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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DEXTER ERIC WILLIAMS, Defendant and Appellant.	B185615 (Los Angeles County Super. Ct. No. BA258753)

APPEAL from a judgment of the Superior Court of Los Angeles County, Marsha N. Revel, Judge. Modified and, as modified, affirmed with directions.

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

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Robert F. Katz and Roy C. Preminger, Deputy Attorneys General, for Plaintiff and Respondent.

Dexter Eric Williams appeals from the judgment entered following his conviction by jury on count 1 - second degree murder (Pen. Code, § 187) and count 2 - shooting from a motor vehicle (Pen. Code, § 12034, subd. (c)) with, as to each offense, personal use of a firearm (Pen. Code, § 12022.53, subd. (b)), personal and intentional discharge of a firearm (Pen. Code, § 12022.53, subd. (c)), and personal and intentional discharge of a firearm causing great bodily injury and death (Pen. Code, § 12022.53, subd. (d)), with court findings that he suffered a prior felony conviction (Pen. Code, § 667, subd. (d)), a prior serious felony conviction (Pen. Code § 667, subd. (a)), and a prior felony conviction for which he served a separate prison term (Pen. Code, § 667.5, subd. (b)). The court sentenced him to prison for an unstayed term of 60 years to life.

In this case, we reject appellant's claim that the trial court erred by failing to instruct on perfect self-defense. There was no substantial evidence that when appellant shot and killed the decedent, appellant actually or reasonably believed that he was in imminent danger of death or great bodily injury. Moreover, there was no substantial evidence that appellant was acting based solely upon fear of such danger, but substantial evidence that appellant was committing a gang-related retaliatory shooting. Further, perfect self-defense was unavailable as a defense because there was substantial evidence that appellant sought a quarrel with the decedent with intent to create the necessity to exercise perfect self-defense, and no substantial evidence to the contrary. Finally, perfect self-defense instructions would have been inconsistent with appellant's misidentification defense.

We reject appellant's claims of instructional error regarding imperfect self-defense. In particular, we reject appellant's claim that the trial court erroneously gave two instructions (CALJIC Nos. 5.50 and 5.51) containing "reasonable person" standards which conflicted with other instructions that imperfect self-defense was based on an actual but unreasonable belief in danger. The above two instructions pertained to perfect self-defense and no reasonable jury would have

understood them as referring to imperfect self-defense; therefore, the challenged instructions did not prevent the jury from considering imperfect self-defense.

Moreover, although appellant argues the alleged error prejudicially prevented the jury from considering imperfect self-defense, any error was not prejudicial. First, appellant's defense theory was misidentification, not voluntary manslaughter based on imperfect self-defense. Second, appellant was not entitled to any imperfect self-defense instructions because (1) there was no substantial evidence that when appellant killed the decedent, appellant actually believed that he was in imminent danger of death or great bodily injury, (2) there was no substantial evidence that appellant acted upon any such belief but substantial evidence he acted with a retaliatory purpose, and (3) appellant sought a quarrel with the decedent to avail himself of any mitigation of imperfect self-defense. Third, the court gave other adequate instructions on imperfect self-defense. Fourth, imperfect self-defense was relevant only to the issue of whether appellant committed voluntary manslaughter based on imperfect self-defense, and the jury, having convicted appellant of murder, necessarily rejected any mitigation evidence of imperfect self-defense. Therefore, it was not reasonably probable that the jury would have convicted appellant of voluntary manslaughter based on imperfect self-defense absent the alleged instructional errors.

Appellant also claims the trial court erroneously failed to give two instructions (CALJIC Nos. 5.12 and 5.17) which would have distinguished perfect and imperfect self-defense and eliminated the previously mentioned alleged instructional conflict. However, as mentioned, no reasonable jury would have understood a conflict to have existed; therefore, the giving of CALJIC Nos. 5.12 and 5.17 was unnecessary. In any event, any trial court error in failing to give CALJIC Nos. 5.12 and 5.17 was not prejudicial for the reasons mentioned in the prejudice analysis in the preceding paragraph. Appellant further claims the trial court erroneously failed to give CALJIC No. 5.17 because it defined "actual but unreasonable belief" for purposes of imperfect self-defense. However, no error

occurred because the court adequately instructed on "actual but unreasonable belief." In any event, the claimed error was not prejudicial.

We reject appellant's claim that the trial court prejudicially erred by instructing that intent to kill was a necessary element of voluntary manslaughter based on imperfect self-defense, because a defendant can commit that offense merely with conscious disregard for life. We agree the instruction was erroneous. However, the claimed error was not prejudicial. First, the prosecutor correctly argued to the jury that appellant could commit voluntary manslaughter with intent to kill or conscious disregard for life. Second, appellant's claim of instructional error is relevant only to the issue of whether appellant committed voluntary manslaughter based on imperfect self-defense. However, the error was not prejudicial for the reasons set forth in the previously mentioned prejudice analysis. Accordingly, we reject appellant's related claim that the trial court committed cumulative prejudicial instructional error.

Notwithstanding respondent's concession, we reject appellant's claim that the Penal Code section 667.5, subdivision (b), enhancement pertaining to count 2, must be stricken. The trial court's staying of the enhancement was consistent with the fact that punishment on the enhancement was barred by Penal Code section 654. Finally, in light of our disposition of appellant's claims on their merits, we reject his final claim that he was denied effective assistance of counsel to the extent he waived any claimed errors by failing to object below.

FACTUAL SUMMARY

1. *People's Evidence*.

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence, the sufficiency of which is undisputed, established that in June 2003, Demond Weidman was a member of the Rolling 30's gang. Weidman and another man went to a house to buy drugs but the two were robbed of their money after they went inside. Weidman told his sister that it

had been dark inside the house and that he had seen infrared lights which he believed emanated from guns.

Weidman later spoke with appellant, who was also a Rolling 30's gang member. Weidman told appellant that Rolling 20's gang members had committed the robbery and therefore had disrespected the Rolling 30's gang. Both gangs were part of the Bloods gang.

Subsequently, during the afternoon of June 13, 2003, Byron Brown (the decedent), Michael Dupree, and Martin Moore were at a gas station at Normandie and Adams. The gas station was in an area claimed by the Rolling 20's gang. Dupree and Moore had arrived in Dupree's silver Lexus. Brown and Dupree were members of the Rolling 20's gang. Moore was a former member of the Black P Stones, another Bloods gang. Brown, Dupree, and Moore were friends.

Appellant drove up in a brown Cadillac and was its sole occupant. Moore recognized appellant and approached his car. Dupree testified that appellant told Moore, "Step back, Stone." Moore saw a gun in appellant's lap and complied.

Moore testified as follows. Brown was talking with appellant, and appellant told Brown, "'That's messed up, man, what you did.'" Appellant commented that someone owed something to someone. Appellant said, "'You know that was f'ed up, what happened.'" Appellant also said, "'You know, that's fucked up.'"

Moore heard comments about someone owing something over a drug deal. Brown and appellant were arguing and appellant told Brown that he owed appellant. Moore heard someone say that someone from the Rolling 30's gang "came over into 20's" to buy drugs, the drug deal went bad because "the guy was smoking sherm," and once he got "high," they robbed him of his money. Brown replied he was not involved.

Appellant then said, "'Don't reach for that. Don't reach for that, man. Don't reach for that.'" Immediately thereafter, appellant began shooting Brown. Appellant fired over five shots. Moore saw appellant fire the first shot, then

Moore and Dupree fled. Brown had been standing near the front of the driver's side of appellant's car. Appellant had been seated in his car the entire time. After the shooting, Brown fell and appellant drove away.

According to Moore, Brown never took out a gun, and no one did shooting other than appellant. Brown never removed anything from his pockets. Brown was facing appellant just before appellant put his gun out the driver's window, which was down, and first shot Brown.

Moore testified that if one Bloods set robbed another Bloods set, this would be disrespectful. Moore was familiar with what happened when there were "drug rip-offs" between gangs. It was disrespectful for one gang to "rip off" another gang and retaliation would result. The retaliation would vary from mutual combat to shootings.

Dupree testified as follows. An argument was occurring and Dupree heard the person in the car say, "'Don't go in your pockets.'" When the person in the car made that comment, Brown was "[l]ike fumbling around here, getting his phone. He must have been grabbing his phone." Brown's cell phone was on his left hip, and Brown moved like he was going to his cell phone "just checking like it might have gone off or vibrated." Brown was wearing a sweatshirt, but Dupree could not remember if the shirt covered the phone. When Brown went to his left hip area, Brown was going for his phone. According to Dupree, Brown never put his hands in his pockets, and Dupree never saw Brown take anything out and point it at the car's driver. When the shots were fired, Brown was "standing on the side of the door" about three to five feet from the driver.

On June 14, 2003, police arrested appellant and, at that time, he possessed an operable .38-caliber revolver. A medical examiner testified Brown suffered three gunshot wounds, that is, two in the back and one in the right arm. One medium caliber bullet entered Brown's left upper back. A medium caliber bullet was between a .32- and .38-caliber bullet, or a 9-millimeter bullet. The bullet traveled through Brown from back to front, left to right, and upward. The bullet

passed through Brown's lung and severed his aorta, killing him rapidly. The medical examiner recovered the bullet.

A second bullet causing a nonfatal wound entered Brown's right lower back and passed through his body. A third bullet entered his right upper arm and lodged near the armpit. The third bullet was of medium caliber. Because of an arm's mobility, the medical examiner could not opine the direction of travel of that bullet or the position of the gun at the time the gun fired that bullet. A criminalist testified the two recovered bullets were consistent with having been fired from a .38-caliber or .357-magnum gun. The criminalist could not determine whether the bullets were fired from the revolver which police recovered from appellant on June 14, 2003.

2. *Defense Evidence*.

In defense, Frank Garcia, a television station employee, testified that about 4:00 p.m. on June 13, 2003, he was at the intersection of Normandie and Adams when he heard what he thought might have been gunshots. He looked towards the gas station and saw people running from it. One such person was a man who looked to the left and right, jumped, then ran across Normandie. The man was holding his right arm straight out to his side, his left arm was moving up and down, and he then began running. Garcia did not see anything in the man's hand. Garcia parked his car and later saw persons standing next to a silver, grayish car at the station. One such person was yelling, using profanity, and pointing in the direction of the man who appeared to be running.

CONTENTIONS

Appellant contends the trial court (1) erroneously failed to instruct fully on perfect self-defense, (2) erroneously instructed on imperfect self-defense, and (3) erroneously instructed that intent to kill was a required element of voluntary manslaughter. He also contends the cumulative instructional error was prejudicial, a stayed Penal Code section 667.5, subdivision (b), enhancement must be stricken, and he was denied effective assistance of counsel.

DISCUSSION

1. *The Court Did Not Erroneously Fail to Instruct Fully on Perfect Self-Defense.*

a. *Pertinent Facts.*

During jury argument, appellant conceded that Weidman and his companion were robbed, and that a witness heard Weidman tell someone whom the witness believed was appellant that the robbery was disrespectful. Moreover, as to the events of June 13, 2003, appellant conceded that the cause of Brown's death was not at issue. Appellant's counsel also argued, "I'm not disputing that something horrible happened on June 13, 2003." Appellant argued the People had to prove their case beyond a reasonable doubt, but appellant did not expressly dispute that someone committed the offenses alleged in counts 1 and 2, nor did appellant expressly dispute that the murder was of the first degree. Instead, appellant argued that the issue in this case was identity.[1] Appellant did not request instructions on perfect self-defense.

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[1] Appellant's counsel argued, "The prosecutor is right about one thing, about my closing argument. We will talk about eyewitness identity and witness believability." Counsel indicated he would review the jury instructions with the jury "to make sure you are clear on what I think are the critical ones, which I believe are eyewitness identification, believability of witnesses, and that's it." Counsel argued there were two reasonable interpretations concerning whether the recovered bullets came from the firearm recovered from appellant, one interpretation pointing to guilt, the other to innocence, and "that's what it is, an eyewitness case." Counsel later stated "[t]he gravamen of this case involves eyewitness identification testimony and witness believability." Counsel argued the present case was an "eyewitness identification case." Counsel extensively reviewed with the jury the witnesses' testimony in light of jury instructions pertaining to witness credibility and eyewitness identifications.

b. *Analysis.*

Appellant claims the trial court erroneously failed to instruct sua sponte on perfect self-defense using CALIJC Nos. 5.10, 5.12, 5.13, and 5.15, with the result that his convictions must be reversed.[2] We disagree.

1) *Pertinent law.*

People v. Randle (2005) 35 Cal.4th 987 (*Randle*) discussed self-defense in the context of homicide. *Randle* stated, "Self-defense is *perfect* or *imperfect*. For perfect self-defense, one must actually *and* reasonably believe in the necessity of defending oneself from imminent danger of death or great bodily injury. [Citation.] A killing committed in perfect self-defense is neither murder nor manslaughter; it is justifiable homicide." (*Id. at* p. 994.) We discuss imperfect self-defense later.

Concerning justifiable homicide committed in self-defense, *People v. Flannel* (1979) 25 Cal.3d 668 states, "the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone." (*Id.* at pp. 674-675.) There is no dispute that CALJIC No. 5.12 correctly states pertinent law on justifiable homicide committed in self-defense; indeed, appellant claims the trial court erred by failing to give it. That instruction states, in relevant part, "A bare fear of death or great bodily injury

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[2] CALJIC No. 5.10 reads: "Homicide is justifiable and not unlawful when committed by any person who is resisting an attempt to commit a forcible and atrocious crime." We discuss CALJIC No. 5.12 later. CALJIC No. 5.13 reads, in relevant part: "Homicide is justifiable and not unlawful when committed by any person in the defense of [himself] [herself] . . . if [he] [she] actually and reasonably believed that the individual killed intended to commit a forcible and atrocious crime and that there was imminent danger of that crime being accomplished. A person may act upon appearances whether the danger is real or merely apparent." CALJIC No. 5.15 reads: "Upon a trial of a charge of murder, a killing is lawful if it was [justifiable] [excusable]. The burden is on the prosecution to prove beyond a reasonable doubt that the homicide was unlawful, that is, not [justifiable] [excusable]. If you have a reasonable doubt that the homicide was unlawful, you must find the defendant not guilty."

is not sufficient to justify a homicide. To justify taking the life of another in self-defense, the circumstances must be such as would excite the fears of a reasonable person placed in a similar position, and the party killing must act under the influence of those fears alone. The danger must be apparent, present, immediate and instantly dealt with, or must so appear at the time to the slayer as a reasonable person, and the killing must be done under a well-founded belief that it is necessary to save one's self from death or great bodily harm."

Even assuming perfect self-defense is otherwise available as a defense, it is unavailable when the defendant sought a quarrel with the intent to create a real or apparent necessity of exercising self-defense. (See *People v. Garnier* (1950) 95 Cal.App.2d 489, 496; CALJIC No. 5.55.[3]) Finally, a trial court is under no duty to instruct on perfect self-defense unless there is substantial evidence to support the instruction. (*In re Christian S.* (1994) 7 Cal.4th 768, 783.)

2) *Application of the Law to This Case.*

In the present case, there was evidence that in June 2003, Rolling 20's gang members robbed Rolling 30's gang members during a drug rip off. There was also evidence that such a robbery would result in gang retaliation including shootings. Later, on June 13, 2003, appellant, a Rolling 30's gang member and therefore a member of the robbery victims' gang, arrived at the gas station armed with a gun. He first encountered Moore, whom he referred to as Stone. Moore had been a former member of the Black P Stones, a gang other than the Rolling 20's. Appellant's reference supported the inference that he was distinguishing between the Black P Stones and Rolling 20's gangs. Appellant told Stone to step back and did not argue with him.

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[3] CALJIC No. 5.55 states, "The right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense."

Instead, it was with Brown, a member of the Rolling 20's gang, that appellant began arguing shortly after he arrived. Appellant, using profanity, complained that a Rolling 30's gang member had been the victim of a drug rip-off robbery committed by Rolling 20's gang members, suggested Brown's involvement, and told him that he owed appellant. Brown denied involvement.

As appellant concedes, there was no evidence that Brown was armed. According to Moore, Brown had been standing near the front of the driver's side of appellant's car. Brown was facing appellant just before he shot Brown. According to Dupree, Brown was getting the cell phone on his left hip, the side of Brown closest to the driver's side of the car. This supported an inference that appellant saw that Brown merely had been reaching for his cell phone. Nonetheless, with Brown only about three to five feet from appellant, appellant, according to Dupree, told Brown not to go in his pocket. Moore testified appellant repeatedly told Brown "'Don't reach for that.'" There was no evidence that Brown actually put his hands in his pockets.

Moreover, there is no evidence that appellant, at the scene, said Brown had a weapon or was preparing to point one at appellant. For all the record demonstrates, to the extent appellant told Brown "'Don't reach for that,'" appellant might have simply been telling Brown not to reach for his cell phone. There is no evidence that appellant, at the scene, denied knowing that Brown was reaching for a cell phone.

Even faced only with the above events, we might have concluded there was no substantial evidence of perfect self-defense. But the pertinent events did not end with the above. Appellant fired more than five shots from a .38-caliber or .357-magnum gun at the unarmed Brown at close, if not point blank, range. According to the forensic evidence, three bullets hit Brown, two in the back. This provided uncontradicted evidence that after any effort by Brown to get his phone, but immediately before appellant shot him, Brown had turned away and had his back to appellant. There was also evidence that Brown fled and therefore

evidence he turned his back to appellant to flee. There was no evidence that, after Brown began turning away, but before he was shot, he did anything causing appellant to believe he was in imminent danger. After appellant shot Brown, appellant drove away, evidencing consciousness of guilt.

In light of the above, we conclude for four reasons that the trial court did not err by failing to instruct on perfect self-defense. First, there was no substantial evidence that, at the time appellant shot Brown, appellant actually or reasonably believed that Brown presented an imminent danger of death or great bodily injury to appellant. There was no substantial evidence that there was danger that was apparent, present, immediate and had to be instantly dealt with, or that the danger appeared to be such to appellant as a reasonable person. For this reason alone, the trial court did not err by failing to instruct on perfect self-defense. (Cf. *People v. Stitely* (2005) 35 Cal.4th 514, 552; *People v. Hill* (2005) 131 Cal.App.4th 1089, 1102.)

Second, there was ample evidence that appellant shot Brown in retaliation for a drug rip-off robbery. We also note in this regard that there is no dispute that appellant committed a violation of Penal Code section 12034, subdivision (c), the offense alleged in count 2. That subdivision provides that "Any person who willfully and *maliciously* discharges a firearm from a motor vehicle at another person other than an occupant of a motor vehicle is guilty of a felony . . . ." (Italics added.) The court, using CALJIC No. 1.22, instructed the jury that the term "maliciously" meant "a wish to vex, annoy or injure another person, or an intent to do a wrongful act." (See Pen. Code, § 7, par. 4.) Even if appellant shot Brown motivated in part by fear of death or great bodily injury, there was no substantial evidence that, when appellant killed Brown, appellant "acted under the influence of such fears alone." Under these circumstances, the trial court did not err by failing to instruct on perfect self-defense. (Cf. *People v. Levitt* (1984) 156 Cal.App.3d 500, 509-510; see *People v. Trevino* (1988) 200 Cal.App.3d 874, 877-880.)

Third, assuming perfect self-defense was otherwise available to appellant as a defense, we conclude it is unavailable where, as here, there was substantial evidence that appellant sought a quarrel with Brown with the intent to create a real or apparent necessity of exercising self-defense, and no substantial evidence to the contrary. (Cf. *People v. Hill*, *supra*, 131 Cal.App.4th at p. 1102; see *People v. Garnier*, *supra*, 95 Cal.App.2d at p. 496.) The jury reasonably could have concluded that appellant merely feigned concern for danger as a pretext to shoot Brown.

Finally, appellant concedes he did not argue perfect self-defense to the jury. Instead, he argued identity, that is, that he was not the person who killed Brown. The defense argument was thus inconsistent with perfect self-defense instructions (cf. *People v. Eilers* (1991) 231 Cal.App.3d 288, 294, fn. 2), which applied only if appellant killed. "[E]ven where substantial evidence supports a *defense* to the charge, sua sponte instructions thereon are not required if they appear inconsistent with the defendant's trial theory." (*People v. Rios* (2000) 23 Cal.4th 450, 464.) Therefore, the trial court's failure to give such instructions was not error. None of appellant's arguments or characterizations of the evidence compel a contrary conclusion.

2. *The Court Did Not Erroneously Instruct on Imperfect Self-Defense.*

a. *Pertinent Facts.*

The court instructed the jury on the definition of voluntary manslaughter (CALJIC No. 8.40),[4] "murder and manslaughter distinguished" (CALJIC No.

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[4] CALJIC No. 8.40 read: "Every person who unlawfully kills another human being without malice aforethought, but with an intent to kill . . . is guilty of voluntary manslaughter in violation of Penal Code section 192, subdivision (a). [¶] There is no malice aforethought if the killing occurred . . . in the actual but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury. [¶] . . . [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A human being was killed; [¶] 2. The killing was unlawful; and [¶] 3. The perpetrator of the killing intended to kill the

8.50; capitalization omitted),[5] "self-defense--actual danger not necessary" (CALJIC No. 5.51; capitalization omitted)[6] and then "self-defense--assailed person need not retreat" (CALJIC No. 5.50; capitalization omitted).[7] The court also instructed on the definition of manslaughter (CALJIC No. 8.37).

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alleged victim . . . ; and [¶] 4. The perpetrator's conduct resulted in the unlawful killing. [¶] A killing is unlawful, if it was neither justifiable nor excusable."

[5] CALJIC No. 8.50 read: "The distinction between murder and manslaughter is that murder requires malice while manslaughter does not. [¶] When the act causing the death, though unlawful, is done in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, the offense is manslaughter. In that case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent. [¶] To establish that a killing is murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done in the actual, even though unreasonable, belief in the necessity to defend against imminent peril to life or great bodily injury."

[6] CALJIC No. 5.51 read: "Actual danger is not necessary to justify self-defense. If one is confronted by the appearance of danger which arouses in [his] mind, as a reasonable person, an actual belief and fear that [he] is about to suffer bodily injury, and if a reasonable person in a like situation, seeing and knowing the same facts, would be justified in believing [himself] in like danger, and if that individual so confronted acts in self-defense upon these appearances and from that fear and actual beliefs, the person's right of self-defense is the same whether the danger is real or merely apparent."

[7] CALJIC No. 5.50 read: "A person threatened with an attack that justifies the exercise of the right of self-defense need not retreat. In the exercise of [his] right of self-defense a person may stand [his] ground and defend [himself] by the use of all force and means which would appear to be necessary to a reasonable person in a similar situation and with similar knowledge; and a person may pursue [his] assailant until [he] has secured [himself] from danger if that course likewise appears reasonably necessary. This law applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene."

b. *Analysis.*

1) *The Court Did Not Err by Giving CALJIC Nos. 5.50 and 5.51.*

Appellant claims the trial court erroneously gave CALJIC Nos. 5.50 and 5.51. In particular, he argues that those two instructions gave conflicting instructions on imperfect self-defense because they conflicted with CALJIC Nos. 8.40 and 8.50. He asserts the bare concepts in CALJIC Nos. 5.50 and 5.51 that an assailed person need not retreat, and danger need not be actual but may only be apparent, respectively, apply to perfect self-defense and imperfect self-defense alike. However, appellant argues that (1) CALJIC No. 5.50 told the jury that permissible force was limited to what appeared to be necessary to a "reasonable person," (2) CALJIC No. 5.51 told the jury that the defendant's actual belief in danger had to be that of a "reasonable person," (3) these "reasonable person" standards conflicted with language in CALJIC Nos. 8.40 and 8.50 indicating that the offense is voluntary manslaughter, and manslaughter, respectively, when the killing is done in the actual but "unreasonable" belief in the necessity to defend; therefore, (4) the jury was misinstructed on the law of imperfect self-defense as it relates to voluntary manslaughter and his conviction on count 1 must be reversed. We reject appellant's claim.

a) *No Instructional Error Occurred*.

"One acting in imperfect self-defense . . . actually believes he must defend himself from imminent danger of death or great bodily injury; however, his belief is unreasonable. [Citations.] Imperfect self-defense mitigates, rather than justifies, homicide; it does so by negating the element of malice." (*Randle, supra*, 35 Cal.4th at p. 994.)

To evaluate appellant's claim of instructional error, "'[w]e determine how it is reasonably likely the jury understood the instruction, and whether the instruction, so understood, accurately reflects applicable law. [Citations.]' [Citations.] 'Whether instructions are correct and adequate is determined by

consideration of the entire charge to the jury. [Citation.]' [Citations.]" (*People v. James* (1998) 62 Cal.App.4th 244, 273-274.)

CALJIC No. 5.50 discussed the right not to retreat from a threatened attack "that justifies the exercise of the right of self-defense." CALJIC No. 5.51 stated actual danger is not necessary to "justify self-defense" and referred to the "right of self-defense." That is, CALJIC Nos. 5.50 and 5.51 applied to the *justification* or right of self-defense, that is, the *fully exculpating* affirmative defense of perfect self-defense. CALJIC Nos. 8.40 and 8.50 effectively instructed on, inter alia, an actual but unreasonable belief in the necessity to defend as *mitigation* negating malice aforethought for purposes of establishing the *crime* of voluntary manslaughter. Notwithstanding any intent of the trial court in giving CALJIC Nos. 5.50 and 5.51, no jury reasonably would have understood any part of those two instructions as being relevant to, or explaining, CALJIC No. 8.40 or 8.50. No reasonable jury would have applied a portion of CALJIC No. 5.50 or 5.51 to perfect self-defense and another portion to imperfect self-defense.

In particular, no jury reasonably would have understood the "reasonable person" language in CALJIC No. 5.50 or 5.51 as conflicting with the language in CALJIC No. 8.40 or 8.50 concerning actual but "unreasonable" belief. Appellant concedes ". . . CALJIC Nos. 5.50 and 5.51 contained 'reasonable person' language that was only applicable to perfect self-defense." The trial court did not error by giving CALJIC Nos. 5.50 and 5.51, since it is not reasonably likely that the jury would have understood those instructions as appellant suggests.

b) *Any Instructional Error Was Not Prejudicial.*

Moreover, any error in giving CALJIC Nos. 5.50 and 5.51 does not warrant reversal of the judgment. As mentioned, appellant argues that, as a result of the alleged instructional error, the court misinstructed on imperfect self-defense. Imperfect self-defense was relevant only to the issue of whether appellant committed voluntary manslaughter based on imperfect self-defense. Voluntary manslaughter based on imperfect self-defense is a lesser included offense of

murder. (*People v. Barton* (1995) 12 Cal.4th 186, 200-201.) In *People v. Breverman* (1998) 19 Cal.4th 142 (*Breverman*), our Supreme Court stated "we conclude that in a noncapital case, error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under [*People v.*] *Watson* [(1956) 46 Cal.2d 818, 836]." (*Breverman*, *supra*, 19 Cal.4th at p. 178.)

At the outset, we note appellant, during jury argument, did not argue he committed voluntary manslaughter or, in particular, voluntary manslaughter based on imperfect self-defense. He argued he was not the person who killed.

Further, appellant was not entitled to any instructions on imperfect self-defense for reasons, some of which are similar to those we previously articulated. First, there was no substantial evidence that, at the time appellant shot Brown, appellant actually believed that Brown presented an imminent danger of death or great bodily injury to appellant. (Cf. *People v. Stitely*, *supra*, 35 Cal.4th at p. 552.) Second, there was no substantial evidence that appellant acted upon any such belief but substantial evidence that he acted with a retaliatory motive (see *People v. Sinclair* (1998) 64 Cal.App.4th 1012, 1016) and, without dispute, "maliciously" within the meaning of Penal Code section 12034, subdivision (c). Third, even assuming imperfect self-defense was otherwise available to appellant as mitigation, we conclude imperfect self-defense was unavailable where, as here, there was substantial evidence that appellant sought a quarrel with Brown with the intent to create the necessity of exercising imperfect self-defense, and no substantial evidence to the contrary. (Cf. *People v. Seaton* (2001) 26 Cal.4th 598, 664; *People v. Hill*, *supra*, 131 Cal.App.4th at p. 1102.)

Fourth, in the present case, CALJIC Nos. 8.40 and 8.50 effectively instructed the jury on voluntary manslaughter and imperfect self-defense. (*People v. Cordero* (1989) 216 Cal.App.3d 275, 279 (*Cordero*). Fifth, the jury, instructed pursuant to CALJIC No. 8.50 that imperfect self-defense negated malice

aforethought, nonetheless convicted him of murder. The jury thus rejected any mitigation evidence that appellant killed in imperfect self-defense. Therefore, even absent the alleged instructional error, the jury would not have convicted appellant of voluntary manslaughter based on imperfect self-defense, and any trial court error in giving CALJIC Nos. 5.50 and 5.51 was harmless. (Cf. *People v. Lasko* (2000) 23 Cal.4th 101, 111-113 (*Lasko*); *Breverman*, *supra*, 19 Cal.4th at p. 178.)

2) *The Court Did Not Erroneously Fail to Give CALJIC Nos. 5.12 and 5.17.*

Appellant claims the trial court erroneously failed to give CALJIC No. 5.12 (discussed previously) pertaining to justifiable homicide in self-defense, and CALJIC No. 5.17[8] pertaining to an actual but unreasonable belief in the necessity to defend for purposes of manslaughter. He argues that (1) CALJIC No. 5.12 explicated perfect self-defense, (2) CALJIC No. 5.17 explicated the distinction between the doctrines of perfect and imperfect self-defense, and (3) the instructions' distinction between the two doctrines would have eliminated the previously mentioned alleged conflict between, on the one hand, CALJIC Nos. 5.50 and 5.51, and, on the other, CALJIC Nos. 8.40 and 8.50. We disagree.

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[8] CALJIC No. 5.17 states: "A person who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same situation seeing and knowing the same facts would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of [voluntary] [or] [involuntary] manslaughter. [¶] As used in this instruction, an 'imminent' [peril] [or] [danger] means one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer. [¶] [However, this principle is not available, and malice aforethought is not negated, if the defendant by [his] [her] [unlawful] [or] [wrongful] conduct created the circumstances which legally justified [his] [her] adversary's [use of force], [attack] [or] [pursuit].] [¶] [This principle applies equally to a person who kills in purported self-defense or purported defense of another person.]"

First, as previously mentioned, no jury reasonably would have understood any part of CALJIC No. 5.50 or 5.51 as conflicting with CALJIC No. 8.40 or 8.50; therefore, the giving of CALJIC Nos. 5.12 and 5.17 was unnecessary. A trial court is under no duty to give unnecessary instructions (*People v. Schultz* (1987) 192 Cal.App.3d 535, 539); therefore, the court did not err by failing to give CALJIC No. 5.12 or 5.17.

Moreover, even if the trial court erred by failing to give CALJIC Nos. 5.12 and 5.17, the prejudice analysis in part 2.b.1(b), applies with equal force here to compel the conclusion that any such error does not warrant reversal of the judgment. (Cf. *Breverman*, *supra*, 19 Cal.4th at p. 178.)

3) *The Court Did Not Erroneously Fail to Define "Actual But Unreasonable Belief."*

Appellant claims the trial court's failure to give CALJIC No. 5.17 was error because it would have instructed on the meaning of the previously mentioned phrase "actual but unreasonable belief" and that such a belief negates malice aforethought even if a reasonable person would not have had that belief. We disagree.

The court gave CALJIC Nos. 8.40 and 8.50, which instructed on "actual but unreasonable belief." CALJIC No. 5.17 would have defined that phrase. (*Cordero*, *supra*, 216 Cal.App.3d at p. 279.) Therefore, appellant is really arguing the trial court failed to clarify the phrase by using CALJIC No. 5.17. (*Ibid.*) However, appellant failed to request that the court give the clarifying CALJIC No. 5.17 instruction; therefore, he arguably waived the issue of whether it should have been given. (*People v. Palmer* (2005) 133 Cal.App.4th 1141, 1156.) In any event, even if the issue were not waived, CALJIC Nos. 8.40 and 8.50 adequately instructed on imperfect self-defense and the concept of an actual but unreasonable belief. (*Cordero*, *supra*, 216 Cal.App.3d at p. 279.) None of appellant's arguments compel a contrary conclusion. Finally, the prejudice analysis in part 2.b.1(b), applies with equal force here to compel the conclusion that any error in

failing to give CALJIC No. 5.17 to define "actual but unreasonable belief" does not warrant reversal of the judgment. (Cf. *Breverman*, *supra*, 19 Cal.4th at p. 178.)

3. *The Court's Erroneous Instruction That Intent to Kill Was a Required Element of Voluntary Manslaughter Was Not Prejudicial*.

a. *Pertinent Facts*.

The trial court also instructed the jury on voluntary manslaughter using CALJIC No. 8.40. (See fn. 4.) The instruction indicated that anyone who unlawfully killed another human being without malice aforethought but with an intent to kill was guilty of voluntary manslaughter. The instruction also indicated that one of the elements of voluntary manslaughter that had to be proved was that the perpetrator of the killing intended to kill the alleged victim. We will present additional facts where pertinent to the analysis below.

b. *Analysis*.

1) *The Giving of CALJIC No. 8.40 Was Error*.

Appellant claims CALJIC No. 8.40 erroneously instructed the jury that intent to kill was a necessary element of voluntary manslaughter. We agree.

In *People v. Blakely* (2000) 23 Cal.4th 82 (*Blakely*), a trial court instructed a jury that an intentional killing in imperfect self-defense (unreasonable self-defense)[9] was voluntary manslaughter. The trial court refused to instruct that an unintentional killing in imperfect self-defense was involuntary manslaughter. The jury convicted the defendant of voluntary manslaughter. (*Blakely*, at pp. 86-87.)

On appeal, the defendant argued that "one who unintentionally and unlawfully kills in unreasonable self-defense is guilty only of involuntary manslaughter." (*Blakely*, *supra*, 23 Cal.4th at p. 88.) As pertinent here, *Blakely*

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[9] The terms "imperfect self-defense" and "unreasonable self-defense" are used interchangeably in case law. (*People v. Manriquez* (2005) 37 Cal.4th 547, 582; *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1354.)

concluded that "a defendant who, with the intent to kill *or with conscious disregard for life*, unlawfully kills in unreasonable self-defense is guilty of voluntary manslaughter." (*Id.* at p. 91; some italics omitted.) *Blakely* noted the defendant's argument was "based on the assumption that intent to kill is a *necessary* element of voluntary manslaughter" (*id*. at p. 89; italics added) and, therefore, a defendant who, without intent to kill but with conscious disregard for life, unlawfully killed in imperfect self-defense could not be guilty of voluntary manslaughter but only of involuntary manslaughter. (*Ibid*.)

Blakely, relying on the companion case of *Lasko*, *supra*, 23 Cal.4th 101, rejected the defendant's argument that intent to kill was a necessary element of voluntary manslaughter. (*Blakely*, *supra*, 23 Cal.4th at pp. 89-91, 93, fn. 5.) *Lasko* had concluded "intent to kill is not a necessary element of the crime of voluntary manslaughter." (*Lasko*, *supra*, 23 Cal.4th at p. 111.) Accordingly, *Blakely* concluded that when a defendant "acting with a conscious disregard for life, unintentionally kills in unreasonable self-defense, the killing is voluntary rather than involuntary manslaughter." (*Blakely*, *supra*, 23 Cal.4th at p. 91.)

In *Blakely*, the defendant, convicted of voluntary manslaughter based on imperfect self-defense as mitigation, claimed intent to kill *was* a necessary element of voluntary manslaughter, and he was entitled to instructions on the lesser offense of involuntary manslaughter. *Blakely* held intent to kill was not a necessary element of voluntary manslaughter. In the present case, appellant, convicted of second degree murder, claims intent to kill *is not* a necessary element of voluntary manslaughter based on imperfect self-defense as mitigation; therefore, the trial court erred by instructing that intent to kill was a necessary element. *Blakely's* holding controls the present case; the trial court below erred by instructing that intent to kill was a necessary element of voluntary manslaughter based on imperfect self-defense.

Respondent claims *Blakely* held that a person "who intentionally kills in unreasonable self-defense is guilty of voluntary manslaughter"; therefore, the trial

court properly instructed that "intent to kill is an element of imperfect self-defense voluntary manslaughter." This misses the mark. The issue is not whether intent to kill is an element, but whether it is a necessary element. A person who intentionally kills in imperfect self-defense is guilty of voluntary manslaughter, but so is a person who, merely with conscious disregard for life, kills in imperfect self-defense. The situation is somewhat analogous to the alternative elements of force and fear in robbery; each is an element but unnecessary if the other exists. We hold the trial court erred by instructing that intent to kill was a necessary element of voluntary manslaughter. (*Lasko, supra,* 23 Cal.4th at p. 111; *Blakely, supra*, 23 Cal.4th at pp. 87-91.)

2) *The Error Was Not Prejudicial.*

However, it does not follow that reversal of the judgment is warranted. As mentioned, voluntary manslaughter based on imperfect self-defense is a lesser included offense of murder; therefore, we evaluate prejudice under the standard enunciated in *People v. Watson, supra*, 46 Cal.2d at 836. (*Breverman, supra,* 19 Cal.4th at p. 178.)

The error here was not prejudicial for two reasons. First, the prosecutor correctly argued to the jury that appellant could commit voluntary manslaughter with intent to kill *or* conscious disregard for life.

Second, and more importantly, appellant's argument that intent to kill is not a necessary element of voluntary manslaughter is relevant only if the error prevented the jury from considering voluntary manslaughter based on imperfect self-defense as a lesser included offense of murder. However, for the reasons discussed in the prejudice analysis in part 2.b.1(b), appellant was not entitled to instructions on imperfect self-defense, and the jury necessarily rejected any mitigation evidence of imperfect self-defense when the jury convicted him of murder. As to the latter point, we note the court instructed the jury pursuant to CALJIC No. 8.50 that, apart from whether appellant intended to kill, imperfect self-defense negated malice aforethought. The jury convicted appellant of murder

anyway, rejecting imperfect self-defense. Therefore, it is not reasonably probable that, absent the instructional error, the jury would have convicted appellant of voluntary manslaughter based on imperfect self-defense,[10] and the trial court's instructional error was not prejudicial. (Cf. *Lasko, supra*, 23 Cal.4th at p. 113; *Breverman, supra*, 19 Cal.4th at p. 178.)

4. *The Penal Code Section 667.5, Subdivision (b) Enhancement Need Not Be Stricken.*

a. *Pertinent Facts.*

As mentioned, the jury convicted appellant on counts 1 and 2. Moreover, as relevant here, as to count 2, the jury found true, inter alia, a Penal Code section 12022.53, subdivision (d), allegation, and the court found true allegations that appellant suffered a prior felony conviction under the Three Strikes law, a prior serious felony conviction under Penal Code section 667, subdivision (a), and, pursuant to Penal Code section 667.5, subdivision (b), a prior felony conviction for which he had served a separate prison term. The true findings as to the Penal Code section 667, subdivision (a), and Penal Code section 667.5, subdivision (b), enhancements were based on the same prior conviction.

At sentencing on August 19, 2005, the court sentenced appellant to prison for 60 years to life on count 1 (including the sentence for the offense plus applicable enhancements). As to count 2, the court stated, "The court selects the high term of seven years, plus the 25 years to life, and that would be 32 years to life. The court is going to stay the sentence pursuant to 654 because as a result of

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[10] It is true that first degree murder as alleged in this case required intent to kill, and the jury convicted appellant only of second degree murder, suggesting the jury did not conclude appellant intended to kill. However, the verdict did not mean the People had not presented ample evidence of intent to kill; the verdict meant only that the jury concluded such intent had not been proven beyond a reasonable doubt. In any event, the issue of whether appellant intended to kill does not affect the analysis. Neither does the fact that the court did not fully instruct on involuntary manslaughter.

this conduct the 187 occurred. . . ." The court later stated, "So that's 32, plus a five-year prior. 37 years to life on that, which is stayed pursuant to 654, and once again the court – I'm not sure if I have to strike or stay the one-year prior." After an unreported bench conference, the court stated, "As to the one-year prior the court will stay that."

The August 19, 2005 minute order reflects "Sentence as to count two is ordered stayed pursuant to Penal Code section 654, with the stay to become permanent upon the completion of the sentence imposed in count one." (Some capitalization omitted.) The minute order also states, "The sentencing enhancement[] pursuant to section[] . . . 667.5(b) [is] stayed by the court pursuant to section 654 Penal Code." (Some capitalization omitted.)

b. *Analysis.*

Appellant claims the Penal Code section 667.5, subdivision (b), enhancement pertaining to count 2 must be stricken. Notwithstanding respondent's concession, we reject appellant's claim.

The court concluded Penal Code section 654 barred punishment on count 2. When Penal Code section 654 bars punishment on a count, the section also bars punishment on any enhancement pertaining to that count. (*People v. Bracamonte* (2003) 106 Cal.App.4th 704, 709, 711-712; *People v. Guilford* (1984) 151 Cal.App.3d 406, 411-412; *People v. Smith* (1985) 163 Cal.App.3d 908, 912-914.) None of the cases cited by appellant deal with the application of Penal Code section 654 or compel a contrary conclusion.[11]

The trial court's staying of the enhancement on count 2 was consistent with the fact that Penal Code section 654 barred punishment on the enhancement. We will modify the judgment to reflect the approved articulation of the remedy,

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[11] In light of our discussion of appellant's contentions, we reject his contention that he was denied effective assistance of counsel to the extent he waived any issues by failing to object below.

namely, that punishment on the enhancement is imposed but execution thereof stayed pending appellant's completion of sentence on count 1. (*People v. Pearson* (1986) 42 Cal.3d 351, 360.)

DISPOSITION

The judgment is modified to reflect that punishment on the Penal Code section 667.5, subdivision (b), enhancement pertaining to count 2 is imposed, but execution thereof is stayed pending completion of appellant's sentence on his conviction for second degree murder (count 1), such stay then to become permanent, and, as modified, the judgment is affirmed. The trial court is directed to forward to the Department of Corrections an amended abstract of judgment reflecting the above modification.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P.J.

ALDRICH, J.