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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL ROBERT GENOVESE, Defendant and Appellant.	C055486 (Super. Ct. No. 06F00478)

APPEAL from a judgment of the Superior Court of Sacramento County, Gail D. Ohanesian, J. Affirmed.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette and Michael P. Farrell, Assistant Attorneys General, Carlos A. Martinez and Wanda Hill Rouzan, 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 II of the DISCUSSION.

A jury convicted defendant Michael Robert Genovese of second degree murder in the killing of Douglas Sanford (Pen. Code, § 187; undesignated statutory references are to the Penal Code), rejecting the prosecution's theory of first degree murder and the defense theory of manslaughter based on imperfect defense of another. The jury also found that defendant personally used a deadly weapon, a knife. (§ 12022, subd. (b)(1).) Sentenced to a prison term of 15 years to life, plus one year for weapon use, defendant claims prejudicial instructional error.

In the published portion of the opinion, we shall review the standard series of CALCRIM homicide instructions given the jury. We shall conclude there was no instructional error.

In the unpublished portion of the opinion, we conclude the trial court did not commit prejudicial error by giving the jury modified versions of CALCRIM Nos. 3471 and 3472.

We shall therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant intervened fatally in a fistfight between the victim and defendant's step-uncle, Bob Fitch, on January 14, 2006. The People argued defendant planned to kill the victim; defendant testified he was trying to stop the victim from beating Bob Fitch to death. However, defendant originally admitted to police that the use of deadly force was unnecessary.

In August 2006, defendant was charged with murder, with personal use of a knife.

At trial, Bob Fitch did not testify, other than to answer questions about his height and weight when called as a defense witness. He said his height was five feet, 10 inches, and his weight at the time of the killing was 225 or 230 pounds, which he then revised (after a sidebar) to say he had lost weight and was as low as 198 at the time in question.

At the time of death, the victim was five feet, 11 inches tall, and weighed 207. Defendant stands five feet, eight or nine inches tall, and weighed about 130 pounds at the time of the killing (though he weighed 170 at the time of trial).

Other trial evidence included the following:

The victim was engaged to marry Bob Fitch's ex-girlfriend, Toni Roberts. Roberts testified she dated Bob Fitch for about three years and was employed by the trucking business owned by Bob Fitch and his brother Jim Fitch.[1] Roberts broke up with Bob Fitch before Memorial Day 2005. She initially tried to remain friends because he said he had cancer. However, Bob Fitch found it difficult to let go of the failed relationship and harassed Roberts with phone calls, late-night visits, and threats. She described him as an aggressive and angry person, more so when he drank alcohol. The harassment drove Roberts to leave her job in October 2005, but Bob Fitch continued to harass her.

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[1] Our references to Jim Fitch are to Bob's brother, not Jim Fitch's son, James.

Meanwhile, Roberts met the victim on June 12, 2005, and eventually agreed to marry him. At the time of the killing, they were living on his boat at the Oxbow Marina.

In the evening of January 13, 2006, Bob Fitch went to the Elk Grove Brewery with his teenage daughter Megan and her then boyfriend Ricky Vallenza. Vallenza drove Bob's vehicle because Bob had already been drinking alcohol and continued to drink in the car and at the restaurant. Bob Fitch hoped Roberts would be there, but she was not. Around 9:30 p.m., the Fitch party drove to a convenience store, where Bob bought a knife, and then went to the Oxbow Marina, where he slashed the tires on Roberts's and the victim's vehicles, cutting his own hand in the process. Vallenza and Megan took the knife away from him.

The Fitch party parked nearby, with Bob Fitch yelling Roberts's name and leaving cell phone messages for her. Around 11:00 p.m., Roberts and the victim came up from the dock. Bob Fitch emotionally accosted Roberts. Everyone told Bob Fitch he was drunk and needed to go home. The victim called 911. The Fitch party drove away.

A deputy sheriff arrived at 11:37 p.m. and observed the slashed tires and blood.

The victim and Roberts fixed the flat tires and moved the victim's truck to a different area. They returned to the boat and discovered Bob Fitch had left a phone message saying he was taking the kids home and would be back in 45 minutes. The victim left the boat, stating he was going to retrieve his jacket from his truck.

Meanwhile, the Fitch party went to the home of Julie Fitch (ex-wife of Bob Fitch's brother and "stepmom" to defendant). Defendant and several other persons were present. Vallenza told them what happened. Defendant asked to see the knife and then put it in his own pocket.

Bob Fitch's brother, Jim Fitch (with whom defendant was living at the time), arrived a half hour later and found Bob Fitch sitting in the car, "drunk off his ass," with beer cans in the car. Bob Fitch said he wanted to go back to the marina and "kick this guy's ass." Bob Fitch stated about six times that he wanted to kill the victim, he wanted to see the victim dead and uninvolved with Roberts. Bob Fitch kept asking for his car keys, though he was "falling-down drunk" and had an injured hand. The family brought Bob Fitch into the house and tried to stop his bleeding. Jim called 911 because he did not want to fight with Bob and felt it best to have police intervention. The police did not come right away.

Defendant and others decided to tell Bob Fitch they would take him to the marina, but take him to the hospital instead. Defendant volunteered to drive. Megan, who was concerned about her father and heard defendant say, "[C]ome on, let's go beat someone up," told her boyfriend (Vallenza) to go with them.

Defendant drove his own car, with Bob Fitch in the passenger seat, and Vallenza in the back seat. Within a half hour, they returned to retrieve gas money. Vallenza decided to stay at Julie's home.

Jim Fitch testified the plan changed at that point. Defendant planned to drive Bob Fitch around to cool him off and then take him home. Bob Fitch was still talking about going back to the marina. Jim Fitch told defendant not to go near Highway 12, because it led to the marina.

Defendant nevertheless followed Bob Fitch's directions and drove Bob Fitch to the marina, where they encountered the victim.

Defendant's version of events, as related in a videotaped police interview played for the jury, evolved during the interview. He said Bob Fitch, while at Julie Fitch's home, said he "want[ed] him [the victim] dead." Defendant drove Bob around to sober him up. Defendant first said he followed Bob Fitch's directions because defendant was unfamiliar with the area and did not know where they were going. Defendant then said he "[k]ind of" knew they were seeking the victim, but defendant planned simply to drive by the marina "so [Bob Fitch] can stop tripping about it . . . ."

Defendant said they arrived at the marina and saw Roberts's vehicle, driven by the victim, who pulled up and asked if Bob Fitch was in the car.[2] Bob said, "I'm right here." The victim pulled up and blocked defendant's car. The victim and Bob Fitch hopped out of the vehicles. Defendant thought he saw something

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[2] In contrast, the jury heard an audiotape of 911 calls made by the victim around 2:00 a.m., stating he was in his vehicle in the parking lot and was afraid because the person who had slashed his tires and threatened him was in a vehicle right behind him.

small in the victim's hand -- not a gun, but an object that the victim held as if to swing it.[3] The victim and Bob Fitch tackled each other and rolled around on the ground, hitting each other.

Defendant first said he yelled at Bob Fitch to stop and tried to pull him off the victim. Defendant said he may have kicked the victim, but not intentionally. Defendant finally succeeded in pulling Bob Fitch away as the victim screamed, "I'm dying, Bob. I'm dying. Stop. Stop." Defendant said he did not see anyone get stabbed. Defendant said he saw the knife in Bob's hand as they drove away, and defendant took the knife and threw it out the car window. Defendant's car got stuck, so he called Julie Fitch's home, and she came to pick them up.

The detective left the room, and defendant telephoned Julie and said he was going to tell the police the truth.

The detective returned, said he talked to Bob Fitch and had a clearer idea what happened. The detective read defendant his *Miranda* rights.

Defendant admitted he stabbed the victim in the back but said he did it because he was "scared for Bob." Defendant thought it was only once or twice (though the victim had eight stab wounds). Bob Fitch and the victim rolled over, with Bob Fitch now on top, holding the victim down while the victim continued to hit Bob Fitch. Defendant kicked the victim in the head on purpose, because the victim was hurting Bob Fitch. The

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[3] No such object was found on the ground. A .25 caliber gun and a cell phone were found in the victim's pockets.

victim said, “Bob, I’m dying.” Defendant saw a car coming and told Bob they had to leave. Defendant ran to his car, and Bob followed.[4]

Defendant stated in the police interview that he did not mean to kill the victim but stabbed him, “because I was scared. I . . . thought he was going to kill Bob. . . . He was beating the crap out of Bob. I thought he was going to kill Bob.”

Upon further questioning, defendant said he knew Bob’s life was not in danger, he knew stabbing could be fatal, and it was not necessary to kill the victim. Defendant said he did it because he “[j]ust wasn’t thinking. It just happened so fast.” The detective asked, “why would you take deadly force action in that situation? It wasn’t necessary. Was it necessary?” Defendant responded, “No Sir.”

When asked why he drove Bob Fitch to the marina when Bob was threatening to kill the victim, defendant gave several answers, i.e., he did not know; he thought Bob wanted only to beat up the victim rather than kill him; and he thought Bob wanted only to finish slashing the tires.

The detective then brought in Bob Fitch, who kept repeating he did not stab anyone. Defendant explained he was the one who stabbed the victim. Bob claimed he did not plan to kill the

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[4] The motorist testified he saw a male kick something and saw one person (larger than defendant) running away. The motorist stopped and found the victim, who said, “help me” in a shallow breath. The jury was told the parties stipulated the motorist in his 911 call said he saw “two guys” running away.

victim but planned only to tell the victim that he (Bob) had had sex with Roberts a few days earlier.

Defendant showed the police the location where he threw the knife, but it was not found.

The jury heard evidence that Bob Fitch was combative when taken into police custody near dawn and tried to kick out the window of the patrol car. A deputy testified Bob Fitch had dried blood all over his face and clothing and some blood on his hand. He also had abrasions, a swollen cheek, and an inch-long cut on his forehead, which could be consistent with getting hit by someone wearing a ring. The police took him to the hospital, where the dried blood was scrubbed off and he received three stitches to the forehead and a tetanus shot. The jury saw a police photograph of Bob Fitch.[5] By the time Bob Fitch's blood was tested at 3:45 p.m., no alcohol was present, but the jury heard evidence concerning the burn-off rate of alcohol. No alcohol was detected in the blood of defendant or the victim.

The victim died of multiple stab wounds. He sustained stab wounds on the back, lower left side of the chest, right side, upper back (four wounds), and right upper arm near the shoulder. The victim also sustained contusions, abrasions and small lacerations on the face and scalp.

At trial, defendant testified in his own defense. He was 20 years old at the time of the killing. He took the knife at

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[5] Defendant says no police photos were taken of Bob Fitch. However, the cited page of the transcript shows only that a deputy sheriff testified it was not he who took photos.

Julie's home, thinking it would be harder for Bob to get it from defendant than from Bob's daughter, Megan. (Defendant thought he took the knife from Megan, though other evidence indicated he took it from her boyfriend.) Defendant testified the victim struck the first blow. Defendant said he stabbed the victim in the back once or twice. The victim kept beating Bob. Bob kept taking the hits. Defendant turned to look at an approaching car. When defendant turned back, Bob was on top of the victim, but the victim was still hitting Bob. Defendant kicked the victim once. Defendant tried to push Bob off of the victim but could not, so defendant went back to his car. Bob followed. Bob appeared to be injured.

Defendant said he did not intend to, nor did he want to, kill the victim. Defendant intervened out of concern for the welfare of Bob, who was like family to defendant. Bob gave him a job when he needed one, and the Fitch family took defendant in. Defendant had heard that Bob had throat cancer and therefore assumed Bob was weak. "And the way [the victim] was beating him, I didn't -- I -- I felt that I had to come in and help him, to save him, because if Doug -- if Doug would have kept beating him like he was, there's no telling, he could have killed Bob." Defendant explained his conflicting statement to the police (that he did not think Bob's life was in danger) by saying, "I was scared to say that I stabbed [the victim]." Defendant admitted he realized before the interview that he had stabbed the victim. Bob's brother Jim told defendant before the

interview “to choose your words wisely. My brother’s life is at stake.”

On cross-examination, defendant admitted he now knew what the law of self-defense was but did not know at the time of his police interview. Defendant admitted he was sober at the time of the killing; he knew Bob was drunk and very angry, and defendant heard Bob talking at Julie’s house about wanting to kill the victim. When confronted with inconsistencies between his trial testimony and his police interview (e.g., his denial that he knew they were going to the marina conflicts with his prior statement that he knew they were going to the marina but thought Bob just wanted to slash more tires), defendant said he was scared and tired at the police interview and gave some answers he thought the detective wanted to hear, just so defendant could go home. Defendant denied the statement attributed to him by Vallenza, i.e., that defendant wanted to go back and finish what Bob could not.

Julie Fitch testified that, when she picked up defendant and Bob Fitch at the marina area, defendant said he stabbed the victim to save Bob’s life. Bob Fitch was saturated in blood from head to toe. On cross-examination, she admitted she loves defendant like a son. She took away Bob Fitch’s car keys before the incident because she believed him when he said he wanted to kill the victim and did not care if he (Bob) landed in prison because he had no reason to live. On the drive home, Bob Fitch was happy and thrilled and said, “we really got that guy good.”

The jury found defendant guilty of second degree murder and found true the knife allegation.

The trial court sentenced defendant to a prison term of 15 years to life for murder, plus one year for the enhancement.

DISCUSSION

I. Instruction Re Voluntary Manslaughter

Defendant contends the trial court denied his federal and state constitutional rights to due process, a fair trial, and the right to present a defense, because the jury instructions on voluntary manslaughter were defective. Defendant contends the jury was erroneously not told (1) imperfect defense of another eliminates malice, and (2) imperfect defense of another can exist where a defendant, acting with conscious disregard for life, *unintentionally* kills in unreasonable defense of another.

As to the first point, we shall conclude it does not matter that the instructions failed to inform the jury specifically that imperfect defense of another would eliminate malice, because the instructions as a whole adequately covered the concept.

As to the second point, we shall conclude there was no error in the CALCRIM instructions.[6]

A. Instructions Given to Jury

The trial court instructed the jury:

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[6] The CALCRIM instructions were amended while this appeal was pending but not in any way that affects the outcome of this appeal.

"[CALCRIM No. 500] Homicide is the killing of one human being by another. Murder and manslaughter are types of homicide. The defendant is charged with murder. Manslaughter is a lesser offense to murder."

"A homicide can be lawful or unlawful. If a person kills with a legally valid excuse or justification, the killing is lawful and he has not committed a crime. If there is no legally valid excuse or justification, the killing is unlawful and, depending on the circumstances, the person is guilty of either murder or manslaughter. You must decide whether the killing in this case was unlawful and, if so, what specific crime was committed."

"[CALCRIM No. 505] The defendant is not guilty of murder or manslaughter if he was justified in killing someone in defense of another. The defendant acted in lawful defense of another if:

"1. The defendant reasonably believed that Robert Fitch was in imminent danger of being killed or suffering great bodily injury;

"2. The defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger;

"AND

"3. The defendant used no more force than was reasonably necessary to defend against that danger.

"Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of great bodily

injury to Robert Fitch. Defendant's belief must have been reasonable and he must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the killing was not justified.

"When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

"The defendant's belief that Robert Fitch was threatened may be reasonable even if he relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true.

"[No retreat requirement.]

"*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

"The People have the burden of proving beyond a reasonable doubt that the killing was not justified. If the People have not met this burden, you must find the defendant not guilty of murder or manslaughter."

"[CALCRIM No. 520] The defendant is charged in Count 1 with murder.

“To prove that the defendant is guilty of this crime, the People must prove that:

“1. The defendant committed an act that caused the death of another person;

“AND

“2. When the defendant acted, he had a state of mind called malice aforethought.

“AND

“3. He killed without lawful excuse or justification.

“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:

“1. He intentionally committed an act;

“2. The natural consequences of the act were dangerous to human life;

“3. At the time he acted, he knew his act was dangerous to human life;

“AND

“4. He deliberately acted with conscious disregard for human life.

“[Describing malice aforethought and natural/probable consequences.]

“[Distinction between first and second degree murder.]

"[Reduction to voluntary manslaughter for sudden quarrel or heat of passion.]"

The court also instructed the jury on imperfect defense of others (pursuant to CALCRIM No. 571), as follows:

"A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect defense of another.

"If you conclude the defendant acted in complete defense of another, his action was lawful and you must find him not guilty of any crime. The difference between complete defense of another and imperfect defense of another depends on whether the defendant's belief in the need to use deadly force was reasonable.

"The defendant acted in imperfect defense of another if:

"1. The defendant actually believed that Robert Fitch was in imminent danger of being killed or suffering great bodily injury;

"AND

"2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger;

"BUT

"3. At least one of those beliefs was unreasonable.

"Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be.

"In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant.

"Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

"The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect defense of another. If the People have not met this burden, you must find the defendant not guilty of murder."

B. Analysis

1. Legal Principles

Our standard of review is de novo where the question is one of law involving the determination of applicable legal principles. (*People v. Alvarez* (1996) 14 Cal.4th 155, 217.)

A killing is voluntary manslaughter when the defendant, acting with *conscious disregard* for life and the knowledge that the conduct is life-endangering, *unintentionally* kills while having an unreasonable but good faith belief in the need to act in self-defense. (*People v. Blakely* (2000) 23 Cal.4th 82, 88-91.) A killing is also voluntary manslaughter when the defendant, acting with conscious disregard for life and the knowledge that the conduct is life-endangering, unintentionally but unlawfully kills in a sudden quarrel or heat of passion. (*People v. Lasko* (2000) 23 Cal.4th 101, 108-111.)

California recognizes the doctrine of imperfect defense of another. (*People v. Randle* (2005) 35 Cal.4th 987, 994-1001.) One who kills in imperfect defense of another -- in the actual but unreasonable belief he must defend another from imminent

danger of death or great bodily injury -- lacks malice and is guilty only of manslaughter. (*Id*. at pp. 996-997.)

Under the doctrine of defense of another, reasonableness is tested from the point of view of the defendant, not the point of view of the person being defended. (*Randle, supra*, 35 Cal.4th at pp. 999-1000.) Although some states adopted an "alter ego" rule (under which one who attempts to defend another person steps into the shoes of the other person and so acts at his peril if that person was in the wrong), California applies the view that one coming to the defense of others is protected by the mistake-of-fact doctrine and may act upon the situation as it reasonably seems to be. (*Id*. at pp. 997-1001.)

In *Randle*, the defendant and his accomplice were caught burglarizing a car. (*Id*. at p. 991.) The defendant and his accomplice fled, but the car owner and a relative (collectively burglary victim) chased them, caught and beat the accomplice, recovered the stolen property, returned to the victim's truck, and then returned to the accomplice and resumed beating him severely. (*Id*. at p. 991.) The defendant pulled out his gun and killed the burglary victim. (*Id*. at p. 992.) The Supreme Court held the trial court prejudicially erred in refusing to instruct the jury on the doctrine of imperfect defense of another. (*Id*. at pp. 1002-1004.) If the defendant killed in the actual but unreasonable belief that he had to defend another from imminent danger of death or great bodily injury, he was guilty of manslaughter, not murder, because he lacked the malice required for murder. In contrast to *self*-defense, which is lost

if the defendant creates circumstances justifying his adversary's attack (*In re Christian S*. (1994) 7 Cal.4th 768, 771), the defendant could invoke the "defense of another" doctrine, even though his own criminal conduct set in motion the series of events that led to the fatal shooting, because the retreat of the defendant and his accomplice and the subsequent recovery of the stolen items extinguished the legal justification for the victim's attack on the defendant's accomplice. (*Randle, supra*, 35 Cal.4th at pp. 1002-1004.) Similarly, *imperfect self*-defense is an available defense when the victim's use of force against the defendant is unlawful, even when the defendant set in motion the chain of events that led the victim to attack the defendant. (*People v. Vasquez* (2006) 136 Cal.App.4th 1176 [trial court should have instructed the jury on imperfect self-defense where defendant confronted victim with an accusation, the victim began to choke the defendant, and the defendant pulled out a gun and shot the victim].)

2. Malice

As for defendant's complaint that the jury was not told imperfect defense of another eliminates malice, it does not matter that the CALCRIM instructions failed to inform the jury that imperfect defense of another would eliminate malice. As we have set forth above, the jury was told, in a series of instructions, what different kinds of acts and situations would reduce the crime from murder to voluntary manslaughter. It is immaterial that the jury was not informed that, in fact, what

was going on was that the jury was finding an absence of malice. As Justice Corrigan has explained in her Preface to the CALCRIM jury instructions, "our work reflects a belief that sound communication takes into account the audience to which it is addressed." (CALCRIM jury instructions, Vol. 1, Preface, p. xi.) "Malice is another word of multiple meanings in criminal law . . . ." (1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, § 11, p. 213.) The definition of malice may be interesting to lawyers and judges and law professors, but it does not aid the task of lay jurors to inform them that, when the defendant acts in an honest but unreasonable belief in the need to defend another, he is acting without malice. Consequently, the CALCRIM instructions are not erroneous in their failure to tell the jury the role that malice (or lack of malice) plays in reducing murder to voluntary manslaughter.

3. Conscious Disregard

Defendant argues the instructions did not inform the jurors they could find him guilty of voluntary manslaughter if they found that he, while acting in imperfect defense of another (or sudden quarrel or heat of passion), killed either intentionally or unintentionally with conscious disregard for human life.

Either an intent to kill or a conscious disregard for life is an essential requirement of voluntary manslaughter in this scenario. (*Blakely, supra*, 23 Cal.4th at pp. 88-91; *Lasko, supra*, 23 Cal.4th 101.)

Defendant argues the trial court should have expressly instructed the jury that intent to kill or conscious disregard

for life is an essential element of voluntary manslaughter, in accordance with *Blakely* and *Lasko*, and the failure to do so left the jurors with no way to apply defendant's proffered defense to the elements of express or implied malice to ascertain whether these elements had been proven beyond a reasonable doubt. We disagree.

Thus, although the jury was not expressly instructed in that manner, the jury *was* instructed, "A killing *that would otherwise be murder* is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect defense of another." (Italics added.) Similarly, the jury was instructed, "A killing *that would otherwise be murder* is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion."

The killing could not "otherwise be murder" unless the jury found defendant intended to kill the victim or acted with conscious disregard for human life, and the jury was so informed in the instruction defining murder (i.e., that to prove murder, the prosecution must prove defendant acted with malice aforethought, and there are two kinds of malice aforethought--express, which requires intent to kill, and implied, with requires conscious disregard for human life).

Thus, the instructions did let the jury know that a killing in imperfect self-defense (or heat of passion, etc.), whether intentional or in conscious disregard of life, is voluntary manslaughter.

Defendant argues the language, "killing that would otherwise be murder," was faulty for failing to inform the jury that voluntary manslaughter could be found despite the existence of an intent to kill or conscious disregard for life. This argument is not well taken. Defendant says intent to kill or conscious disregard for life used to be expressly stated as an essential element of voluntary manslaughter in former CALJIC No. 8.40, which defined voluntary manslaughter and said that every person who unlawfully kills another human being without malice aforethought but either with an intent to kill, or with conscious disregard for human life, was guilty of voluntary manslaughter. Language similar to former CALJIC No. 8.40 now appears in CALCRIM No. 572, which defines voluntary manslaughter when murder is not charged. (CALCRIM No. 572.) Here, voluntary manslaughter was a lesser offense of murder. Defendant argues that, since no instruction tracking former CALJIC No. 8.40 was given in this case, once the jury determined that express or implied malice was present in defendant's case, they were given no instructions telling them that *even if* they found this to be true, they could still find defendant guilty of voluntary manslaughter if they believed he acted in heat of passion or in reasonable/unreasonable defense of Bob Fitch. But defendant's argument is defeated by the plain language of the instructions as given to the jury, that "[a] killing that would otherwise be murder is reduced to voluntary manslaughter" if defendant acted in imperfect defense of another or sudden quarrel or heat of passion.

We conclude there was no error in the jury instructions on voluntary manslaughter.

II. Modified CALCRIM Nos. 3471 And 3472

Defendant contends the trial court erred in instructing the jury with modified versions of CALCRIM Nos. 3471 and 3472, limiting application of self-defense or defense of another if defendant provoked the fight in order to create an excuse to use force, or aided and abetted Bob Fitch, and Bob Fitch was the initial aggressor or a mutual combatant or contrived the defense. We see no reversible error.

A. Background

The prosecutor asked the court to instruct the jury with CALCRIM Nos. 3471[7] and 3472,[8] which on their face limit a

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[7] The standard CALCRIM No. 3471, as revised in April 2008, states, "A person who engages in mutual combat or who is the initial aggressor has a right to self-defense only if: [¶] 1. (He/She) actually and in good faith tries to stop fighting; [AND] [¶] 2. (He/She) indicates, by word or by conduct, to (his/her) opponent, in a way that a reasonable person would understand, that (he/she) wants to stop fighting and that (he/she) has stopped fighting(;/.) [¶] < *Give element 3 in cases of mutual combat* > [¶] [AND [¶] 3. (He/She) gives (his/her) opponent a chance to stop fighting.]

"If a person meets these requirements, (he/she) then has a right to self-defense if the opponent continues to fight. [¶] If you decide that the defendant started the fight using non-deadly force and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend (himself/herself) with deadly force and was not required to try to stop fighting.]"

[8] Current CALCRIM No. 3472 provides, "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."

defendant's right to claim *self*-defense if he contrived the defense or was the initial aggressor or mutual combatant. The prosecutor wanted the court to adapt these instructions to include defense of another.[9]

The trial court questioned the applicability of these instructions to the doctrine of defense of another.

Defense counsel initially said he had no objection to CALCRIM No. 3472, but later said he objected to the text, though he had no objection to the principle reflected in the title of the instruction, that the right to the defense may not be contrived. Defense counsel argued the instructions did not apply, because *Randle, supra*, 35 Cal.4th at page 1000, held the reasonableness of a claim of defense of another is tested from the point of view of the defendant, not from the point of view of the person being defended. *Randle* rejected the "alter ego rule," under which one who attempts to defend another person would step into the shoes of the other person, and so act at his peril if that other person was in the wrong. (*Id*. at pp. 997-1000.)

The trial court concluded that, just as imperfect self-defense has limitations, imperfect defense of another also has

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[9] CALCRIM Nos. 3471 and 3472 appear under a subheading of "SELF-DEFENSE AND DEFENSE OF ANOTHER" (CALCRIM No. 3470 et seq.) under the heading of "DEFENSES AND INSANITY." The trial court was not asked to and did not instruct with CALCRIM No. 3470, which addresses "Right to Self-Defense or Defense of Another (Non-Homicide)." However, as we have indicated, the trial court did instruct the jury with CALCRIM No. 505, "Justifiable Homicide: Self-Defense or Defense of Another."

limitations. For example, said the court, "the imperfect self-defense doctrine would not permit a fleeing felon who shoots a pursuing police officer to escape a murder conviction even if the felon killed his pursuer with an actual belief in the need [to protect himself]. [¶] I find it inconceivable that using the same example, imperfect defense of others, would permit a third person who was fully aware of the context of the circumstances to shoot the pursuing police officer and still escape a murder conviction if the third person killed the pursuer with an actual belief in the need for a defense of others. [¶] The case at bar is not whether the defendant saw Robert Fitch being attacked and had to decide whether to intervene without knowing the full context of the circumstances. [¶] Although it appears that this is uncharted territory, I find that the application of perfect or imperfect defense of others in the case at bar is not without some limitations particularly if the jury were to find that the defendant . . . was an aider and abettor of Robert Fitch in mutual combat or as an aggressor in provoking a fight."

Although neither side was urging a theory of aiding and abetting, the prosecutor had requested jury instructions on aiding and abetting because "the defense has, through the presentation of their questions and the evidence that they presented, created a scenario where they might intend to argue that the defendant only stabbed [the victim] one or two times, left the scene, walked back to the car, left Bob Fitch there. [¶] And a specific question from [defense counsel] was, to the

defendant, is it possible Bob Fitch had a knife, and I believe the answer was yes. [¶] So I certainly think that there's a possibility that they are going to make an argument that, you know, hey, Bob Fitch could have inflicted those fatal wounds. And so if that happens, I certainly would want to argue to the jury, hey, you know, either way, he's guilty, whether he did the fatal stabbing himself or he aided and abetted Bob in doing that."

The trial court accordingly instructed the jury with a modified version of CALCRIM No. 3471, as follows:

"If you find that defendant is an aider and abettor of Robert Fitch as otherwise instructed, and that Robert Fitch has engaged in mutual combat or was the first one to use physical force, defendant has a right to defense of others only if:

"1. He or Robert Fitch actually and in good faith has tried to stop the fighting;

"AND

"2. He or Robert Fitch has indicated, by word or by conduct, to Douglas Sanford, in a way that a reasonable person would understand, that he or Robert Fitch wants to stop the fighting and that he or Robert Fitch has stopped fighting;

"AND

"3. He or Robert Fitch has given Douglas Sanford a chance to stop fighting.

"If defendant has met these requirements, he then has a right to defense of Robert Fitch if Douglas Sanford continues to fight.

"If you decide that Robert Fitch started the fight using non-deadly force and Douglas Sanford responded with such sudden and deadly force that Robert Fitch could not withdraw from the fight, then the defendant had the right to defend Robert Fitch with deadly force and was not required to stop the fighting."

The court also instructed the jury with a modified version of CALCRIM No. 3472, that "[a] person does not have the right to self-defense or defense of others if he has provoked or if he aids and abets a person who has provoked a fight or quarrel with the intent to create an excuse to use force."

The trial court also gave general instructions on aiding and abetting murder, as well as aiding/abetting assault with force likely to produce great bodily injury with murder as a natural and probable consequence.

In closing argument to the jury, the prosecutor argued this was a case of first degree murder -- that defendant was "pumped up" from the excitement of the evening's events, knew Bob was saying he wanted to kill the victim, pocketed Bob's knife, deliberately took Bob back to the marina, and provoked the fight (even though defendant did not throw the first punch) so that defendant could "finish" for Bob what Bob could not finish. The prosecutor argued against self-defense or defense of others and argued, "You're not entitled to this defense if he [defendant] provoked or instigated the fight. [¶] You're also not entitled to this defense if you aid and abet somebody in provoking a fight or initiate a fight. [¶] In criminal law . . . you're guilty for the crimes that you commit and you're also guilty for

the crimes where you aid and abet your partner in crime. [For example], the guy driving the car in [a] gang shooting . . . . [¶] And we'll talk a little bit about aiding and abetting. But just know that if your buddy starts to fight and you were aiding and abetting your buddy, then again you're not entitled to this defense. [¶] Aiding and abetting we don't have to worry about too much because it's our position the defendant himself is the one that provoked this entire event."

Defense counsel did not argue that anyone other than defendant stabbed the victim. Defense counsel argued to the jury that the prosecution had two theories -- premeditated murder and aiding/abetting. Defense counsel argued the aiding/abetting theory did not apply but was being used by the prosecution to "get around" the defense of others.

In rebuttal argument, the prosecutor told the jury, "You know, my first theory is the defendant directly is the participant who killed Doug Sanford, but the second fall-back theory is this aiding and abetting. It wasn't really my theory. It's a fall-back theory designed to address scenarios where the Defense might get up here and argue something differently. [¶] If the Defense were to get up here and say well, the defendant only stabbed him one time, and then remember he left and walked back to the car. [¶] So it's very possible, Ladies and Gentlemen, that Bob Fitch is the one who inflicted those final, fatal blows. [¶] If that is an argument that would have been addressed by Defense, then this aiding and abetting is the law that would still hold the defendant responsible. [¶] . . . [¶]

[T]he defendant would be guilty as an aider and abettor. That's not the way the facts went in this case. [¶] The Court, in an abundance of caution, is going to instruct you on aiding and abetting, but the Court's also gonna tell you that not all of the instructions necessarily apply. [¶] . . . [¶] And I can tell you right now that the instructions you're gonna hear on aiding and abetting, natural and probable consequences, you can just set those aside and disregard those because that's not the theory that I'm proffering. It's certainly nothing the Defense was arguing. It was more of the safety valve. So you don't need to worry about that."

During deliberations, the jury asked:

1. Whether CALCRIM No. 3472 (that the defense may not be contrived) applied to imperfect defense of another, as well as defense of another.

2. Whether there was a definition of second degree murder.

3. Whether the statement in CALCRIM No. 3472 -- "with the intent to create an excuse to use force" -- referred to a person, fight, or quarrel.

The trial court responded, after discussion with counsel:

"1. Yes.

"2. Instruction 520 defines murder. Instruction 521 defines first degree murder. Any murder that does not meet the definition of first degree murder is deemed second degree murder.

"3. Please clarify your question."

The jury did not clarify the question but returned their verdict that day.

B. Analysis

1. Modified CALCRIM No. 3471

We begin by observing the instruction told the jurors to apply modified CALCRIM No. 3471 only if they found defendant aided and abetted Bob Fitch in the specified conduct. The jury was given general instructions regarding aiding and abetting with respect to murder as the target offense and murder as the natural and probable consequence of a target offense of assault with force likely to cause great bodily harm. Defendant does not assign error to the general aiding/abetting instructions given to the jury. Moreover, as defendant acknowledges, neither the prosecution nor the defense urged the aiding/abetting theory on the jury.

Defendant has four arguments about modified CALCRIM No. 3471: (a) It is inapplicable because there was insufficient evidence of mutual combat; (b) there was no evidence Bob was the aggressor; (c) even assuming aiding/abetting instructions applied, defendant could still assert the defense of another based on his own mens rea; and (4) the instruction was confusing because no one argued aiding/abetting. We shall conclude there was no reversible error.

a. Evidence of Mutual Combat

Instructions limiting the right of self-defense are erroneous if not applicable to any evidence in the case.

(*People v. Miles* (1962) 201 Cal.App.2d 708, 709.) We see no reason to apply a different standard to defense of another.

Defendant argues the facts did not support modified CALCRIM No. 3471, because there was no evidence that Bob Fitch was a mutual combatant.

Defendant cites *People v. Fowler* (1918) 178 Cal. 657, that mutual combat referred to a duel or other fight begun or continued by mutual consent or agreement, express or implied. Defendant cites *People v. Ross* (2007) 155 Cal.App.4th 1033 (published after defendant's trial), which involved a prosecution for battery causing serious bodily injury, arising from a social gathering where the defendant engaged in a hostile verbal exchange with a woman (who was bigger than he was). (*Id*. at pp. 1038 and 1040, fn. 6.) She slapped him. He responded with a blow (or blows), fracturing her cheekbone. (*Id*. at p. 1036, 1040.) The trial court told the jury to use the common, everyday meaning of "mutual combat." (*Id*. at p. 1036.) The appellate court said this was error because in ordinary speech "mutual combat" might describe any violent struggle, however it came into being. (*Id*. at p. 1044.)

Ross held "mutual combat" has a particular legal meaning, i.e., "fighting by mutual intention or consent, as most clearly reflected in an express or implied *agreement* to fight. The agreement need not have all the characteristics of a legally binding contract; indeed, it necessarily lacks at least one such characteristic: a lawful object. But there must be evidence from which the jury could reasonably find that *both combatants*

actually consented or intended to fight before the claimed occasion for self-defense arose." (*Id*. at pp. 1046-1047.) The "common intention or desire must precede the first assaultive conduct, or at least the first conduct sufficient to trigger a right of self-defense in its target. If A triggers such a right in B by striking him, B does not forfeit that right merely because the blow makes him 'want to fight.' Hot blood may cause him to exercise the right unreasonably, and to that extent he will forfeit it. But his 'want[ing] to fight' does not make it a case of mutual combat." (*Id*. at p. 1045, fn. 14.)

Ross, supra, 155 Cal.App.4th 1033, also held the trial court should not have instructed on mutual combat at all because the evidence showed (at best for the prosecution) an exchange of belligerent comments culminating in an impulsive and unexpected blow by the alleged victim to which defendant responded with a combination, flurry, or barrage of blows. (*Id*. at p. 1052.) This did not mean the defendant was entitled to strike the victim. The jury must decide whether the defendant responded with reasonable force to avert a threat of violence against his person. (*Id*. at p. 1054.)

Defendant argues the fight in our case was spontaneous, there was no evidence that Bob Fitch and the victim prearranged to fight, and neither defendant nor Bob Fitch "knew" the victim was going to be there. Although Bob was threatening the victim all night long, defendant says it was just talk, and Bob was a blowhard, and Bob did not try to hit the victim when they met earlier that night.

Defendant's argument is flawed because it assumes the jury must accept his evidence and inferences. However, the evidence clearly supported a conclusion that Bob Fitch was a mutual combatant. There was abundant evidence that Bob went looking for the victim to kill him. There was also evidence supporting an inference that the victim understood he might encounter Bob, i.e., the victim had a gun in his pocket and did not merely retrieve his jacket from the vehicle (as he had stated to Roberts as the purpose for leaving the boat knowing Bob had threatened to come back) but rather was operating the vehicle.

We conclude substantial evidence supported the instruction on mutual combatant.

b. Evidence of Bob Fitch as the First to Use Force

Defendant argues there was no evidence supporting an inference that Bob Fitch was the first to use physical force. We disagree.

Defendant merely reiterates his interpretation of the evidence and argues any contrary interpretation would be mere suspicion and not a reasonable inference. We disagree. The evidence clearly supported an inference that Bob Fitch threw the first punch, including evidence that the victim called 911 from the vehicle, suggesting his anger was tempered by fear, whereas Bob Fitch was itching for a fight.

c. Defendant's Mens Rea

Defendant argues that, even assuming aiding and abetting instructions applied, he could still assert the defense of another based on his own state of mind. However, while we agree

defense of another is evaluated from the point of view of the defendant, rather than the person being defended (*People v. Randle, supra*, 35 Cal.4th 987), the instructions did not interfere with this principle.

The point of *Randle* is that one who comes to the defense of another "'is protected by the usual mistake-of-fact doctrine and may act upon the situation as it reasonably seems to be.'" (*Randle, supra*, 35 Cal.4th at p. 1000, fn. 4, quoting *Perkins & Boyce*, Criminal Law (3d ed. 1982) Self-Defense, § 5, pp. 1144-1145.)

Here, if defendant aided and abetted Bob Fitch in murder or in committing an assault with force likely to produce great bodily injury (as instructed by the trial court), then defendant's point of view is linked with Bob Fitch's point of view under the circumstances of this case, where defendant was with Bob Fitch the whole time. Defendant did not come upon the scene mid-fight.

Defendant's position, as clarified in his reply brief, is: If the evidence did not establish that *he* was the initial aggressor or mutual combatant, "but only aided and abetted Bob in the assault on [the victim] when [defendant] believed reasonably or unreasonably that [the victim] was going to cause Bob great bodily harm or death, then he [defendant] was entitled in his own right to defend Bob and the jury should have been so instructed. This is so even if Bob would not have otherwise been entitled to a self-defense instruction."

This clarification by defendant does not do justice to the jury instructions actually given. Defendant assumes he had no aiding/abetting liability until he used the knife to stab the victim. This ignores the instructions, which told the jury aiding/abetting was shown if defendant's words or conduct aided/abetted Fitch in assaulting the victim.

Defendant misreads *Randle, supra*, 35 Cal.4th 987, as supposedly holding that, once the burglary victim (through his companion) used deadly force against one of the burglars, the other burglar's right of defense came into being (even though the burglars had set the chain of events in motion), because the burglary victim's actions were no longer justified. However, the critical point was not that the burglary victim used deadly force, but that he used deadly force *after the legal justification ended*, i.e., after the burglars retreated and the victim recovered his stolen property and placed it in his truck. (*Id*. at pp. 1002-1003.)

Defendant claims the instructions did not make the distinction that, if the victim responded to a non-deadly attack with deadly force, then defendant's right to self-defense (he presumably means defense of another) came into being. However, the jury was so instructed, as follows: "If you decide that Robert Fitch started the fight using non-deadly force and [the victim] responded with such sudden and deadly force that Robert Fitch could not withdraw from the fight, then the defendant had the right to defend Robert Fitch with deadly force and was not required to stop the fighting."

Defendant quotes from *People v. McCoy* (2001) 25 Cal.4th 1111, that "when a person, with the mental state necessary for an aider and abettor, helps or induces another to kill, that person's guilt is determined by the combined acts of all the participants as well as that person's own mens rea. If that person's mens rea is more culpable than another's, that person's guilt may be greater even if the other might be deemed the actual perpetrator." (*Id*. at p. 1122.) In *McCoy*, two defendants -- McCoy and Lakey -- were involved in a drive-by shooting. Both fired their handguns, although McCoy's gun inflicted the fatal wounds. (*Ibid*.) McCoy argued he fired in (unreasonable) self-defense. (*Id*. at p. 1115.) The question before the Supreme Court was whether reversal of McCoy's convictions for instructional error required reversal of Lakey's conviction on the ground an aider/abettor could not be guilty of a greater offense than the actual perpetrator. (*Id*. at pp. 1114, 1116.) The Supreme Court said both defendants were to some extent perpetrators and aiders/abettors. (*Id*. at p. 1122.) Once the jury found, as it clearly did, that Lakey acted with the necessary mental state of an aider/abettor, it could find him liable for both his and McCoy's acts, without having to distinguish between them. But Lakey's guilt was also based on his own mental state, not McCoy's. McCoy's unreasonable self-defense theory was personal to him. A jury could reasonably have found that Lakey did not act under reasonable self-defense, even if McCoy did. Thus, Lakey's murder conviction could stand,

notwithstanding that on retrial McCoy might be convicted of a lesser crime or even acquitted. (*Ibid*.)

Defendant says this case presents a role reversal of *McCoy*, because here it was defendant who actually killed the victim, but he arguably could also have aided/abetted Bob Fitch in the assault of the victim by driving Bob to the marina. Nonetheless, says defendant, he could also have had an independent mens rea that opened the door to defense of another, even though Bob would not have a similar defense, because defense of another is used to negate the mental state of the actual actor, not the mental state of the aider/abettor (which according to defendant would have been Bob Fitch, who did not engage in any stabbing of the victim).

We reiterate the jury was instructed in connection with defense of another that, "[w]hen deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. . . . [¶] . . . [¶] The defendant's belief that Robert Fitch was threatened may be reasonable even if he relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true."

Thus, the jury was properly instructed to determine defendant's culpability with respect to his own knowledge and state of mind.

As indicated, defendant does not assign error to the general aiding/abetting instructions given to the jury. Moreover, as defendant acknowledges, neither the prosecution nor the defense urged the aiding/abetting theory on the jury.

We see no interference with principles concerning defendant's mens rea.

d. Claim that Instruction was Confusing

Defendant argues that, because no one argued aiding/abetting, modified CALCRIM No. 3471 was inapplicable and confusing.

However, the jury was instructed, "Some of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them."

Viewing the instructions as a whole (*People v. Kelly* (1992) 1 Cal.4th 495, 525-526), we see nothing confusing. Even assuming the instruction was defective, defendant's argument illustrates why any error was harmless. The jury was instructed that some instructions may be inapplicable, depending on their findings. Defendant testified he personally stabbed the victim. The prosecutor withdrew any aiding and abetting theory in closing argument to the jury. Moreover, the jury questioned CALCRIM No. 3472 but not CALCRIM No. 3471. It is inconceivable that the jury convicted defendant on a theory of aiding and abetting and that the instruction prejudiced defendant.

Viewing the record as a whole, we conclude beyond a reasonable doubt that modified CALCRIM No. 3471 did not constitute reversible error.

2. Modified CALCRIM No. 3472

As we have mentioned, the trial court instructed the jury with modified CALCRIM No. 3472 as follows:

Defendant argues the facts did not support giving modified CALCRIM No. 3472, which said, "A person does not have the right to self-defense or defense of others if he has provoked a fight or he aids and abets a person who has provoked a fight or quarrel with the intent to create an excuse to use force." We disagree.

Defendant views this instruction as particularly damaging because the prosecution's theory was that defendant was the initial aggressor who set the chain of events in motion. However, the instruction does not impose culpability merely for setting a chain of events in motion. Rather, the defendant must have set the events in motion with the intent to create an excuse to use force.

Defendant says there was no evidence supporting the instruction, because only three people were there, and defendant was the only one who testified. If the jury believed defendant, then the victim was the aggressor. Defendant says he only had a little blood on his shoestrings, and if he had been the aggressor, surely he would have some defensive wounds or more blood on him. However, defendant ignores the testimony of various persons at Julie Fitch's home, that defendant said he

would help Bob Fitch beat up the victim. It was for the jury to decide whether defendant meant it or was merely attempting to pacify Bob Fitch. That defendant drove Bob Fitch to the marina where the victim lived would support a finding that defendant meant what he said. Thus, this case is distinguishable from defendant's cited authority, *People v. Hatchett* (1944) 63 Cal.App.2d 144, where there was no evidence that the defendant sought a quarrel with the deceased to contrive the defense.

Defendant repeats his contention that *Randle, supra*, 35 Cal.4th 987, allows defense of another to be "resurrected" by the unlawful actions of the victim, even if the defendant set the chain of events in motion. However, the burglary victim's use of force in *Randle* was unjustified because the burglars had already retreated and the victim had already recovered his property. Here, Bob Fitch did not retreat from fighting the victim at any time before defendant inflicted the fatal stab wounds.

Defendant complains that, in giving modified CALCRIM No. 3472, the court did not instruct the jury, as the court did with modified CALCRIM No. 3471, that if the jurors found the victim responded to a non-deadly attack with deadly force and Bob Fitch was unable to withdraw from the fight, defendant would be justified in defending Bob. However, the trial court had just given that instruction in the preceding paragraph, and defendant cites no authority entitling him to a separate similar instruction in connection with the instruction that defense of another is unavailable if the defendant provoked or

aided/abetted a person who provoked a fight with the intent to contrive the defense.

Finding no error, we need not address defendant's argument concerning prejudice.

We reject defendant's claim that the cumulative effect of instructional errors requires reversal.

We conclude defendant fails to show grounds for reversal.

DISPOSITION

The judgment is affirmed.

SIMS, Acting P. J.

We concur:

RAYE, J.

HULL, J.