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CERTIFIED FOR PUBLICATION
COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

AMALIA CATHERINE BRYANT,

Defendant and Appellant.

D057570

(Super. Ct. No. SWF014495)

APPEAL from a judgment of the Superior Court of Riverside County, Timothy F. Freer, Judge. Reversed with directions.

Anthony J. Dain, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, James H. Flaherty III and Kristen Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

A jury found Amalia Catherine Bryant not guilty of first degree murder, but guilty of second degree murder (Pen. Code, §§ 187, subd. (a), 189).¹ The jury also found that Bryant personally used a deadly or dangerous weapon within the meaning of section 12022, subdivision (b)(1), in committing the murder. The trial court sentenced Bryant to an aggregate term of 16 years to life in prison.

On appeal, Bryant claims that the trial court erred in failing to instruct the jury, *sua sponte*, on the lesser included offenses of voluntary manslaughter (§ 192, subd. (a)) and involuntary manslaughter (§ 192, subd. (b)). With respect to voluntary manslaughter, Bryant claims that the trial court committed reversible error in failing to instruct the jury, *sua sponte*, pursuant to *People v. Garcia* (2008) 162 Cal.App.4th 18 (*Garcia*), that an unintentional killing committed without malice during the course of an inherently dangerous assaultive felony constitutes voluntary manslaughter. With respect to involuntary manslaughter, Bryant contends that the trial court was required to instruct the jury to consider whether she was guilty of misdemeanor manslaughter based on an unlawful killing occurring in the commission of the misdemeanor offense of brandishing a deadly weapon (§ 417, subd. (a)(1)). Bryant also claims that the court was required to instruct the jury to consider whether she was guilty of involuntary manslaughter based on

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

an unlawful killing occurring in the commission of a lawful act done with criminal negligence.

We conclude that the trial court committed reversible error by failing to instruct the jury on the theory of *voluntary* manslaughter articulated in *Garcia*. We reject Bryant's contention that the court erred in failing to instruct the jury on *involuntary* manslaughter. We reverse the second degree murder conviction and permit the People to retry Bryant on a charge of second degree murder. If the People do not bring Bryant to retrial on a charge of second degree murder, the judgment shall be modified to reflect a conviction for voluntary manslaughter, and the trial court shall resentence Bryant accordingly.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The prosecution's evidence*

1. *Bryant's relationship with the victim*

Bryant and victim Robert Golden (Robert) started dating in late 2003, a few months after Robert graduated from high school. In the spring of 2004, Bryant discovered that she was pregnant with twins. In the summer of 2005, Bryant and Robert moved in together. During the fall of 2005, Robert told several people that he was unhappy in the relationship and that he wanted to leave Bryant.

2. *The stabbing*

On November 24, 2005, which was Thanksgiving Day, Bryant and Robert went to Robert's aunt's house for dinner. Robert and Bryant left at approximately 7:30 p.m.

After they had returned home, Robert's mother, Andrea Golden (Andrea), stopped by Robert and Bryant's apartment for a short time. Robert was playing video games and told Andrea that Bryant had gone to bed.

At about 8:45 p.m., several neighbors heard Bryant screaming for help. The neighbors went to Robert and Bryant's apartment. Robert was lying in the doorway of the apartment on his stomach, face down, and Bryant was next to him. Bryant was hysterical and was screaming, "Someone call 911," "Please call an ambulance," and, "I think I stabbed him. I think I stabbed him." A neighbor called 911.

Deputy Joseph Narciso of the Riverside County Sheriff's Department responded to the apartment at 8:53 p.m. Deputy Narciso asked Bryant "who stabbed" the victim. Bryant responded, "I did." Paramedics took Robert to the hospital, where he was pronounced dead.

3. *The autopsy*

Dr. Aaron Gleckman performed an autopsy on Robert's body. Robert was six feet one inch tall and weighed approximately 285 pounds. Dr. Gleckman testified that Robert died from a four-inch to five-inch deep stab wound that passed through both his xiphoid process (the small bone below the sternum) and his pericardium (a tough fibrous membrane that surrounds the heart), and penetrated the right ventricle of his heart. The stab wound was angled slightly upward. Dr. Gleckman testified that it would take a "significant amount of intentional force" to inflict the stab wound, and that a person could not simply walk into a knife and have the blade penetrate four to five inches into his body.

Robert had also suffered several other less serious injuries. He had a one-inch bruise underneath the surface of his scalp on the back right side of his head, and a one-by-one-half-inch ecchymosis (bleeding under the skin) on the left side of his back. Robert also had some scratches on the right side of his forehead, above his mouth, and on the left side of his chin. Robert had approximately seven incised wounds on his left forearm and a one-inch-long curvilinear incised wound on the back of his left wrist. In addition, Robert had cuts or scratches on several fingers, bruising on one of his hands, and bruising on his left forearm.

4. *Bryant's interview with police*

The People played an audiotape of an interview that Lieutenant Cheryl Evans of the Riverside County Sheriff's Department conducted with Bryant on the afternoon after the stabbing. During the interview, Bryant described the events that led up to the stabbing. Bryant explained that after she and Robert returned to their apartment from Thanksgiving dinner, she put on a red negligee in an attempt to entice Robert into having sex. However, Bryant changed her mind about wanting to have sex with Robert after writing in her journal. Bryant began to listen to some music, and started to call a friend on the telephone. Robert asked Bryant who she was calling, and Bryant told him that it was "none of his business." In response, Robert unplugged the phone and hit Bryant on the leg with the phone. Bryant swung a ceramic doll at Robert but missed. Robert then pushed Bryant down on the bed and started to strangle her. Bryant could not breathe. Bryant was eventually able to get free from Robert. She picked up a glass candle holder

and then grabbed a knife from the dresser drawer and started to cut herself with the knife.²

Robert lunged at Bryant while holding a hair brush. Bryant threw the glass candle holder at Robert. The candle holder shattered when it hit the ground. Robert then knocked the knife out of Bryant's hand with the brush. Bryant picked up shards of glass from the broken candle holder and tried to cut her wrists with them, telling Robert that she was going to kill herself. Robert responded, "Do it. Just do it. . . . [D]on't hurt anyone else."

After deciding that she did not want to give Robert the pleasure of seeing her die, Bryant walked toward the front door in an attempt to leave the apartment. Robert blocked Bryant's path to the front door. Bryant grabbed a telephone and hit Robert in the head with it. Bryant then grabbed a knife from the kitchen table and said, "You better let me leave or I'll hurt you." Bryant "jabbed at [Robert] with the knife," and Robert grabbed Bryant's hand in attempt to wrest the knife from her. While struggling over the knife, Robert bit Bryant. Bryant broke free momentarily and stabbed Robert with the knife as he came toward her.

5. *Physical evidence*

At approximately 2:00 a.m. on the morning after the stabbing, Lieutenant Evans conducted a physical examination of Bryant. Bryant was wearing a red satin negligee. She had a fresh bruise on the back of her left thigh/buttock area and older bruising on her

² Bryant explained that she would sometimes cut herself because she was unable to cope with her depression.

arms. Bryant also had an indentation injury to her thumb, and a one-half-inch red mark on the left side of her neck.³ In addition, Bryant had numerous scars on her wrists from cutting herself, and several small, fresh cuts near her wrists.

Police conducted a search of Robert and Bryant's apartment. In the master bedroom, police discovered a telephone cord that had been removed from the wall, a knife in a dresser drawer, a hard plastic doll, and a battery cover to a phone. In the hallway outside of the bedroom, police found the broken glass candle holder. There was a large concentration of blood on the carpet and linoleum in the living room, and a trail of blood leading to the front door. A faceplate and the handset to a cordless telephone were on the living room floor near the front door. Police found a knife with a blade that was approximately six and one-half inches long, with blood on both sides of the blade, on top of a book on the kitchen counter.

During the People's case-in-chief, numerous entries from Bryant's diaries and online journals were read to the jury. Most of the entries were written in the fall of 2005, and focused primarily on Bryant's feelings of inadequacy stemming from her love/hate relationship with Robert.

B. *The defense*

As discussed in greater detail in part III.A.1., *post*, Bryant acknowledged at trial that she stabbed Robert. During closing argument, defense counsel argued that Bryant had stabbed Robert in self-defense and that Bryant had not intended to kill Robert.

³ When Lieutenant Evans examined Bryant 12 hours later, the mark on Bryant's neck was gone.

Counsel argued that if the jury were to find that Bryant had not acted in self-defense, the jury should find her guilty of voluntary manslaughter, based upon either imperfect self-defense or heat of passion.

C. *Rebuttal*

Andrea testified that she believed Bryant had been the aggressor during prior incidents of domestic violence between Robert and Bryant. Bryant's friend testified that Bryant loved attention and said that she would make herself appear to be the victim in an attempt to draw attention to herself.

III.

DISCUSSION

The trial court properly did not instruct the jury on involuntary manslaughter, but committed reversible error in failing to instruct the jury on the theory of voluntary manslaughter described in Garcia

A. *Bryant's claims on appeal*

In her opening brief, Bryant claims that the trial court erred in failing to instruct the jury on the lesser included offense of involuntary manslaughter. In their respondent's brief, the People argue that the evidence did not support an instruction on involuntary manslaughter because Bryant's own testimony demonstrated that she committed a felony assault with a deadly weapon.

Neither party cited *Garcia, supra*, 162 Cal.App.4th 18 in its initial briefing. In *Garcia*, as discussed in greater detail below, the Court of Appeal held that a trial court had not erred in failing to instruct a jury on involuntary manslaughter because the evidence established that the defendant had, at a minimum, killed the victim during the

commission of an inherently dangerous felony, namely, an assault with a deadly weapon. (*Id.* at p. 33.) The *Garcia* court reasoned that an unintentional killing without malice committed during the course of an inherently dangerous assaultive felony constitutes *voluntary*, rather than *involuntary*, manslaughter. (*Id.* at pp. 31-33.)

In view of the People's argument that Bryant's testimony establishes that she committed a felony assault with a deadly weapon, and considering other evidence presented at trial, we requested that the parties submit supplemental briefs addressing this aspect of *Garcia*. In her supplemental brief, Bryant claims that the trial court committed reversible error by failing to instruct the jury, *sua sponte*, that an unintentional killing without malice committed during the course of an inherently dangerous felony constitutes voluntary manslaughter. In their supplemental brief, the People maintain that the trial court had no *sua sponte* duty to provide such an instruction in this case because "[Bryant's] testimony defied any possibility that she acted without implied malice when she killed [Robert]."

B. *The law governing whether a trial court must instruct the jury on lesser included offenses, and the standard of review on appeal*

The law governing a trial court's duty to instruct the jury on lesser included offenses, and the standard of review that this court applies in reviewing a trial court's decision regarding whether to give such an instruction, are well established:

"Instructions on lesser included offenses must be given when there is substantial evidence for a jury to conclude the defendant is guilty of the lesser offense but not the charged offense. [Citations.] Substantial evidence is defined for this purpose as 'evidence sufficient to "deserve consideration by the jury," that is, evidence that a reasonable jury could find persuasive.' [Citation.] 'In deciding

whether evidence is "substantial" in this context, a court determines only its bare legal sufficiency, not its weight.' [Citation.] The trial court's decision whether or not the substantial evidence test was met is reviewed on appeal under an independent or de novo standard of review. [Citations.]" (*Garcia, supra*, 162 Cal.App.4th at pp. 24-25.)

C. Garcia

In *Garcia, supra*, 162 Cal.App.4th at page 22, the Court of Appeal considered whether the trial court had a sua sponte duty to instruct on involuntary manslaughter where there is substantial evidence that the defendant committed an unintentional killing without malice during the course of an inherently dangerous assaultive felony. The defendant in *Garcia* struck the victim in the face with the butt of a shotgun, causing the victim to fall and hit his head on the sidewalk. The victim died as a result of the injuries he sustained in the fall. (*Ibid.*) A jury found the defendant not guilty of murder, but guilty of the lesser included offense of voluntary manslaughter. (*Id.* at p. 23.) The defendant claimed on appeal that the trial court had erred in failing to instruct the jury on the lesser included offense of involuntary manslaughter because there was substantial evidence that the killing was "committed without malice and without either an intent to kill or conscious disregard for human life and, therefore, was neither murder nor voluntary manslaughter." (*Id.* at p. 26.)

The *Garcia* court rejected the defendant's claim. (*Garcia, supra*, 162 Cal.App.4th at p. 22.) The *Garcia* court began its analysis by discussing the distinction between murder and manslaughter:

"Murder is the unlawful killing of a human being or a fetus 'with malice aforethought.' [Citations.] 'Express malice' is an unlawful

intent to kill. [Citations.] 'Implied malice' requires a defendant's awareness of engaging in conduct that endangers the life of another. [Citation.] 'Malice is implied when the killing is proximately caused by "an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.' " ' [Citations.]" (*Garcia, supra*, at pp. 26-27, fn. omitted.)

"Manslaughter is the 'unlawful killing of a human being without malice.'

[Citations.]" (*Garcia, supra*, 162 Cal.App.4th at p. 27.) The *Garcia* court referred to two well-established theories of voluntary manslaughter, namely, where a defendant lacks malice either because he acts in "unreasonable self-defense" or in the "heat of passion." (*Id.* at p. 27.) The *Garcia* court described the offense of involuntary manslaughter in the following manner:

"The statutory definition of involuntary manslaughter limits the offense, other than for acts committed while driving a vehicle, to the unlawful killing of a human being without malice 'in the commission of an unlawful act, not amounting to [a] felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.' [Citation.] Involuntary manslaughter based on 'an unlawful act, not amounting to [a] felony'—a killing resulting from the commission of a misdemeanor—requires proof not only that the defendant acted with general criminal intent but also that the predicate misdemeanor was dangerous to human life under the circumstances of its commission. [Citations.] Involuntary manslaughter based on the commission of a lawful act that might produce death 'without due caution and circumspection' requires proof of criminal negligence—that is, 'aggravated, culpable, gross, or reckless' conduct that creates a high risk of death or great bodily injury and that evidences a disregard for human life or indifference to the consequences of the conduct. [Citations.]" (*Id.* at pp. 27-28.)

The *Garcia* court observed that California law was not clear as to what homicide offense, if any, is established where a defendant commits an unintentional killing,

without malice, during the course of a felony that does not qualify the defendant for either first or second degree felony-murder. (*Garcia, supra*, 162 Cal.App.4th at p. 28.) After reviewing the relevant case law, including a discussion of second degree felony-murder and the "merger doctrine" (*id.* at p. 29),⁴ the *Garcia* court concluded that "an unlawful killing during the commission of an inherently dangerous felony, even if unintentional, is at least voluntary manslaughter." (*Id.* at p. 31.) *Garcia* thus articulates a third theory of voluntary manslaughter, in addition to the well-established theories of unreasonable self-defense and heat of passion.

In applying the law pertaining to the various homicide offenses to the facts at issue in that case, the *Garcia* court noted that the evidence "unquestionably" demonstrated that the defendant "committed an assault with a deadly weapon/firearm on [the victim], an inherently dangerous felony, causing [the victim's] death." (*Garcia, supra*, 162 Cal.App.4th at pp. 31-32.) The *Garcia* court held that in light of this evidence, the trial court had not erred in failing to instruct on involuntary manslaughter, reasoning: "Because an assault with a deadly weapon or with a firearm is inherently dangerous, the trial court properly concluded the evidence would not support [the defendant's] conviction for involuntary manslaughter and, therefore, did not err in declining to instruct

⁴ The *Garcia* court explained that while a defendant may be found guilty of second degree felony-murder based on an unintentional killing committed without malice during the course of an inherently dangerous felony, this theory does not apply where the underlying felony is an aggravated assault, in light of the "merger doctrine" first recognized in *People v. Ireland* (1969) 70 Cal.2d 522. (*Garcia, supra*, 162 Cal.App.4th at pp. 28-29; see also *People v. Chun* (2009) 45 Cal.4th 1172, 1178 (*Chun*) ["all assaultive-type crimes . . . merge with the charged homicide and cannot be the basis for a second degree felony-murder instruction"].)

the jury on involuntary manslaughter as a lesser included offense of murder." (*Id.* at p. 22; accord *People v. Parras* (2007) 152 Cal.App.4th 219, 228 [rejecting contention that the trial court erred in failing to instruct the jury on involuntary manslaughter because, "If this homicide occurred during the commission of another criminal offense, that offense was a felony, not the misdemeanor required under this theory"].)

D. *Factual and procedural background*

1. *Relevant evidence*⁵

a. *Expert testimony*

Dr. Paul Hermann, a forensic pathologist, testified concerning Robert's stab wound. Dr. Hermann testified that "it wouldn't take a whole lot of force" to cause the wound, and that "[a] sharp knife could to go through the skin, and directly into the heart, perhaps incising the bone." After reviewing Dr. Gleckman's autopsy report on the stand, Dr. Hermann stated, "So [Dr. Gleckman's] description is it goes through the bone, and that [maybe] it actually cut the bone in half. If that's the case, it would take somewhat more force than it would just going through the skin. But, it's not a very large bone, so a little hard to tell how much force it's going to take."

Dr. John Thornton, a forensic scientist, testified that the physical evidence in the case was consistent with there having been a struggle between Robert and Bryant on the night of the stabbing.

⁵ In considering whether the trial court had a sua sponte duty to instruct the jury on the lesser included offenses of voluntary or involuntary manslaughter, we construe the relevant evidence in the light most favorable to Bryant. (See *People v. Turk* (2008) 164 Cal.App.4th 1361, 1368.)

b. *Bryant's testimony*

Bryant testified that she and Robert started dating around September 2003, shortly after his high school graduation. Bryant had graduated from high school the prior year. Bryant claimed that Robert had frequently physically abused her throughout their relationship, and she recounted numerous instances of such domestic violence during her testimony. Bryant stated that when the couple argued, Robert often physically restrained her, choked her, and/or hit her. Bryant described an incident during which Robert hit her in the stomach while she was pregnant, and another incident during which Robert tackled her into a wall. During this latter incident, Bryant claimed that she lost consciousness and that the force of her body hitting the wall created a hole in the wall. Bryant stated that a few days before the stabbing, she and Robert got into an argument in their apartment. When she tried to leave the apartment, Robert pushed her to the floor, held her down by her arms and shook her.⁶

Bryant testified that on the night of the stabbing, she went into her bedroom at approximately 8:00 p.m. and began to write in her journal. Robert remained in the living room. Bryant wrote in her journal for approximately 10 minutes,⁷ and then listened to

⁶ The defense presented photographs of bruises on Bryant's arms taken shortly after the stabbing. Bryant testified that these bruises stemmed from the incident a few days prior to the stabbing.

⁷ Bryant testified that she wrote in her journal that Robert had ignored her throughout that entire day, which was Thanksgiving, and that she had contemplated not attending the family's Thanksgiving dinner. Bryant explained that she was "really angry" when she was writing in her journal. Bryant also noted that she wrote in the last paragraph of the journal entry for that day:

some music for a half hour or so. Bryant testified that after listening to the music, she "wanted to leave." Bryant explained, "[After] thinking about what I wrote in my diary . . . I wanted out of life in general and just, you know, dealing with all [of] this." Bryant grabbed Robert's pillows and a blanket from their bed, walked to the living room, threw the pillows and blanket on the living room floor, and told Robert that she did not want to be in the relationship anymore.

Bryant then grabbed a cordless phone from the kitchen table and started to walk toward her bedroom. Robert demanded to know who Bryant was calling. Bryant told Robert that it was "none of his business," and proceeded to dial her friend's phone number. Before her friend could answer the call, Robert unplugged the telephone from the jack. Bryant began to yell that she wanted to leave. Robert grabbed the phone from Bryant and hit her on her upper right thigh with it. After hitting Bryant, Robert got on top of her and started to choke her. Bryant began to lose consciousness. Bryant was able to get Robert off of her. She then grabbed a doll that was on a dresser, and swung the doll at Robert. Robert was able to avoid being struck by the doll, and left the bedroom. After Robert left the room, Bryant closed the door.

Once the door was closed, Bryant grabbed a glass candle holder and tried to break it. Robert forced his way back into the bedroom, and Bryant threw the candle holder and the phone at him. The candle holder shattered in the hallway, and the phone landed at the

"I'm seriously thinking of having an affair. I need so much more that he can't, won't give me. I want to leave with the kids and just go. I don't know where. I need love."

opposite end of the hallway.⁸ Robert continued to advance toward Bryant, holding a pink hairbrush. Bryant grabbed her "cutting knife"⁹ from a desk drawer because she wanted to scare Robert. Bryant stated that she threatened Robert with the knife, explaining, "I told him if he didn't let me leave, I was going to kill him."

Bryant began to cut her arm with the knife, inflicting very minor scratches. Robert knocked the knife out Bryant's hand and left the room. Bryant then went into the hallway, picked up some broken shards of glass from the candle holder, and told Robert that she was going to kill herself. According to Bryant, Robert responded, "Do it. Just do it." He also said, "Don't hurt anybody else," or words to that effect.

Bryant decided that she wanted to leave the apartment. She got up and started to walk toward the door. According to Bryant, Robert told her, "No, you can't leave. You can't leave. Just do it. Just kill yourself." Robert pushed Bryant away from the front door. Bryant grabbed the phone that was in the hallway and hit Robert over the head with it. The blow did not affect Robert. Bryant backed up and saw a knife on the kitchen table.¹⁰ Bryant grabbed the knife, while Robert remained by the front door.

Bryant moved toward the front door, holding the knife and screaming, "Let me leave." Bryant stated that she "thrust [the knife] at him and pulled back." Robert grabbed

⁸ Bryant implied that neither object struck Robert.

⁹ Bryant explained that she started cutting her arms at the age of 13 "[t]o relieve stress." Bryant stated that she had continued to cut herself throughout her relationship with Robert.

¹⁰ Bryant explained that this knife was a different knife from her "cutting knife," which she had discussed earlier in her testimony.

the wrist of the hand in which Bryant was holding the knife. The two struggled over the knife until Bryant was able to break free.

With respect to the stabbing, Bryant testified as follows:

"[Bryant]: He came at me, and I thrust the knife at him.

"[Defense counsel]: And how did you thrust the knife at him[?]

"[Bryant]: Like this.

"[Defense counsel]: And were you standing up?

"[Bryant]: Yes, I was.

"[Defense counsel]: And for the record, you were describing that you held the knife in a fist, and you pushed out—pushed out forward. Is that right?

"[Bryant]: That's correct."

On cross-examination, Bryant described the stabbing as follows:

"[Prosecutor]: And you took that knife and you plunged it forward into his chest?

"[Bryant]: It wasn't deliberate.

"[Prosecutor]: Well, ma'am, did your arm accidentally just go like this, like you described, or did you intentionally take that sharp knife in your hand—you knew it was sharp, right?

"[Bryant]: Yes.

"[Prosecutor]: And you plunged it forward towards the man who was standing in front of you?

"[Bryant]: He was lunging at me, yes."

Bryant stated that after she thrust her hand out, she "didn't feel anything," and that she thereafter pulled the knife out. According to Bryant, Robert said, "You stabbed me," in a surprised tone. During cross-examination, Bryant testified that she did not know that she had stabbed Robert until she saw "all the blood."

Bryant immediately ran to a neighbor's house screaming, "Help," and "Call 911."¹¹ When the police arrived and asked Bryant what had happened, she responded, "I stabbed him." Bryant testified that she never intended to kill Robert.

c. *Responding officers' testimony*

Riverside County Sheriff's Deputy Fred Bommer testified that when he placed Bryant in his patrol car, she was "still hysterical," but that "after a while, she calmed down." Bommer further testified that while Bryant was sitting in his police car immediately after the stabbing, she said, "[T]his wasn't supposed to happen." Detective Erik Davis of the Riverside County Sheriff's Department testified that a neighbor told him that, just after the stabbing, Bryant said, "I didn't mean to. Just wake up, Rob." Detective Davis also testified that the neighbor told him that Bryant was upset and had been screaming, "Wake up. Wake up please," and "I didn't mean it. I didn't mean it. Wake up. Wake up."

¹¹ As noted in part II.A.2, *ante*, several neighbors heard Bryant screaming for help. When the neighbors arrived at Bryant and Robert's apartment, Bryant was crying and talking fast. The neighbors described Bryant as "scared" and "hysterical."

d. *Lieutenant Evans's interview with Bryant*

The defense played a redacted videotape of an interview that Lieutenant Evans conducted with Bryant in the early morning hours on the day after the stabbing.¹² During the interview, Bryant stated that during previous arguments, she had "threatened to kill [Robert] a couple of times, but I never meant it," and that "[i]n our arguments [Robert has] threatened the same thing." Lieutenant Evans asked Bryant why she had attempted to break the candle holder on the dresser during the struggle. Bryant responded, "Because . . . I wanted him to know how mad I was. I wanted . . . to either use that to cut myself or kinda use that to push him out the door but like I never really wanted to stab him or anything. I just wanted to, you know, get him . . . to back away from me so he wouldn't hurt me anymore." Lieutenant Evans asked Bryant to demonstrate how Bryant had stabbed Robert. Bryant extended her left arm out slightly, in a jabbing motion, and said, "It was just a lunge like that."¹³ Lieutenant Evans asked, "How many times do you think you thrust the knife at him?" Bryant responded, "Just once. Just the one time."

During this interview, Bryant also said, "He wasn't supposed to get hurt." Lieutenant Evans responded by asking Bryant what she was thinking when she "grabbed the knife" before stabbing Robert. Bryant responded, "I wanted to scare him. I wanted to

¹² As noted in part II.A.4., *ante*, the People played an audiotape of a separate interview that Lieutenant Evans conducted with Bryant in the afternoon the day after the stabbing.

¹³ Bryant was sitting in a chair while she performed this demonstration for Lieutenant Evans.

scare him. It was just supposed to be a tool to get to the door. I was never supposed to touch him."

Bryant was crying and emotional throughout the interview, and asked whether Robert was going to be okay. Near the end of the interview, when Lieutenant Evans told Bryant that Robert had died, Bryant began sobbing uncontrollably and later vomited.

2. *The trial court's jury instructions*

The trial court instructed the jury on first and second degree murder (CALCRIM Nos. 520, 521), as well as the lesser included offense of voluntary manslaughter based on imperfect self-defense (CALCRIM No. 571) and heat of passion (CALCRIM No. 570). The trial court also instructed the jury on the principles of a justified killing based on self-defense (CALCRIM Nos. 505, 3471, 3472, 3474).

E. *The trial court properly did not instruct the jury on involuntary manslaughter because the record establishes that, at a minimum, Bryant committed an assault with a deadly weapon that resulted in the victim's death*¹⁴

1. *The elements of assault with a deadly weapon*

The elements of an assault with a deadly weapon are as follows: (1) the defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person; (2) the defendant was aware of facts that would lead a reasonable person to realize such nature of the deadly weapon; (3) the defendant did the act willfully; and (4) the defendant had the present ability to apply force with the deadly

¹⁴ For purposes of our analysis, we assume that the jury would not have found that Bryant acted in perfect self-defense. If Bryant had acted in perfect self-defense, she would not be guilty of *any* offense, including involuntary manslaughter.

weapon. (§§ 240, 245, subd. (a)(1); *People v. Williams* (2001) 26 Cal.4th 779 (*Williams*); CALCRIM No. 875.)¹⁵

In *Williams, supra*, 26 Cal.4th 779, the Supreme Court clarified the intent necessary to be found guilty of committing an assault. The *Williams* court expressly rejected the contention that "assault requires either a desire to cause an application of physical force or substantial certainty that such an application would result." (*Id.* at p. 784.) Instead, the *Williams* court held that, "assault requires actual knowledge of the facts sufficient to establish that the defendant's act by its nature will probably and directly result in injury to another." (*Id.* at p. 782.) The *Williams* court explained that "mere recklessness or criminal negligence is still not enough [citation] because a jury cannot find a defendant guilty of assault based on facts he should have known but did not know [citation]." (*Id.* at p. 788, fn. omitted.)

¹⁵ Assault with a deadly weapon is a "wobbler," i.e., it may be punished either as a felony or a misdemeanor. (§ 245, subd. (a)(1).) However, "[a] wobbler is deemed a felony unless charged as a misdemeanor by the People or reduced to a misdemeanor by the sentencing court under section 17, subdivision (b). [Citation.]" (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901, fn. 7.) Therefore, unless charged as a misdemeanor, "assault with a deadly weapon . . . [is a] . . . felon[y]" that cannot serve as the basis of a misdemeanor manslaughter instruction. (*Garcia, supra*, 162 Cal.App.4th at p. 28, fn. 4.)

2. *Bryant's testimony established that she committed, at a minimum, an assault with a deadly weapon*

With respect to the first element of assault with a deadly weapon, Bryant testified that she thrust a knife toward Robert as he advanced toward her. On cross-examination, Bryant agreed with the prosecutor that, while holding the knife, she plunged her arm toward Robert, and described Robert's action as "lunging" at her at the time she stabbed him. Thus, Bryant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person. With respect to the second element, Bryant agreed with the prosecutor that she knew that the knife was "sharp" and that she was in possession of a "dangerous weapon." Thus, Bryant was aware of facts that would lead a reasonable person to realize the nature of the deadly weapon. With respect to the third element, even assuming that Bryant's testimony does not establish that she had the specific intent to stab Robert, "assault does not require a specific intent to injure the victim" (*Williams, supra*, 26 Cal.4th at p. 788), and Bryant's testimony does establish that she had "actual knowledge of the facts sufficient to establish that [her] act [of thrusting her knife-wielding arm toward the oncoming victim] by its nature will probably and directly result in injury to another." (*Id.* at p. 782.) The final element, that the defendant had the present ability to apply force with the deadly weapon, was undisputedly satisfied when Bryant's knife contacted Robert's chest.

The evidence thus demonstrated that the defendant "committed an assault with a deadly weapon . . . on [the victim], an inherently dangerous felony, causing [the victim's] death." (*Garcia, supra*, 162 Cal.App.4th at pp. 31-32.) Therefore, as in *Garcia*, if the

jury were to find Bryant guilty of a homicide offense, the evidence established that Bryant committed "at least voluntary manslaughter." (*Id.* at p. 31.) The trial court therefore properly did not instruct the jury on involuntary manslaughter. (*Id.* at p. 33 ["in light of the undisputed evidence [the defendant] assaulted [the victim] with a deadly weapon . . . there was not sufficient evidence in this case [that] the killing of [victim] was involuntary manslaughter".])

3. *Bryant's arguments in support of her claim that the trial court erred in failing to instruct on involuntary manslaughter are unpersuasive*

We reject Bryant's claim that the trial court was required to instruct the jury on involuntary manslaughter based on the theory that the killing resulted from Bryant's commission of the misdemeanor offense of brandishing a deadly weapon. (§ 417, subd. (a)(1).)¹⁶ For the reasons discussed above, there was no substantial evidence from which the jury could have found that Robert's death resulted from the misdemeanor offense of brandishing, rather than from a felony assault with a deadly weapon. Bryant's reliance on *People v. Lee* (1999) 20 Cal.4th 47 (*Lee*) (plur. opn. of Baxter, J.)¹⁷ in support of her claim that there is substantial evidence in this case to support a misdemeanor manslaughter instruction is unpersuasive. In *Lee*, the defendant, who was extremely

¹⁶ Section 417, subdivision (a)(1) provides, "Every person who, except in self-defense, in the presence of any other person, draws or exhibits any deadly weapon whatsoever, other than a firearm, in a rude, angry, or threatening manner, or who in any manner, unlawfully uses a deadly weapon other than a firearm in any fight or quarrel is guilty of a misdemeanor, punishable by imprisonment in a county jail for not less than 30 days."

¹⁷ Unless otherwise specified, all subsequent citations to *Lee* are to Justice Baxter's plurality opinion.

intoxicated, began to argue with his wife. (*Id.* at p. 53.) One of the couple's children, 12-year-old Mary, saw her parents "arguing and pushing each other." (*Ibid.*) The defendant went to his bedroom "staggering and falling against the wall," and retrieved a handgun. (*Ibid.*) The couple "continued to push each other with the gun between them." (*Ibid.*) Mary went to her bedroom, heard her parents arguing, and then heard a shot. (*Ibid.*) When Mary came out of her bedroom, she saw her father holding her mother on the floor, begging her not to die. (*Ibid.*) The *Lee* court held that the trial court erred in failing to instruct the jury on a "misdemeanor manslaughter" theory of involuntary manslaughter because the defendant's use of the gun during the argument constituted the misdemeanor offense of brandishing the weapon. (*Id.* at p. 61.)

In *Lee*, there was evidence that the killing occurred while the defendant was extremely intoxicated and holding a gun while engaged in a physical struggle with his wife. In addition, there was an absence of evidence as to the mechanism by which the gun was actually fired.¹⁸ Under these circumstances, the jury in *Lee* could have reasonably found that the gun was accidentally fired during the scuffle, and thus, that the defendant was guilty of involuntary manslaughter based on a killing resulting from the commission of a misdemeanor brandishing. In this case, in contrast, in light of Bryant's testimony, there is no reasonable way to view the evidence as demonstrating anything

¹⁸ The *Lee* plurality did not expressly state that there was an absence of evidence concerning how the fatal shot was fired, but it implied as much by not discussing any such evidence. (See also *Lee, supra*, 20 Cal.4th at p. 82 (dis. opn. of Kennard, J.) ["There was no eyewitness testimony concerning the final minutes of the confrontation between defendant and his wife, the victim"].)

less than an assault with a deadly weapon—a felony. The trial court therefore did not err in failing to instruct the jury on involuntary manslaughter based on a killing resulting from the commission of a misdemeanor brandishing, under *Lee*.

For a similar reason, we also reject Bryant's contention that the trial court was required to instruct on involuntary manslaughter based on a killing resulting from the commission of a lawful act committed with criminal negligence, pursuant to *People v. Villanueva* (2008) 169 Cal.App.4th 41. In *Villanueva*, the court stated that "a homicide is excusable when a defendant accidentally kills while brandishing a weapon in self-defense, if the defendant acted with usual and ordinary caution" (*id.* at p. 54), and "[i]f the act is done in a criminally negligent manner, the homicide is involuntary manslaughter." (*Id.* at p. 54, fn.12.) In this case, for the reasons stated above, Bryant's act in stabbing Robert was at least a felony assault with a deadly weapon. Thus, the record does not contain substantial evidence from which the jury could find that Bryant acted in a manner that was merely criminally negligent. (See *Williams, supra*, 26 Cal.4th at p. 788 [defendant may not be convicted of assault based upon "mere recklessness or criminal negligence"].)

F. *The trial court erred in failing to instruct the jury on the Garcia theory of voluntary manslaughter because there was substantial evidence that Bryant did not subjectively appreciate that her conduct endangered Robert's life*

The People do not dispute that, under *Garcia*, the trial court would have had a sua sponte duty to instruct the jury that an unintentional killing without malice committed during the course of an inherently dangerous assaultive felony constitutes voluntary manslaughter. The People acknowledge as much in their supplemental brief:

"The *Garcia* theory of voluntary manslaughter differs from implied malice murder in that the defendant [does] not subjectively appreciate the lethality of his or her conduct. The linchpin of implied malice murder is that before a defendant can be convicted of that crime, there must be evidence that the defendant appreciated that his deliberate conduct endangered the life of another and that the defendant acted with conscious disregard for life. . . . [¶] Accordingly the trial court [had] a sua sponte duty to instruct on the *Garcia* theory of voluntary manslaughter if there were substantial evidence that appellant did not subjectively appreciate that her conduct endangered [Robert's] life."

However, the People maintain that the court had no duty to give this instruction in the present case because there was not substantial evidence in the record from which the jury could have found that Bryant did not subjectively appreciate that her conduct endangered Robert's life.¹⁹

Viewing the evidence in the light most favorable to Bryant, as is required (*People v. Turk, supra*, 164 Cal.App.4th at p. 1368), we conclude that there is substantial evidence from which a reasonable jury could find that Bryant did not subjectively appreciate that her conduct endangered Robert's life. To begin with, the stabbing occurred during a heated physical struggle shortly after Robert had attempted to wrest the knife from Bryant, and while he was lunging toward her. Robert expressed surprise that he had been stabbed, and Bryant testified that she did not know that she had stabbed Robert until she saw him bleeding. There also is undisputed evidence that Robert suffered a single stab wound, as well as expert testimony that "it wouldn't take a whole

¹⁹ This theory of voluntary manslaughter is at issue in a case currently pending before the Supreme Court. (See *People v. Cravens* (Aug. 18, 2010, D054613) [nonpub. opn.] review granted Nov. 23, 2010, S186661.)

lot of force" to have caused Robert's wound. In addition, it is undisputed that after Bryant realized that she had stabbed Robert, she immediately attempted to summon medical assistance, and that she was hysterical and expressed extreme remorse immediately after the stabbing. A reasonable jury also could have found credible the statements that Bryant made in the immediate aftermath of the stabbing, such as, "[T]his wasn't supposed to happen," and, "I didn't mean to." Further, Bryant told Lieutenant Evans during her initial police interview in the hours after the stabbing that she "never really wanted to stab [Robert] or anything," and that the only thing she wanted to do was "to scare [Robert]" Finally, the jury could have believed Bryant's testimony that she never intended to kill Robert. In light of this evidence, we conclude that a reasonable jury could have found that Bryant did not harbor implied malice at the time of the stabbing, because she did not subjectively appreciate that her conduct endangered Robert's life.

We reject all of the People's arguments to the contrary. To begin with, we reject the People's contention, raised in their supplemental brief, that "[Bryant's] testimony defied any possibility that she acted without implied malice when she killed [Robert]." We agree with the People that Bryant's testimony established that she knew that knives are sharp,²⁰ and that she "thrust the knife" at Robert as he lunged toward her. Further,

²⁰ The People are also correct that Bryant "acknowledged she had a history with cutting herself and was aware that knives were dangerous objects." However, Bryant's history of making incisions on her arms has minimal, if any, relevance in proving that she subjectively appreciated that her act of thrusting a knife at Robert as he lunged toward her endangered Robert's life.

for the reasons more fully stated in part III.E., *ante*, we agree with the People that Bryant's testimony demonstrates that she knew that her act of thrusting a knife toward Robert would probably and directly result in injury to Robert. Thus, we agree with the People's contention, raised in their respondent's brief, that "[Bryant's] testimony that she intentionally thrust[] the knife at [Robert] . . . forecloses a theory of misdemeanor manslaughter," since that testimony establishes that she committed at least a felony assault with a deadly weapon. However, Bryant did not testify either that she intended to stab Robert or that she knew that her act of thrusting the knife toward Robert would endanger his life. Further, Bryant's testimony concerning her actions in the immediate wake of the stabbing—i.e. that she did not realize that she had stabbed Robert until she saw him bleeding, and that she immediately sought medical assistance—suggested an accidental killing. A jury might also have reasonably found that in light of the rapidity with which events unfolded during the struggle, Bryant had not anticipated that Robert would lunge at her just as she thrust the knife toward him. Thus, we cannot conclude that Bryant's testimony demonstrates, *as a matter of law*, that Bryant subjectively appreciated that her conduct endangered Robert's life.

Nor are we persuaded by the People's contention that Bryant's acknowledgment that she threatened to kill Robert while she was holding her cutting knife during their initial struggle in the bedroom conclusively established implied malice. Bryant also testified that she made this threat to "scare [Robert] so he would let [her] leave," and that she did not actually intend to kill him. In addition, after making this threat, Bryant used

the knife that she was holding at that time to cut herself, *not* to attack Robert.²¹ Further, the statements that Bryant made during her initial police interview were consistent with her claim that she never intended to kill Robert, notwithstanding her earlier threat. In particular, Bryant acknowledged to Lieutenant Evans that she had threatened to kill Robert in the past but that she had never intended to carry out such threats. Thus, while Bryant's earlier threat is certainly relevant to a determination as to whether she acted with implied malice in stabbing Robert, the threat does not conclusively establish that she acted with conscious disregard for Robert's life. (See *People v. Manriquez* (2005) 37 Cal.4th 547, 585 (*Manriquez*) ["In deciding whether there is substantial evidence of a lesser offense, courts should not evaluate the credibility of witnesses, a task for the jury"].)

Finally, we reject the People's contention that a finding that Bryant did not appreciate that her conduct endangered Robert's life cannot be reconciled with the fact that Bryant "grabbed the knife after hitting [Robert] over the head with the telephone proved to be ineffective and she needed to escalate her mode of force." Bryant testified that she grabbed the knife in order to "scare [Robert] so he would let [her] leave," and that, in grabbing in knife, she did not have any intent to kill Robert. The jury could have found Bryant credible on these points. (See *Manriquez, supra*, 37 Cal.4th at p. 585.)

²¹ As noted in part II.A.4, *ante*, Bryant stabbed Robert with a different knife, one that she told police she picked up from the kitchen table just prior to the stabbing.

Accordingly, we conclude that the trial court erred in failing to instruct the jury on the lesser included offense of voluntary manslaughter, based on the theory articulated by the court in *Garcia*.²²

G. *The trial court's failure to instruct the jury on the Garcia theory of voluntary manslaughter requires reversal*

1. *The proper standard of prejudice*

In *People v. Breverman* (1998) 19 Cal.4th 142, 149 (*Breverman*), the Supreme Court held, "The sua sponte duty to instruct fully on all lesser included offenses suggested by the evidence arises from California law alone," and thus a trial court's error in fulfilling this duty "must . . . be evaluated under the generally applicable California test for harmless error . . . set forth in [*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*)]." (*Breverman, supra*, at p. 176.) Under *Watson*, reversal is not warranted unless "it appears 'reasonably probable' the defendant would have achieved a more favorable outcome had the error not occurred. (*Watson, supra*, . . . at p. 836.)" (*Breverman, supra*, at p. 178; e.g., *People v. Moye* (2009) 47 Cal.4th 537, 555 [citing *Breverman* and applying *Watson* in determining whether trial court's assumed error in failing to instruct on a heat of passion theory of voluntary manslaughter was

²² The *Garcia* theory of voluntary manslaughter is not described in any CALCRIM jury instruction, and the case is not referred to in the bench notes of any instructions. In light of its importance in clarifying a distinct theory of voluntary manslaughter, we urge the Judicial Counsel of California Advisory Committee on Criminal Jury Instructions to consider including an instruction based on *Garcia* in its set of standard criminal jury instructions.

prejudicial].)²³ "The Supreme Court has emphasized 'that a "probability" in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*. [Citations.]' [Citation.]" (*People v. Soojian* (2010) 190 Cal.App.4th 491, 519.)

2. *There is a reasonable probability that Bryant would have received a more favorable result if the trial court had instructed the jury on the Garcia theory of voluntary manslaughter*

We conclude that there is a reasonable possibility that Bryant would have received a more favorable result if the trial court had instructed the jury on the *Garcia* theory of

²³ We reject Bryant's contention that we should apply the standard of prejudice set forth in *Chapman v. California* (1967) 386 U.S. 18, which is utilized in reviewing federal constitutional errors, under the theory expressed by Justice Kennard in her dissent in *Moye, supra*, 47 Cal.4th at page 563 (dis. opn. of Kennard, J.). In her dissent, Justice Kennard stated, "[T]he trial court's failure to instruct on the heat of passion theory of voluntary manslaughter was federal constitutional error 'because the trial court . . . inadequately instructed the jury on the elements of murder by failing to explain that the element of malice is not present when the defendant kills in the heat of passion.'" (*Id.* at p. 564; see also *Breverman, supra*, 19 Cal.4th at p. 194 (dis. opn. of Kennard, J.) [noting that jury instructions that erroneously describe an element of an offense are subject to the *Chapman* standard of prejudice].) Justice Kennard reasoned, "'Given the manner in which California has structured the relationship between murder and voluntary manslaughter, the complete definition of malice is the intent to kill or the intent to do a dangerous act with conscious disregard of its danger *plus the absence of* both heat of passion and unreasonable self-defense.'" (*Moye, supra*, at pp. 563-564 (dis. opn. of Kennard, J.).)

Even assuming that a majority of the Supreme Court were to adopt Justice Kennard's view, it has no application to a trial court's failure to instruct the jury that an unintentional killing *without malice* committed during the course of an inherently dangerous assaultive felony constitutes voluntary manslaughter under *Garcia*. Unlike acts committed in a heat of passion or unreasonable self-defense, which "negate malice" (*Manriquez, supra*, 37 Cal.4th at p. 583), a *Garcia* theory of voluntary manslaughter applies independently of, and in the absence of, malice. The failure to instruct on the *Garcia* theory of voluntary manslaughter thus does not constitute an erroneous description of the malice element of murder. Therefore, pursuant to *Breverman, supra*, 19 Cal.4th 142, the *Watson* standard of prejudice applies.

voluntary manslaughter, for the following reasons. First, as discussed in part III.F., *ante*, the evidence of the physical acts that Bryant undertook on the night of the stabbing does not establish, as a matter of law, that she acted with implied malice. This is not, for example, a case in which the victims "were hit by multiple gunshots fired at close range from three different firearms." (*Chun, supra*, 45 Cal.4th at p. 1205 ["No juror could have found that defendant participated in this shooting, either as a shooter or as an aider and abettor, without also finding that defendant committed an act that is dangerous to life and did so knowing of the danger and with conscious disregard for life—which is a valid theory of malice"].) Rather, in this case, Robert died from a single stab wound incurred during a physical struggle.

Further, the physical evidence from the crime scene generally corroborated Bryant's testimony as to the nature of the struggle. In addition, her testimony was largely consistent with the statements that she made to the police immediately following the stabbing, and was ambiguous with respect to whether she harbored implied malice at the time of the stabbing. In particular, as noted in part III.F., *ante*, Bryant never said that she intended to stab Robert or that she knew that her act of thrusting the knife toward Robert as he lunged at her would endanger his life.

In addition, the other evidence of Bryant's mental state in committing the stabbing was far from conclusive. Importantly, the jury could have reasonably considered the fact that Bryant immediately sought medical attention for Robert and that she expressed both extreme remorse for the consequences of her actions, and a concern for Robert's well-being in the minutes and hours following the stabbing—evidence that is inconsistent with

Bryant having harbored implied malice at the time of the stabbing. (See, e.g., *People v. Burden* (1977) 72 Cal.App.3d 603, 620-621 ["A defendant's lack of concern as to whether the victim lived or died, expressed or implied, has been found to be substantial evidence of an 'abandoned and malignant heart' by the appellate courts of this state"]; *People v. Ogg* (1958) 159 Cal.App.2d 38, 51 ["Defendant's failure to seek the assistance of his friends or to obtain medical aid even though he knew that his wife was seriously injured indicates a heartless attitude and callous indifference toward her"].) In light of this evidence, a jury might well have concluded that Bryant failed to appreciate the severity of the consequences of her act in thrusting a knife toward Robert as he lunged at her. Accordingly, we reject the People's contention that "[Robert's] manner of death and [Bryant's] mental state was not such that a jury could have reasonably found [Bryant] acted without implied malice."²⁴

We reject all of the other arguments that the People offer in support of their contention that any instructional error was harmless. The People note that Bryant and Robert had a "history of violence," and contend that Robert's death was "a snapshot of appellant's volatility." However, the People do not explain how evidence presented at trial concerning the couple's abusive relationship establishes that the trial court's instructional error was harmless, and we see no basis upon which to draw such a

²⁴ The jury acquitted Bryant of first degree murder, and the evidence of the distinct theories of voluntary manslaughter as to which the trial court did instruct the jury—imperfect self-defense and heat of passion—was relatively weak. Indeed, the People do not contend that the jury's implied finding that Bryant did not act in either imperfect self-defense or the heat of passion is relevant in determining whether the trial court's failure to instruct on the distinct *Garcia* theory of voluntary manslaughter was prejudicial.

conclusion.²⁵ Nor are we persuaded that this court may affirm the judgment based on the "relatively short [jury] deliberation[s]" and the fact that the jury reached a verdict 45 minutes after the court reporter completed a read back of Bryant's testimony.²⁶ To do so would amount to little more than speculation as to what occurred during those deliberations.

In most cases in which the jury finds that the defendant killed the victim in the course of committing a felony that is inherently dangerous to human life, the jury will likely also conclude that the defendant harbored express or implied malice, and thus, that the defendant is guilty of second degree murder. However, there are cases, such as this, in which it is not clear from the circumstances of the offense that in committing an inherently dangerous felony, the defendant acted in conscious disregard of life. In such a case, the defendant is entitled to a jury instruction based on the *Garcia* theory of voluntary manslaughter.²⁷

²⁵ As the People acknowledge in their supplemental brief, there was considerable evidence presented at trial that the Robert and Bryant were "*mutually* abusive." (Italics added.)

²⁶ The jury deliberated for approximately four hours over a two-day period.

²⁷ In this case, in light of the merger doctrine, Bryant may not be convicted of second degree felony-murder based upon an unintentional killing committed without malice during the course of an inherently dangerous felony. (*Chun, supra*, 45 Cal.4th at p. 1178; see fn. 4, *ante*.) However, the possibility of an unwarranted second degree murder conviction exists in this case because the failure to instruct on a lesser included offense that is supported by the evidence presents "the jury with an 'unwarranted all-or-nothing choice. . . .'" (*Breverman, supra*, 19 Cal.4th at p. 155.)

IV.

DISPOSITION

Bryant's conviction for second degree murder is reversed. If the People do not bring Bryant to retrial on a charge of second degree murder within the time limit set forth in section 1382 (i.e., 60 days after the filing of the remittitur unless good cause is shown for a different period or Bryant waives the 60-day requirement), the trial court shall proceed as if the remittitur constituted a modification of the judgment to reflect a conviction for voluntary manslaughter, and shall resentence Bryant accordingly.

AARON, J.

WE CONCUR:

NARES, Acting P. J.

McINTYRE, J.