be 'unconscious,' that is, unable to stand erect or move without support, and would be unaware of their surroundings"].)

Further, Young and Woolwine's testimony that Turk appeared intoxicated does not, by itself, constitute evidence of unconsciousness. In *Ray*, the defendant presented expert testimony that the level of secrobarbital in his bloodstream on the day of the killing would have produced an effect equivalent to a blood alcohol level of .20 to .25 percent. (*Ray, supra*, 14 Cal.3d at p. 25, fn. 3.) Further, several witnesses testified that the defendant appeared "dazed" during two fights that ultimately culminated in the victim's death. (*Ibid*.) The *Ray* court nevertheless emphatically concluded that, "Defendant's contention that the court was required to instruct *sua sponte* on the defense

of unconsciousness fails because of a complete absence of factual support in the record." (*Id*. at p. 25.) The *Ray* court reasoned:

> "Testimony that he appeared dazed at times is entirely consistent with expert opinion that drugs ingested by defendant produced an intoxication which, together with the blows to his head, could have caused defendant to be 'quite confused in a mental sense.' No expert, however, testified that following the first altercation defendant thereafter continued to function in an unconscious state as a result of his experiences." (*Ray, supra*, 14 Cal.3d at p. 26.)

Similarly, in this case, Turk identifies no expert or eyewitness testimony that suggests that he was unconscious at the time of the killing.

Further, Turk does not suggest that there was any evidence of the amount of alcohol he ingested prior to the killing, or of his blood alcohol level at the time of the killing. (Compare with *People v. Graham* (1969) 71 Cal.2d 303, 311, disapproved on another ground by *Ray, supra*, 14 Cal.3d at p. 32 [concluding trial court erred in failing to instruct the jury regarding unconsciousness stemming from voluntary intoxication in case in which record contained evidence that on afternoon and evening of killing, defendant drank "a fifth of wine," two-thirds of "a pint of scotch," shared another fifth of wine with a second person and consumed a cube of sugar containing LSD].)

In sum, the evidence, when viewed in the light most favorable to Turk, indicates that prior to the killing, he had "consumed some unknown amount of alcohol" resulting in a level of intoxication short of the "grossly intoxicated" state of unconsciousness. (*Abilez, supra*, 41 Cal.4th at p. 516.) Accordingly, we conclude that the trial court did

not err in failing to instruct the jury sua sponte regarding involuntary manslaughter stemming from voluntary intoxication.[15]

B. *CALCRIM No. 625 correctly states the law regarding voluntary intoxication*

Turk claims that the trial court erred in instructing the jury pursuant to CALCRIM No. 625 because the instruction erroneously informed the jury that it could not consider Turk's voluntary intoxication in determining whether he harbored malice aforethought. Turk's primary contention is that while CALCRIM No. 625 informed the jury that it could consider his voluntary intoxication in determining whether he acted with the intent to kill, the instruction implied that the jury could not consider his voluntary intoxication in determining whether he acted with malice aforethought.

"The independent or de novo standard of review is applicable in assessing whether instructions correctly state the law . . . ." (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

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15 In light of our conclusion that the trial court did not have a sua sponte duty to instruct on involuntary manslaughter premised on voluntary intoxication, we need not consider the People's argument that the trial court adequately instructed the jury regarding this theory of involuntary manslaughter by instructing the jury on involuntary manslaughter pursuant to CALCRIM No. 580 and voluntary intoxication pursuant to CALCRIM No. 625. However, we note that the modified version of CALCRIM No. 580 that the court gave in this case did not refer to voluntary intoxication. (Compare with CALCRIM No. 626 [involuntary manslaughter premised on unconsciousness stemming from voluntary intoxication].) The trial court's involuntary manslaughter instruction was premised on a distinct theory of involuntary manslaughter. The instruction informed the jury that in order to find Turk guilty of involuntary manslaughter, it had to find, inter alia, that he "committed a crime that posed a high risk of death or great bodily injury because of the way in which it was committed."

1. *Factual and procedural background*

In instructing the jury regarding the offense of murder, the trial court gave instructions regarding the concepts of express and implied malice, pursuant to a modified version of CALCRIM No. 520. (See part III.A.2.b., *ante*.) The trial court instructed the jury regarding voluntary intoxication pursuant to a modified version of CALCRIM No. 625. (See part III.A.2.b., *ante*.)

2. *Governing law*

a. *Relevant statutory law*

Sections 187 and 188 define murder and malice aforethought, respectively. (See part III.A.3.a., *ante*.) Section 22, subdivision (b) limits the admissibility of evidence of a defendant's voluntary intoxication in a case in which the defendant is charged with murder to "whether the defendant premeditated, deliberated, or harbored express malice aforethought." (See part III.A.3.a., *ante*.)

b. *Voluntary intoxication and its relation to express and implied malice*

In the wake of *Saille*, *supra*, 54 Cal.3d 1103, the California Supreme Court has repeatedly stated that intent to kill and express malice are "in essence" the same concept. (*People v. Smith* (2005) 37 Cal.4th 733, 739 ["Intent to unlawfully kill and express malice are, in essence, 'one and the same,' *quoting Saille*, *supra*, 54 Cal.3d at p. 1114; *People v. Moon* (2005) 37 Cal.4th 1, 29 ["An intent to kill is the ' "functional equivalent" ' of *express* malice"].) Any distinction between the two concepts comes from the fact that

"unreasonable self-defense or a heat of passion defense can further reduce an intentional killing to voluntary manslaughter." (*People v. Swain* (1996) 12 Cal.4th 593, 601, fn. 2.)

3. *The trial court's instructions properly informed the jury that it could consider evidence of voluntary intoxication on the issue of express malice*

Turk argues, "[T]he jury would not have known it could consider the impact of intoxication upon malice aforethought - not unless the jury somehow knew that malice aforethought (express malice, that is) and specific intent were one and the same."[16] However, consistent with section 188 and *Saille*, the trial court specifically instructed the jury that, "The defendant acted with express malice if he unlawfully intended to kill." The court further instructed the jury that it could consider evidence of Turk's voluntary intoxication in deciding whether he had acted "with an intent to kill." Thus, considering the instructions as a whole, as we must (e.g., *People v. Campos* (2007) 156 Cal.App.4th 1228, 1237), the trial court adequately informed the jury that it could consider evidence of Turk's voluntary intoxication on the issue of express malice.

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16 In his argument regarding the failure of the trial court to instruct sua sponte regarding involuntary manslaughter, Turk contends that CALCRIM No. 625 is an incorrect statement of law because it precludes a jury from considering whether voluntary intoxication caused a defendant to become unconscious.

Where a trial court instructs a jury regarding voluntary intoxication resulting in unconsciousness, the bench notes to CALCRIM No. 625 provide that the court should include in the instruction the words "or the defendant was unconscious when he/she acted." In this case, the trial court properly did not include this language because the trial court did not instruct on voluntary intoxication resulting in unconsciousness.

We reject Turk's argument that Justice Brown's concurring opinion in *People v. Wright* (2005) 35 Cal.4th 964, 977 (*Wright*) supports his claim. In her concurring opinion in *Wright*, Justice Brown discussed the history of the California Supreme Court's efforts to define malice aforethought. (*Id*. at p. 979 (concur. opn. by Brown, J.).) In describing that history, Justice Brown noted that, pursuant to *People v. Conley* (1966) 64 Cal.2d 310, disapproved on another ground in *Ray, supra*, 14 Cal.3d at page 32, and superseded by statute as stated in *Saille, supra,* 54 Cal.3d at page 1114, California law regarding malice aforethought had previously provided that, "[a]n awareness of the obligation to act within the general body of laws regulating society . . . is included in the statutory definition of . . . malice. . . ." (*Wright, supra*, 35 Cal.4th at p. 981 (concur. opn. by Brown, J.), quoting *Conley, supra,* 64 Cal.2d at p. 322.) Justice Brown explained that decisions such as *Conley*, in which the Supreme Court interpreted malice as including a component of an awareness-of-civic duty, reflected an effort to distinguish malice from intent to kill:

> "If malice aforethought were closely tied to intent, then any factual defense that might disprove malice would also tend to disprove intent, making a voluntary manslaughter conviction inappropriate and voluntary manslaughter instructions unnecessary. But, by defining malice in a way that sharply distinguished it from intent, we created the possibility that the evidence might disprove malice but nevertheless establish an intentional unlawful killing, making a voluntary manslaughter conviction appropriate. In short, by an accretion upon the statutory definition of malice, we were able to create an element of murder that could be disproved by diminished capacity evidence without simultaneously disproving intent to kill. This accretion, therefore, provided the logical basis by which diminished capacity might reduce murder to voluntary manslaughter." (*Wright, supra*, 35 Cal.4th at pp. 977-978 (conc. opn. by Brown, J.).)

Turk claims that this quotation represents Justice Brown's "understanding of the law," and goes on to argue that a properly instructed jury could have determined that his intoxication prevented him from acting with malice, which he defines as acting without "an awareness of his duty to act in a lawful manner." We disagree.

First, and most fundamentally, the quotation in question did not represent Justice Brown's understanding of the law applicable at the time *Wright* was decided, nor does it represent current law. As Justice Brown herself made clear, in abolishing the diminished capacity doctrine in 1981, the Legislature "rejected the awareness-of-civic-duty gloss we had put on the definition of malice aforethought." (*Wright, supra*, 35 Cal.4th at p. 978 (conc. opn. by Brown, J.).) Referring to the same amendment of section 188 that was at issue in *Saille*, Justice Brown explained, "As amended, section 188 now provides: 'Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice.'" (*Wright, supra*, 35 Cal.4th at p. 978 (conc. opn. by Brown, J.); accord *Saille, supra*, 54 Cal.3d at p. 1114 [stating that amendment to section 188 "directly repudiates the expanded definition of malice aforethought in *People v. Conley, supra,* 64 Cal.2d 310"].) Thus, Justice Brown merely noted in her concurring opinion in *Wright* that California law pertaining to malice aforethought had *previously* contained an awareness-of-civic-duty component. Turk obviously was not entitled to have the jury instructed on the state of the law as it existed prior to 1981.

In any event, even assuming that Justice Brown intended to express the view that express malice remained distinct from an intent to kill, notwithstanding the 1981 amendment to section 188, the Supreme Court has repeatedly stated, both before and after Justice Brown wrote her concurring opinion, that express malice and intent to kill are, in essence, one in the same. (E.g. *People v. Smith*, *supra*, 37 Cal.4th at p. 739; *Saille, supra,* 54 Cal.3d at p. 1114.) We are bound by those opinions (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), not by Justice Brown's concurring opinion. (See, e.g., *People v. Franz* (2001) 88 Cal.App.4th 1426, 1442 ["a concurring opinion is not precedential authority"].)

Accordingly, we conclude that the trial court properly instructed the jury pursuant to CALCRIM No. 625.[17]

C. *Turk invited any error the trial court may have committed in failing to instruct on voluntary manslaughter based on imperfect self-defense; defense counsel did not provide ineffective assistance in requesting that the court not provide self-defense instructions*

Turk claims that the trial court erred in failing to instruct the jury on voluntary manslaughter based on imperfect self-defense. Turk also contends that his trial counsel provided ineffective assistance in requesting that the court not provide self-defense instructions.

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17 In view of our conclusion that the trial court did not err in instructing the jury pursuant to CALCRIM No. 625, we need not consider whether any instructional error would have been harmless, since Turk was convicted of second degree murder, and the jury was instructed on implied malice, for which evidence of Turk's voluntary intoxication was inadmissible.

1. *Factual and procedural background*

During the trial, the court held an unreported conference outside the presence of the jury with defense counsel and the prosecutor for the purpose of discussing jury instructions. The following day, during another hearing outside the presence of the jury, the trial court stated the following:

> "[The court:] Mr. [defense counsel], I have a note to myself that inquiry needs to be made on the record as to the self-defense instruction. [¶] Tentatively, what I believe the position of the defense is that they are not requesting self-defense instructions in this case, either standard self-defense instructions or imperfect self-defense because it is the defense's theory and posture that the defendant did not stab anybody. [¶] And although the defense is entitled to alternative theories, it's my understanding from last evening that the defense is not going to do so and is not requesting self-defense instructions. Mr. [defense counsel] have I stated that accurately?"

Defense counsel responded in the affirmative. The court requested that defense counsel confer with Turk on the record for the purpose of ensuring that Turk understood the decision and that he agreed with it. Defense counsel conferred with Turk and informed the court that he had explained the issue to Turk, and that Turk was in agreement. The trial court then asked Turk whether everything that defense counsel had just stated was accurate. Turk responded, "Yes, your honor."

The trial court did not instruct the jury regarding voluntary manslaughter based on imperfect self-defense, nor did the court instruct the jury regarding perfect self-defense.

2. *Governing law*

In *People v. Barton* (1995) 12 Cal.4th 186, 201 (*Barton*), the Supreme Court held that a trial court must instruct sua sponte on voluntary manslaughter premised on the

theory of unreasonable self-defense as a lesser included offense to murder when there is substantial evidence that the defendant killed in unreasonable self-defense. (Accord *Breverman*, *supra*, 19 Cal.4th at pp. 159-160 [approving *Barton* and stating "Under *Barton,* heat of passion and unreasonable self-defense, as forms of a lesser offense included in murder, thus come within the broadest version of the California duty to provide sua sponte instructions on all the material issues presented by the evidence," italics omitted].) The *Barton* court specifically rejected the defendant's argument that a trial court should not instruct on unreasonable self-defense voluntary manslaughter over a defendant's tactical objection. (*Barton, supra,* 12 Cal.4th at p. 196.)

> "'[U]nreasonable self-defense' is . . . not a true defense; rather, it is a shorthand description of one form of voluntary manslaughter. And voluntary manslaughter, whether it arises from unreasonable self-defense or from a killing during a sudden quarrel or heat of passion, is not a defense but a crime; more precisely, it is a lesser offense included in the crime of murder. Accordingly, when a defendant is charged with murder the trial court's duty to instruct sua sponte, or on its own initiative, on unreasonable self-defense is the same as its duty to instruct on any other lesser included offense: this duty arises whenever the evidence is such that a jury could reasonably conclude that the defendant killed the victim in the unreasonable but good faith belief in having to act in self-defense." (*Id*. at pp. 200-201.)

The *Barton* court explained that when a trial court improperly accedes to a defendant's tactical request not to provide an instruction that the court is required to provide sua sponte, "the defendant may not argue on appeal that in doing so the court committed prejudicial error, thus requiring a reversal of the conviction." (*Barton, supra*, 12 Cal.4th at p. 198.) "In that situation, the doctrine of invited error bars the defendant from challenging on appeal the trial court's failure to give the instruction." (*Ibid*.)

3. *Defense counsel invited any instructional error by requesting that the court not instruct on imperfect self-defense and providing a tactical reason for his request*

As Turk acknowledges, "[I]t is clear from the record that defense counsel intentionally did not request an instruction as to imperfect self-defense based voluntary manslaughter. . . ."[18] Further, as Turk also acknowledges, "defense counsel did, in fact, set forth tactical reasons for not instructing as to self-defense." The invited error doctrine thus bars Turk from prevailing on his contention that the trial court erred in failing to instruct the jury on voluntary manslaughter based on imperfect self-defense. (See *Barton, supra*, 12 Cal.4th at p. 198.)[19]

We reject Turk's contention that the doctrine of invited error does not apply because his trial counsel's stated reasons for requesting that the court not instruct on self-defense purportedly "do not withstand scrutiny." In *People v. Cooper* (1991) 53 Cal.3d 771, 831, the Supreme Court rejected the argument that a defendant can avoid the

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18 In fact, defense counsel affirmatively requested that the court not provide such an instruction.

19 Although Turk's brief focuses on the failure of the trial court to instruct on the lesser included offense of imperfect self-defense voluntary manslaughter, he also contends that the trial court erred in failing to instruct on the defense of perfect self-defense. Turk's trial counsel expressly requested that the court not instruct on the defense of perfect self-defense. Therefore, the court did not err in declining to instruct the jury on that defense. (*Barton, supra*, 12 Cal.4th at p. 195 ["a trial court's duty to instruct, sua sponte, or on its own initiative, on particular defenses is more limited [than its duty to instruct on lesser included offenses], arising 'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case'"].)

doctrine of invited error by asserting on appeal that trial counsel's tactical choice was incompetent:

> "We therefore hold that the record must show only that counsel made a conscious, deliberate tactical choice between having the instruction and not having it. If counsel was ignorant of the choice, or mistakenly believed the court was not giving it to counsel, invited error will not be found. If, however, the record shows this conscious choice, it need not additionally show counsel correctly understood all the legal implications of the tactical choice. Error is invited if counsel made a conscious tactical choice. A claim that the tactical choice was uninformed or otherwise incompetent must, like any such claim, be treated as one of ineffective assistance of counsel."

Similarly, in *People v. Beames* (2007) 40 Cal.4th 907, 927, the court noted that defense counsel expressed a deliberate tactical purpose in refusing lesser included offense instructions. The *Beames* court rejected the defendant's argument that defense counsel was required to provide greater analysis of his tactical choices in order for the doctrine to apply. (*Id*. at p. 928 ["Moreover, we are not persuaded to forgo application of the invited error doctrine based on the mere fact that defense counsel did not discuss the elements or the possible merits of these particular lesser included offenses in more depth than he did while addressing the court about the instructions"].)

4. *Turk has failed to demonstrate that defense counsel provided ineffective assistance in requesting that the court not provide any self-defense instructions*

Turk claims that his trial counsel provided ineffective assistance in requesting that the trial court not instruct the jury regarding perfect or imperfect self-defense.

a. *Factual and procedural background*

As the People note in the statement of facts in their brief, several witnesses testified that Turk instigated the fight that culminated in Howell's death. One witness who saw the beginning of the fight, David Carrel, testified that Turk intentionally dropped a can of beer in front of Howell and said to Howell, "Pick up my beer, bitch." After that, "[Turk] was standing in [Howell's] face, and made no effort to pick up the beer that he just dropped, like he did it on purpose. And he continued to start a fight with him." Another witness, Brian Allen, testified that shortly before the fight, "[Howell] was definitely backing down, trying to you know, diffuse the situation." Allen testified that Howell had "his hands back and open and he was backing up," just before two people "started to swing on him."[20]

During closing, defense counsel argued:

> "Mr. Turk did not commit this crime. He got into a fistfight with Paul Howell. He may have provoked and started the fistfight with Paul Howell. It was Messrs. Young, Anderson, and Cole or Thomas that escalated this and brought knives to a fistfight, not Mr. Turk."

b. *Governing law*

(i) *Ineffective assistance of counsel*

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below a standard of reasonable competence, and that there is a reasonable probability the result would have been more favorable in the absence

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20 Allen could not identify the two individuals in court.

of counsel's deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

(ii) *Relevant law regarding the right of self-defense*

"[A] defendant who ─ through his own wrongful conduct, such as initiating a physical assault or committing a felony ─ has created circumstances under which his adversary's attack or pursuit is legally justified may not invoke unreasonable self-defense." (*People v. Szadziewicz* (2008) 161 Cal.App.4th 823, ____, 74 Cal.Rptr.3d 416, 426; accord CALCRIM No. 3472 ["A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force"].)

"'[M]utual combat' consists of fighting by mutual intention or consent, as most clearly reflected in an express or implied *agreement* to fight." (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1046-1047.) The right of a mutual combatant to engage in self-defense is circumscribed. (*People v. Quach* (2004) 116 Cal.App.4th 294, 302.) "[T]he right to stand his ground and thus defend himself is not immediately available to him, but, instead he must first decline to carry on the affray, must honestly endeavor to escape from it, and must fairly and clearly inform his adversary of his desire for peace and of his abandonment of the contest unless the attack is so sudden and perilous that he cannot withdraw . . . ." (*Ibid.*, italics omitted, quoting *People v. Sawyer* (1967) 256 Cal.App.2d 66, 75, fn. 2; see also CALCRIM No. 3471.)

c. *Turk has failed to demonstrate that he would have been entitled to a jury instruction regarding either imperfect or perfect self-defense, if defense counsel had requested them*

In arguing that defense counsel was ineffective for failing to request jury instructions on perfect and imperfect self-defense, Turk fails to address any of the evidence that the People cite in their brief that suggests that Turk created circumstances under which Howell's response was legally justified. (*People v. Seaton* (2001) 26 Cal.4th 598, 664 [rejecting claim that trial court erred in failing to instruct jury on voluntary manslaughter stemming from imperfect self-defense where defendant failed to cite evidence supporting such an instruction].)

Further, in the statement of facts in his brief, Turk sets forth facts that support the conclusion that Turk engaged in mutual combat, stating, "[T]he evidence indicated that Turk at some point dropped a can of beer in front of Howell and then demanded that he pick it up. When Howell refused, words were exchanged and the two went into the backyard to settle the dispute by fighting." Turk fails to identify any evidence that would support a jury's finding that, notwithstanding his status as a mutual combatant, he was entitled to use self-defense. Turk has thus failed to demonstrate that the evidence warranted giving these instructions and that they would have been proper, if his counsel had requested them. Accordingly, Turk has failed to demonstrate that his counsel's performance was deficient. (See *People v. Slaughter* (2002) 27 Cal.4th 1187, 1221 [finding no ineffective assistance where defense counsel reasonably could have concluded that requesting jury instruction would have been futile].)

D. *The trial court did not err in preventing defense counsel from asking one of the witnesses why the witness did not believe that Turk had stabbed Howell*

Turk claims that the trial court erred under California law in preventing defense counsel from asking one of the prosecution's witnesses why the witness did not believe that Turk had stabbed Howell. We review a trial court's evidentiary rulings under the abuse of discretion standard of review. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113 (*Guerra*), disapproved on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151 ["The abuse of discretion standard of review applies to any ruling by a trial court on the admissibility of evidence"].)

Turk also claims that the trial court's ruling violated Turk's federal constitutional right to present a defense. We assume for purposes of this decision that the de novo standard of review applies to this contention. (See *People v. Cromer* (2001) 24 Cal.4th 889, 901 [noting Supreme Court generally applies independent review to claims based on constitutional rights].)

1. *Factual and procedural background*

On direct examination, Alan Anthonis testified that he was at the Louis Lane party and witnessed portions of the fight between Howell and Turk. However, Anthonis explained that his vantage point had been obscured during parts of the fight, and that during those instances he could not see Howell's body or face. In addition, Anthonis testified that he had been involved in a separate fight during the Howell/Turk fight. Anthonis explained that while he was involved in this fight he could not tell what was going on with the Howell/Turk fight. Anthonis testified that he learned that Howell had

been stabbed "after the backyard had cleared up." The prosecutor asked Anthonis, "How did you learn [Howell] was stabbed?" Anthonis responded that there was blood on Howell's shirt and that one of Howell's friends said, "Oh my God, he got stabbed."

During cross-examination, defense counsel asked Anthonis whether he remembered having told an investigator for the district attorney's office that he had not seen Howell being stabbed. Anthonis responded in the affirmative. At a later point in the cross-examination, the following colloquy occurred:

> "[Defense counsel]: And do you remember telling [an investigator for the district attorney] that you really didn't think [Turk] did it?
>
> "[The prosecutor]: Objection, your honor, calls for a legal conclusion.
>
> "[The court]: Sustained.
>
> "[Prosecutor]: Speculation.
>
> "The court: Stricken. The jury is not to consider that question.
>
> "[Defense counsel]: Do you remember telling the police that you felt like somebody else must have done it?
>
> "[The prosecutor]: Objection your honor. Calls for speculation.
>
> "The court: This entire subject is off-limits, Mr. [defense counsel]. This witness's opinion of who did it is not germane. It's up to the jury."

Defense counsel then asked Anthonis, "But you did not see ─ you did not see the stabbing; is that correct?" Anthonis responded, "No, I did not see the stabbing." Defense counsel asked, "Okay. So you don't know who did the stabbing?" Anthonis replied,

"No." Defense counsel proceeded to ask a series of questions about what Anthonis had observed during and immediately after the Howell/Turk fight.

After Anthonis was excused, the trial court admonished defense counsel, outside the presence of the jury, about asking questions that required speculative answers. The trial court stated, "Witnesses who may have witnessed the stabbing or seen knives are certainly free to testify as to what they saw, but witnesses who did not see the stabbing are not free and should not be asked, even if they are future witnesses . . . Mr. [defense counsel], as to their opinion on who might or might not have stabbed the victim." Defense counsel suggested that he thought he could ask such questions because "no one saw the stabbing," and certain witnesses had suggested, "it could have only happened right over here when this happened . . . ."

The trial court clarified its ruling, stating in part:

> "If there was a future witness that saw the knife, saw the victim moments before they first saw blood and had their eyes on it the whole time, then such a witness is going to be able to testify in more detail regarding their opinions, based on what they actually saw. [¶] But witnesses, basically, who have not seen the stabbing and have seen only what they have said about it so far, is not going to be free to offer opinions, which is another word for speculation, as to who stabbed whom and when. [¶] So that's the ruling. And, you know, obviously, if there is a witness who saw more than I have heard from witnesses so far, they are going to be able to be asked in more detail about what could have or could not have happened in a physical sense in terms of time, location, et cetera. But to ask them just open-ended questions of whether they felt someone else could have done it or this or that is not relevant and not proper and should not be asked in the future. And I will rule on those as they come."

2. *Governing law*

a. *California law*

Evidence Code section 210 provides, "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

Evidence Code section 800 provides:

> "If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is:
>
> "(a) Rationally based on the perception of the witness; and
>
> "(b) Helpful to a clear understanding of his testimony."

"'"[A] lay witness may testify in the form of an opinion only when he cannot adequately describe his observations without using opinion wording."' [Citation.]" (*People v. Callahan* (1999) 74 Cal.App.4th 356, 380 (*Callahan*).) "For example, testimony that another person was intoxicated [citation] or angry [citation] or driving a motor vehicle at an excessive speed [citation] conveys information to the jury more conveniently and more accurately than would a detailed recital of the underlying facts." (*People v. Chapple* (2006) 138 Cal.App.4th 540, 547.) In contrast, "'Where the witness can adequately describe his observations, his opinion or conclusion is inadmissible because it is not helpful to a clear understanding of his testimony.' [Citations.]" (*Callahan, supra*, 74 Cal.App.4th at p. 380.)

In *People v. Thornton* (2007) 41 Cal.4th 391, 429 (*Thornton*), the Supreme Court applied Evidence Code section 800 in considering whether a trial court had erred in sustaining a prosecutor's objection to defense counsel's cross-examination of a witness to an assault. The witness testified on direct examination that she had witnessed a struggle between two occupants of a moving vehicle. (*Thornton, supra*, 41 Cal.4th at p. 427.) The witness saw the vehicle swerving on the road and observed the male driver strike the female passenger several times. (*Ibid*.) The witness testified that the male appeared angry and that the female appeared frightened. (*Ibid*.) On cross-examination, defense counsel asked the witness whether it appeared from the behavior of the vehicle occupants that they knew each other. (*Id.* at p. 428.) The prosecutor objected to the question as calling for speculation. (*Ibid*.) The trial court sustained the objection. (*Ibid*.)

On appeal, the Supreme Court concluded that the trial court had not abused its discretion in sustaining the prosecutor's objection. The court reasoned:

> "[W]e cannot second-guess the court's ruling that asking the witness whether she thought the two vehicle occupants were acting as if they knew each other was speculative. The court was implicitly ruling that the question called for a conjectural lay opinion. Such evidence would not be '[h]elpful to a clear understanding of [the witness's] testimony.' (Evid. Code, § 800, subd. (b).)" (*Thornton, supra*, 41 Cal.4th at p. 429.)

b. *A defendant's federal constitutional right to present a defense*

" 'The state and federal Constitutions guarantee the defendant a meaningful opportunity to present a defense.' [Citation.]" (*People v. Woods* (2004) 120 Cal.App.4th 929, 936.) However, "[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense. [Citation.]" (*People v.*

Mincey (1992) 2 Cal.4th 408, 440 (*Mincey*).) Included among these rules of evidence are rules that preclude the introduction of irrelevant evidence (Evid. Code, § 210) and lay opinion evidence (Evid. Code, § 800).

In *People v. Boyette* (2002) 29 Cal.4th 381, 427, the court explained that an error regarding a "garden-variety evidentiary question[]" does not constitute a violation of a defendant's constitutional right to present a defense:

> "'Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. [Citation.] If the trial court misstepped, "[t]he trial court's ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense." [Citation.]'" (*Id*. at p. 428.

3. *The trial court neither abused its discretion under California law nor violated Turk's constitutional right to present a defense in limiting defense counsel's cross-examination of Anthonis*

It was clear from the prosecutor's direct examination of Anthonis that Anthonis had not seen the stabbing. Further, on cross-examination, Anthonis testified that he had told an investigator that he had not seen the stabbing. In addition, the trial court did not restrict defense counsel's cross-examination of Anthonis regarding what Anthonis had personally observed. Under these circumstances, the trial court could have reasonably concluded that Anthonis's beliefs as to who had committed the stabbing would be speculative and irrelevant, and thus not helpful to the jury in understanding Anthonis's testimony. (See *Thornton, supra*, 41 Cal.4th at p. 429; Evid. Code, §§ 210, 800.)

The questions defense counsel posed concerning what Anthonis thought and felt sought far more speculative answers than the questions defense counsel asked in *Thornton*. In *Thornton*, the witness actually saw a struggle between two people and was asked whether it appeared the individuals in the struggle knew each other. (*Thornton, supra*, 41 Cal.4th at p. 428.) In this case, Anthonis did not see the stabbing, and defense counsel asked Anthonis about statements Anthonis allegedly made regarding who he thought or felt "must have done it."

With respect to Turk's claim that the trial court's ruling violated his right to present a defense, "[b]ecause he did not raise this claim before the trial court, he has forfeited it. [Citation.]" (*Thornton*, *supra*, 41 Cal.4th at p. 427.) In any event, the trial court's ruling constituted no more than the "[a]pplication of the ordinary rules of evidence" (*Mincey, supra*, 2 Cal.4th at p. 440), and clearly did not violate Turk's constitutional right to present a defense.

E. *The trial court did not err in admitting Chris's hearsay statements regarding inculpatory statements Turk made shortly after the killing, pursuant to the prior consistent statement exception to the hearsay rule*

Turk claims the trial court erred in allowing Nicholas to testify regarding statements Chris made to him regarding inculpatory statements Turk made shortly after the killing, pursuant to the prior consistent statement exception to the hearsay rule. We apply the abuse of discretion standard of review to this claim. (See *Guerra, supra*, 37 Cal.4th at p. 1113.)

1. *Factual and procedural background*

a. *Chris's testimony*

On direct examination, Chris testified that he gave Turk and Young a ride from the party shortly after the stabbing. Chris described various statements that he heard Turk make during the ride, as follows:

> "[The prosecutor]: And as you were driving, was there any dialogue going back and forth between Turk and Young?
>
> "[Chris]: Yes.
>
> "[The prosecutor]: What, if anything, did you hear them say?
>
> "[Chris]: [Turk] and [Young] were talking. [Turk] was saying, 'That was cool. It felt good to stab him.'
>
> "[The prosecutor]: Did he say anything else?
>
> "[Chris]: Not that I recall.

Chris stated that Turk appeared to be "pumped on a high." Chris continued to describe the conversation as follows:

> "[The prosecutor]: What did you make of what he was telling you?[21]
>
> "[Chris]: That he was excited that he won the fight.
>
> "[The prosecutor]: After he said that — he actually said, 'It felt good to stab him?'
>
> "[Chris]: That I recall. I am not sure if it was 'stab him', or that 'it felt good,' or that was bad ass.'

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21 Although this question implies that Turk was talking to Chris, the prosecutor had previously asked Chris whether he had heard a conversation between Turk and Young.

"[The prosecutor]: So he said, 'That was bad ass,' too?

"[Chris]: Somewhere in there. I am not really sure."

Chris reiterated that Young and Turk were talking back and forth with each other and that they seemed excited.

During cross-examination, Chris testified that the first time that he informed police that Turk had gotten into Chris's truck on the night of the murder was during an interview in March 2006. Defense counsel attempted to impeach Chris's testimony regarding Turk's statements in the truck in various ways. For example, defense counsel asked Chris whether he had told police that he had not listened to the conversation between Young and Turk:

> "[Defense counsel]: Did you ever tell the police that you did not really listen to what they were saying in the back of the truck?
>
> "[Chris]: Yes.
>
> "[Defense counsel]: And —
>
> "[Chris]: I didn't hear their conversation too well. I heard a couple of things."

Defense counsel also elicited that Chris was intoxicated at the time. Defense counsel then asked Chris, "[D]o you recall during any of your interviews, did you ever feel, like threatened by an arrest?" Chris responded, "That I could get in trouble, yes." Defense counsel asked whether one of the police officers had told Chris during the interview that the police were not planning to arrest him "right then." Chris responded in the affirmative. Defense counsel continued, "And when he said that, did you kind of feel that that was an implied threat that you had to come up with something or you might get

arrested?" Chris responded, "No. I knew that they ─ before I even went in there, that they knew what was going on, what I knew."

On redirect examination, the prosecutor asked Chris, "Even though you were drinking, do you specifically recall when Shaun Turk got in your truck, him saying that it felt good to stab him?" Chris responded in the affirmative. Chris also agreed with the prosecutor that Turk had said, "That was cool." In addition, Chris indicated that either Young or Turk had said something about, "That was bad ass."

On recross-examination, defense counsel asked Chris the following question regarding a March 2006 interview of Chris by police: "And did you tell them in the March interview that you could not say 100 percent what they were saying in the truck?" Chris responded, "Yes. I didn't hear everything." The court asked, "What did you just say?" Chris testified, "I said I didn't hear everything they were saying. I was mainly talking to my brother Justin . . . ."

On further redirect examination, the prosecutor asked a few final questions regarding the conversation that had taken place in the truck:

> "[The prosecutor]: Now, with regard to what [the] defense was asking you about you could not hear everything, but what you told us was all you could hear; is that true?"
>
> "[Chris]: Yes.
>
> "[The prosecutor]: So there could have been more, you just didn't hear it."
>
> "[Chris]: Yes."

b. *Nicholas's testimony*

During direct examination, the prosecutor asked Nicholas whether, on the Monday following the murder, Chris had indicated to him that he knew how Young and Turk had left the Louis Lane party. Nicholas replied that Chris had told him that he had given Young and Turk a ride from the party. The prosecutor continued, "Did he [Chris] indicate to you whether Shaun Turk had said anything about the stabbing of Paul Howell?" Nicholas responded in the affirmative. Defense counsel objected and stated, "Multiple hearsay." The court sustained the objection. The People requested a sidebar conference, which the court granted.

Immediately following the sidebar conference, the following colloquy occurred:

> "[The prosecutor]: Mr. [Nicholas] Cole did you have a conversation with your brother, Chris Cole, . . . Monday following the murder of Paul Howell?"
>
> "[Nicholas]: Yes.
>
> "[The prosecutor]: During that conversation, do you recall whether Chris Cole indicated to you anything that Shaun Turk had said as he was driving them away from the party?"
>
> "[Nicholas]: He said that Turk was on like a high, somewhat amped up from what he had just did, bragging about it."
>
> "[The prosecutor]: Do you recall . . . anything specific that your brother said to you that Shaun Turk had said to him?
>
> "[Nicholas]: Basically, it felt good."

During a break in the proceedings, outside the presence of the jury, the trial court stated that the court wanted to memorialize for the record the unreported sidebar conference that had occurred during Nicholas's testimony. The trial court noted that

during the sidebar conference, the prosecutor had argued that Nicholas's testimony regarding Chris's statement was being offered as a prior consistent statement to "buttress either the credibility or accuracy of Chris Cole's original testimony." The trial court explained further:

> "Chris Cole had testified that he had heard Turk say that it felt good to stab the victim, and that Turk appeared to be on a high while they were both in the truck on the way home from the party. [¶] During cross-examination of Chris Cole, Chris Cole's testimony was attacked on cross-examination by the defense. And as a prior consistent statement, then, if Chris Cole had, indeed, told this witness, Nick Cole, the same thing that he testified to here, about the statements Turk made on the way home from the party, then that would, in the court's view, be a proper prior consistent statement to rehabilitate and reconfirm Chris Cole's testimony in court about what he had heard. And if Chris Cole told the jury and told his brother substantially the same thing, then that would be a prior consistent statement."

The court then asked defense counsel if he wished to restate his objection for the record. Defense counsel argued that the statements were not admissible as prior consistent statements because the prosecutor had failed to first ask Chris about the statements that Chris made to Nicholas before asking Nicholas about the statements. Further, defense counsel argued that he had not been provided any discovery indicating that Chris had made such statements to Nicholas.

The court responded that it did not believe that there was any requirement that the People have first presented independent evidence of Chris's statement to Nicholas before introducing such evidence through Nicholas. Accordingly, the court reaffirmed its ruling and overruled the defense's objection.

2. *Governing law*

Evidence Code section 1236 provides:

> "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791."

Evidence Code section 791 provides:

> "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:
>
> "(a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or
>
> "(b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen."

3. *The trial court did not abuse its discretion in admitting Nicholas's testimony regarding Chris's statements*

Turk claims that the trial court erred in admitting Nicholas's testimony regarding Chris's statements because the statements were hearsay, and were not admissible pursuant to Evidence Code section 1236 and Evidence Code section 791, subdivisions (a) or (b).[22]

In his opening brief Turk claims, "[D]efense counsel did not attempt to impeach [Chris's] credibility concerning what he claimed to have heard Turk say while in the car

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22 We assume for purposes of this decision that Turk's objections in the trial court were sufficient to preserve his claim on appeal.

[truck]," and argues that the introduction of prior consistent statements was thus improper The contention that defense counsel did not attempt to impeach Chris's credibility is belied by the portions of the record quoted above. Defense counsel attempted to impeach Chris regarding his testimony about the statements Turk made while in Chris's truck, in several ways. First, on cross-examination, Chris agreed with defense counsel's question that in a March 2006 police interview, Chris had told police that he had "not really listen[ed]," to Turk and Young's conversation. Chris also agreed with defense counsel that he "could not say 100 percent," what Turk and Young were saying during the conversation. While the gist of Chris's testimony was that he had not heard all of the conversation between Turk and Young, the statements Chris made during the police interview were "sufficiently inconsistent . . . to warrant introduction of the prior consistent statement. . . ." (*People v. Cook* (2007) 40 Cal.4th 1334, 1358.) Further, the consistent statements Chris made to Nicholas were directly related to those aspects of Chris's testimony that the defense challenged. The statements were thus admissible pursuant to Evidence Code section 791, subdivision (a).

Second, defense counsel asked Chris whether he felt that police had threatened to arrest him during any of his interviews, and whether Chris believed that he had to "come up with something," in order to avoid arrest. Defense counsel thus plainly suggested that Chris had fabricated his testimony, or that his testimony had been influenced by an

improper motive. The prior consistent statements were therefore also admissible pursuant to Evidence Code section 791, subdivision (b).[23]

IV.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

AARON, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.

[23] It is undisputed that Chris's statements to Nicholas were made in December 2004, well before the March 2006 police interview. Thus, the requirement in Evidence Code section 791, subdivision (a) that the consistent statement have been made before the "alleged inconsistent statement," and the requirement in Evidence Code section 791, subdivision (b) that the consistent statement have been made before the "improper motive is alleged to have arisen" were both met.