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PEOPLE v. ATHERLY

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THE PEOPLE, Plaintiff and Respondent, v. EDLY ALBERT ATHERLEY, Defendant and Appellant.

Court of Appeals of California, Fourth District, Division One.

Filed January 30, 2018.

Attorney(s) appearing for the Case

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NARES, *Acting P.J.*

Over Thanksgiving weekend in 2013, Edly Albert Atherley hit his wife, Ashley, in the face, giving her two black eyes and a broken nose.¹ Less than an hour later, he killed Ashley by stabbing her in the neck with a butcher knife.

A jury convicted Atherley of second degree murder (Pen. Code, ² §§ 187, subd. (a), 189) and found that in doing so he personally used a deadly weapon within the meaning of section 12022, subdivision (b)(1). The court sentenced him to 15 years to life for murder and a consecutive one-year term for using a deadly weapon.

Atherley appeals, contending (1) CALCRIM No. 625 erroneously precluded the jury from considering voluntary intoxication in connection with his claim of imperfect self-defense, and (2) the court erred in responding to a jury question by referring the jury to the applicable standard instructions on second degree murder and voluntary manslaughter.

We reject both contentions and affirm the judgment. Whether CALCRIM No. 625 improperly precludes a jury from considering voluntary intoxication with respect to imperfect self-defense is currently before the California Supreme Court in *People v. Soto* (2016) [248 Cal.App.4th 884](#), review granted October 12, 2016, S236164 (*Soto*). Assuming without deciding that CALCRIM No. 625 is incorrect as Atherley asserts, on this record any such error is harmless. We also determine the court did not abuse its discretion in responding to the jury question.

FACTUAL AND PROCEDURAL BACKGROUND

A. 2008 Marriage and Domestic Violence

Atherley and Ashley were married in June 2008. In November 2008 police responded to their Florida apartment after Atherley threw Ashley to the floor and stood over her while repeatedly yelling, "You fucking bitch."

B. Spring 2013—"My Son Will Kill You"

In December 2012 Atherley and Ashley moved to San Bernardino, California. For several months, they lived with Atherley's father (Father). According to Father, the couple had "some pretty rough times" with "heated" arguments. Atherley increasingly became more aggressive. Father testified, "It was a terrible relationship. Both of them were just destroying each other."

In May or June 2013, Ashley called Father at his work and asked him to come home because she and Atherley were arguing again.³ At the time, Atherley and Ashley had two children, ages two and five. When Father arrived, he found the five-year old was so scared she had locked herself in the bathroom. Father told Ashley it was "urgent" that she and the children move back to Florida. While driving Ashley to the airport, Father told her, "[I]f you don't go, my son will kill you."⁴

However, within a week, Ashley and the children returned. In August, Atherley, Ashley, and their children moved into an apartment in San Bernardino.

C. October—Atherley Chokes Ashley

In October Atherley was employed as a fitness trainer, and he also worked for a staff management company. Ashley was employed at a bank in Los Angeles (the bank) and also worked as a waitress.

On October 6, Atherley's cousin, S.E., moved in with them to babysit the children while Atherley and Ashley worked. The first night S.E. was there, Atherley was angry with Ashley because she had dyed her hair, which he thought indicated she was having an affair. He called Ashley a "white whore," "cunt," and a "bitch."⁵ However, Ashley remained calm and quiet; she denied having an affair and said she loved him.

Eventually that night, everyone went to bed; S.E. slept on the living room floor. At about 1 a.m., S.E. awakened to hearing Ashley scream. Ashley, scared and crying, told S.E. that Atherley choked her. At S.E.'s insistence, Atherley left the apartment that night. Ashley went to work in the morning, wearing a scarf to hide bruises on her neck.

The next day, Atherley sent Ashley several e-mails apologizing for choking her. Ashley responded to one, stating, "[Y]ou scare me when you get angry and I don't know if I can live that way. That was the most terrifying thing I have ever experienced and it still hurts today as well as leaving a mark for me to hide." Atherley replied that he lost control because he took Benadryl and Nyquil "and drink." Ashley e-mailed Atherley stating, "This pattern[] has progressively gotten worse and I don't want to be there when you lose control one day. . . . I don't know how it would have turned out if someone wasn't there and I don't know how it will turn out the next time." Atherley replied, "I am only that person when I drink."

On October 7, Ashley moved in with Linda L., Atherley's aunt, in Los Angeles. At Ashley's request, Linda kept her location a secret. Linda testified that Ashley was very calm and was "a warm, sweet, respectful young lady."

Linda gave Ashley the keys to her green Honda car. On weekends, Ashley went to the San Bernardino apartment to visit her children, who were living there with Atherley. Ashley slept with the children in their bedroom with the door locked.

D. Atherley Files for Divorce and Stalks Her

On October 23, Atherley filed for divorce and sought child custody. Ashley told S.E. there was "no way" that Atherley was going to get child custody. Karen R., one of Atherley's cousins, advised him "to keep the drama down" and allow Ashley to have custody, while he could have visitation.

About a week later, Ashley was shopping for men's coats at a department store. Atherley followed her there from work. He thought she had a boyfriend.

E. Ashley Rents an Apartment

In early November, Ashley rented an apartment in Los Angeles, and she and the two children moved there.

F. Wednesday Before Thanksgiving, November 27

On November 27 (the day before Thanksgiving), Ashley planned to travel with the children to San Bernardino to have Thanksgiving dinner with Atherley at a restaurant. She planned on returning to Los Angeles that same night because she had to work at the bank the next day.

However, at the last minute, Atherley changed the plans. Atherley told Ashley that Karen let him borrow her GMC vehicle, so he would pick up Ashley and the children in Los Angeles and drive them to San Bernardino for Thanksgiving dinner in the apartment.

Ashley was afraid. She did not want to go. Atherley picked up Ashley and the children and drove them to the San Bernardino apartment. He promised to drive Ashley back to Los Angeles early Friday morning so she could get ready for work, and he told Karen he would return her vehicle later on Friday.

G. Thanksgiving

Atherley's mother (Mother) telephoned Atherley and Ashley around 10 or 10:30 on Thanksgiving. Ashley invited her for dinner, but she had other plans.

H. Friday, November 29

The day after Thanksgiving (November 29), Ashley arrived at the bank for work wearing a man's shirt that was too big for her and no makeup—unusual attire for her. She was very tired and emotional. Ashley told a coworker she argued with Atherley the night before. She was worried, easily startled, did not make eye contact, and was very quiet. Ashley told a coworker the drive from San Bernardino was "very awkward" and "uncomfortable."

Around lunchtime, Ashley told a coworker she was going home to change into her own clothes. At 12:28 p.m., Atherley sent a text to Ashley stating, "Hey, babe, can you call me real quick. Need your advice. Have a few options."

At 12:29 p.m. Ashley called Atherley. She left work around 12:30 p.m. At 12:49 p.m., Atherley texted Ashley, "[H]ere." She got into a green Honda parked in front of the bank, and it drove away.

Ashley never returned to work. She did not contact anyone at the bank to say she would not be returning, which was very unusual.

Ashley was scheduled to work at her waitress job that night, but she never showed up and never contacted anyone to say she was not coming to work. This was also very unusual.

One of Ashley's coworkers, Jonathan K., tried numerous times to text and call Ashley. At 7:40 p.m. a text was sent from Ashley's phone to him stating, "Hey, J." At 7:42 p.m., another text to Jonathan was sent from Ashley's phone stating, "I am so sorry. I fell asleep." At 7:54 p.m., a text from Ashley's phone to Jonathan states, "Hey, J, I have food poisoning." When texting Jonathan in the past, Ashley always referred to him as JK or Jonathan—never as J.

I. Saturday, November 30

On the morning of November 30, Karen telephoned Atherley. She was concerned because he did not return her GMC on Friday as promised. Atherley answered the phone, sounding hung over. Karen said to him, "You sound like you had a rough night . . . is everything ok?" Atherley replied everything was fine. She asked him why he never picked her up on Friday, and he replied, "Man, I'm sorry, Karen. I'm sorry. I'm sorry. Man, I'm sorry, Karen. I'm so, so sorry." She thought he was apologizing for not returning her many messages and for not returning her car. Atherley sounded tired; Karen told him to go back to sleep and call her later.

Later that day, Karen called Atherley again, but he did not answer. Concerned, she spoke to her aunt, Linda, who was also worried because Ashley had not returned her calls.

At around 10 p.m., two of Atherley's neighbors in his San Bernardino apartment complex, George H. and Andrew T., were outside smoking. Although it was cold, Atherley was barefoot outside the apartment complex. He was saturated in blood and also had blood on both of his arms and his right hand. Atherley told them he cut his hand on a fence while looking for his wallet. But there were no metal fences in the area, only brick walls.

Atherley's hand was cut from top to bottom. Andrew testified, "You could see the meat [of his hand] hanging out." Although it was a very deep cut, Atherley did not appear to be in any pain. He also had a scrape a few inches long on his right forearm.

Sam C. was working as a security guard at the apartment complex. At about 10:30 p.m., a woman reported someone was trying to enter the complex through a locked gate. Sam saw Atherley outside, barefoot and wearing a blood-stained shirt and pajama bottoms. Atherley was nervous and his hand was bloody.

Atherley told Sam he cut his hand while trying to hop the fence to look for his wallet. Sam called the police.

Later that evening, Father, who was visiting family in Florida, telephoned Atherley several times, but there was no answer. When Atherley finally answered a call, he sounded "pretty incoherent" and said, "[T]hey're coming for me right now." Concerned, Father telephoned Mother and asked her to check on Atherley.

At 11:19 p.m., San Bernardino Police Officer Myra Doner arrived at the apartment complex in response to Sam's call. Officer Doner contacted Atherley, who was inside the complex. By now, Atherley had apparently changed clothes; he had no blood on his clothes. His hand was not bleeding.

Atherley, whose first name is Edly, identified himself to Officer Doner as Ed Lee. Atherley was not intoxicated or under the influence of any drugs. He refused medical treatment, denied he had been in any physical altercation, and said he had cut his hand while jumping over a metal gate. Atherley told Officer Doner he lived nearby, but did not provide an address. Believing there was no evidence of a crime, Officer Doner departed.

Mariela M. lived upstairs from Atherley's apartment. About midnight, Mariela was outside walking her dogs, and one of them ran up to the doorway of Atherley's apartment. At about the same time, Atherley opened his front door. He seemed surprised to see Mariela, went back inside and shut the door.

J. Sunday, December 1

On Sunday, December 1, Karen was still unable to contact Atherley. Linda was also concerned, so Karen picked her up and drove to Atherley's apartment. On the way, they picked up Mother. They arrived at Atherley's apartment complex around 11:30 a.m. Karen saw her GMC in the parking lot and assumed Atherley was in the apartment.

Stopping first at her vehicle, Karen opened the unlocked car door and saw blood inside. Subsequently, police determined Ashley's blood was on the

interior passenger side door, middle console, and exterior glove compartment.

Karen found two receipts inside the vehicle, both dated Friday, November 29. One was for a telephone accessory purchased at about noon from a Los Angeles gas station near Ashley's apartment. The other was from a 1 or 1:30 p.m. purchase of cigarettes and whiskey from a San Bernardino drug store.

After looking inside the GMC, the three women went to Atherley's apartment, but there was no answer at the locked front door or balcony sliding glass door. They could not see inside through the windows.

Linda and Mother went to ask the manager to open the door. Karen testified she stayed with her GMC; however, Mother and Linda testified that Karen remained at the apartment. Atherley opened the door and fled.

After the manager refused to open the apartment, Linda called the police. At about 3:00 p.m., San Bernardino Police Officer **Lanier** Rogers arrived. After obtaining the key from the manager, Officer Rogers entered the apartment, which smelled of body decomposition.

Ashley was dead on the bathroom floor. Her pants had been removed from her left leg. There was blood on the bathroom door and floor. Bloody towels were next to her body. There was blood on an air mattress on the living room floor, and bloody sheets and blankets were next to the mattress. There was wet blood underneath the air mattress, and blood drops on the living room vertical blinds. A blood trail led from the living room to the bathroom.

Inside the apartment, police also found a bloody pair of pajama pants and a bloody knife blade. Atherley's fingerprint was in blood on the knife. A police criminalist found only a single source of blood on the knife: Ashley's blood.

Police found a knife handle in a corner of the living room with marks showing where the blade broke from the handle. Ashley's blood was also the single source of blood on the handle.

Later, police searched Ashley's apartment. Inside a kitchen drawer police found a set of knives with blades and plastic handles similar to the bloody knife found in Atherley's apartment. The knives were uniformly placed in the drawer, longest to the shortest. However, there was a gap between two of the knives, appearing as though one knife from the set was missing. The gap was consistent with the size of the knife police found in Atherley's apartment.

K. Tuesday After Thanksgiving

Jacqueline V. works as a medical assistant at a clinic in San Bernardino. On December 3 at about 5:30 p.m., Atherley ran up to the clinic door as she was closing and asked for peroxide for his cut hand, which was bleeding. She referred him to the hospital emergency room, but Atherley, who was upset, refused and eventually left.

L. Autopsy

Ashley was 28 years old, five feet nine inches, and weighed 122 pounds. She sustained three "sharp force injuries." The first was a superficial injury on the right thumb caused by a knife, a defensive wound likely occurring when Ashley put up her hands.

The second was a large knife wound in the front of her neck. The knife penetrated at an angle, severing the major blood vessels on the left side, puncturing her chest cavity, and cutting her trachea (windpipe). With her trachea severed, Ashley aspirated blood. She died within minutes.

The third knife wound was a very small puncture mark near her left shoulder blade. There was a corresponding hole in her shirt.

Ashley also had blunt force injuries to her face from four distinct blows: a bruise in the center of her forehead, hemorrhage in both eyelids, a broken nose, and a contusion of her inside upper lip. The lip contusion was consistent with pressure being applied by a hand directly onto the mouth as she was struggling. She sustained these injuries either minutes or up to an hour before she died.

M. Domestic Violence Expert

A domestic violence expert, Susanna Barnett, testified there are three stages that victims of domestic violence experience: (1) tension building (arguments), (2) violence, and (3) a honeymoon period where the abuser is remorseful and asks for another chance. It is common for a victim to return to an abusive relationship five to seven times. The most dangerous time of a domestic violence relationship is when someone leaves their abuser. Barnett explained, "[O]nce the abuser feels they have lost power and control of this person . . . they are finally realizing that maybe she is—he or she is not coming back, then that's when the most dangerous, the homicides occur[]."

Barnett also testified about battered women's syndrome. She explained that a woman who has been physically and psychologically abused over an extended period of time by a dominant male figure may sometimes feel entitled to retaliate. On cross-examination, Barnett testified that women who have been threatened and abused in the past may act in "preemptive self-defense,"—that is, they may attack when they see a chance in order to avoid future harm.

N. Defense Case

1. The October choking incident

Atherley testified in his own defense. He admitted his relationship with Ashley was marked by domestic violence, but claimed Ashley was the aggressor.

the bed. Next thing you know we are having really rough, really passionate sex."

Atherley testified he was not intoxicated when he choked Ashley in October, but was only having a "night cap," "just to help" get to sleep—a "couple of whiskeys." He testified that he choked her because that was "a normal kind of sexual play . . . after a fight like that." He testified Ashley's stunned and scared reaction caught him "off guard."⁶

2. Events of Thanksgiving weekend

Atherley testified that Ashley and the children wanted to come to San Bernardino and spend Thanksgiving with him. Karen let him borrow her GMC and she helped clean his apartment so he could have Ashley and the children there for Thanksgiving dinner.

Atherley testified he picked up Ashley and the children in Los Angeles and had an uneventful drive to San Bernardino. He and Ashley talked about his moving to Los Angeles and looking for work there.

Atherley testified that on Thanksgiving, Ashley gave him a key to her apartment and encouraged him to return to Los Angeles with her. After dinner, he asked Ashley about spending Christmas with him in San Bernardino. He testified that Ashley "flipped out" because she thought he would be living with her in Los Angeles by then. Ashley became angry and accused him of having an affair. Atherley testified that after the argument, they patched things up that night and everything was fine.

Atherley testified that on Friday morning they awoke early, he made breakfast for the children, and drove them all back to Los Angeles in time for Ashley to be at work. He said the ride home was "like old times, holding hands in the car, she was happy." Atherley testified that as Ashley exited the vehicle, she became nervous after glancing at the office building, as if someone was watching her.

Atherley testified that after leaving the children with his cousin his phone "died" so he bought a charger. However, it did not work in the GMC, so he went to Ashley's apartment to charge his phone. After recharging his phone, he drove around Los Angeles looking for jobs. He called Ashley, telling her he had some job options and needed advice.

Atherley testified he picked up Ashley outside the bank. They decided Ashley would play "hooky" and not return to work that afternoon. The plan was to drive back to his apartment, where he would get clothes and his computer, and then return to Los Angeles, where he would continue looking for work. He told Ashley he would get her back to Los Angeles in time for her waitress job that evening.

On the way, Atherley stopped at a drug store, purchased cigarettes and whiskey, and then drove to his apartment. Atherley testified that he and Ashley spent the afternoon together, watching television and having sex.

Atherley testified that when he and Ashley got in the GMC to drive back to Los Angeles, he realized he forgot his computer, so he went back inside the apartment. While Ashley was waiting in the vehicle, she apparently saw a dating Web site on his phone, and when he returned, she accused him of having an affair. They yelled at each other, she hit him, and he responded by hitting her in the face.

Ashley's nose was bleeding. He used napkins in the glove compartment and reclined her seat in an attempt to stop the bleeding. They exited the car and went back to his apartment to ice Ashley's nose. Atherley testified he poured himself a drink.

By now, the sun was setting. Atherley testified he lost track of time, chain smoking cigarettes and drinking. He does not know how much whiskey he consumed. Eventually, Ashley's nose stopped bleeding, but her face began to swell.

Atherley testified that at about 7:10 p.m., while he was in the bedroom changing clothes, he heard Ashley scream, "[F]ucking asshole, [y]ou fucking asshole." Atherley testified Ashley had apparently seen a text message he received from a woman from the dating Web site.

Atherley testified that Ashley "charged" him with a knife. He held up his hand and she stabbed him in his hand with the knife he had used that morning to cut fruit. Atherley testified that Ashley then held his hand down and stabbed his forearm. He pushed her in the face, but she kept coming. Somehow, they landed on the mattress on the living room floor. They struggled over the knife, with Ashley on top of him. Ashley was holding the knife and he had his hand on hers—but Atherley testified he could not remember anything else. He did not see the knife stab Ashley's neck. The next thing he remembers is being cuddled up underneath her dead body. He testified he does not know how Ashley was stabbed.

Atherley testified that he did not intend to kill Ashley, stating, "It was an accident. I don't have an explanation. I don't even remember doing it. But I did not intend to kill Ashley."

Atherley testified he tried to clean Ashley's body. He did not remember speaking to neighbors, the security guard, or police. He testified he did not remember anything else because he was "in shock" and "intellectually, I couldn't compute what was happening."

He hitchhiked to Florida because he realized he needed a lawyer and knew one there. In February 2014 he turned himself into Florida law enforcement.

Atherley testified that Father's account of the June incident was "completely wrong", and Father's testimony that he observed numerous fights between Atherley and Ashley was "[a]bsolutely not true."

Atherley also testified that S.E.'s account of the October 6 incident was wrong. He denied calling Ashley a "cunt" and "whore" and testified that S.E. "absolutely lied."

Atherley testified that he never told his coworker, Karla T., that he had choked his wife. She was lying too.

0. Jury Instructions, Closing Arguments, Verdict

The court instructed the jury on justifiable homicide: self-defense (CALCRIM No. 509), excusable homicide: accident (CALCRIM No. 510), excusable homicide: accident in the heat of passion (CALCRIM No. 511), first or second degree murder with malice aforethought (CALCRIM No. 520), first degree murder (CALCRIM No. 521), provocation: effect on degree of murder (CALCRIM No. 522), voluntary manslaughter: heat of passion (CALCRIM No. 570), voluntary manslaughter: imperfect self-defense (CALCRIM No. 571), involuntary manslaughter (CALCRIM No. 580), voluntary intoxication: effects on homicide crimes (CALCRIM No. 625), and voluntary intoxication causing unconsciousness: effects on homicide crimes (CALCRIM No. 626).

In closing argument, the prosecutor urged the jury find Atherley guilty of first degree murder. She argued that Atherley picked up Ashley at the bank in the green Honda because that vehicle was not connected with him, he took a knife from Ashley's apartment and used it to force her into the vehicle, beat Ashley's face to subdue her, silenced her when she screamed, and eventually killed her. The prosecutor argued there was no evidence of voluntary intoxication, stating:

He never testified that he was drunk. He never testified that he blacked out for five days due to alcohol consumption. He couldn't even tell you how much he had to drink. He said he poured himself a glass and he started smoking, but he couldn't remember the time frame. . . . [¶] . . . He didn't act in imperfect self-defense reducing it to a voluntary manslaughter.

In the defense closing argument, Atherley's lawyer urged the jury to acquit because the homicide was the result of either an accident or self-defense. Defense counsel distinguished perfect from imperfect self-defense, and argued the evidence showed Atherley acted in perfect self-defense, stating:

I don't know if any of you [could] tell me with a straight face that someone is coming at you with a knife, cut in the hand and you are cut in the forearm in a significant manner and you are bleeding profusely, that you don't believe there is imminent harm. That belief is reasonable.

After deliberating about three days, the jury found Atherley guilty of second degree murder and that he used a deadly weapon in committing that crime.

DISCUSSION

I. CALCRIM No. 625 ISSUE

A. Atherley's Contention

The court instructed the jury with CALCRIM No. 625, which provided: "You may consider evidence, if any, of defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill, or the defendant acted with deliberation and premeditation, or the defendant was unconscious when he acted. [¶] . . . [¶] You may not consider evidence of voluntary intoxication for any other purpose." Atherley contends CALCRIM No. 625 is erroneous to the extent it precludes the jury from considering voluntary intoxication for purposes of determining whether he acted in imperfect self-defense.

To put the issue in context, we provide an overview of some general principles of homicide law.

B. Legal Principles

"Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." (§ 187, subd. (a); *People v. Chun* (2009) [45 Cal.4th 1172](#), 1181.) Malice may be express (specific intent to kill) or implied (intentional commission of life-threatening act with conscious disregard for life). (*Chun*, at p. 1181.) Murder is divided into first and second degree. (§ 189.) "Second degree murder is an unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation)." (*Chun*, at p. 1181.)

"Two factors may preclude the formation of malice and reduce murder to voluntary manslaughter: heat of passion and unreasonable self-defense." (*People v. Elmore* (2014) [59 Cal.4th 121](#), 133.) "Self-defense, when based on a *reasonable* belief that killing is necessary to avert an imminent threat of death or great bodily injury, is a complete justification, and such a killing is not a crime. [Citations.] A killing committed when that belief is *unreasonable* is not justifiable. Nevertheless, 'one who holds an honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury does not harbor malice and commits no greater offense than manslaughter.'" (*Id.* at pp. 133-134.)

As a matter of public policy, the Legislature has limited a criminal defendant's ability to use voluntary intoxication evidence as a defense. Section 29.4, subdivision (b), provides, "Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, *or harbored express malice aforethought.*" (Italics added.) Voluntary intoxication is inadmissible to negate implied malice. (*People v. Martin* (2000) [78 Cal.App.4th 1107](#), 1114.)

CALCRIM No. 625 as given here correctly informed the jury that intoxication could negate the mental states of premeditation and intent to kill. However, Atherley argues the instruction was misleading and incorrect to the extent it precluded the using of such evidence "for any other purpose," because this precluded the jury from using evidence of voluntary intoxication to establish he acted in imperfect self-defense, and thus lacked express malice. Atherley explains: "Proof of intoxication tends to support a claim of honest but mistaken belief in an imminent aggravated assault, providing a reason to account for the defendant's objectively unreasonable belief."

In *Soto*, *supra*, [248 Cal.App.4th 884](#), the Court of Appeal held that CALCRIM No. 625 improperly precluded the jury from considering voluntarily intoxication with respect to a defendant's claim of imperfect self-defense. The *Soto* court reasoned that the state of mind required for imperfect self-defense negates express malice, and section 29.4, by its express terms, makes voluntary intoxication admissible on the issue of express malice. (*Soto*, at p. 898.) The California Supreme Court has granted review to consider that issue.

C. No Forfeiture

The Attorney General contends Atherley forfeited this claim by failing to object to CALCRIM No. 625. However, Atherley asserts no objection was needed because he contends CALCRIM No. 625 as given was legally incorrect. (See *People v. Castillo* (1997) [16 Cal.4th 1009](#), 1015 ["Even if the court has no sua sponte duty to instruct on a particular legal point, when it does choose to instruct, it must do so correctly."].)

We agree with Atherley that his claim was not forfeited. "Where . . . defendant asserts that an instruction is incorrect in law an objection is not required." (*People v. Capistrano* (2014) [59 Cal.4th 830](#), 875, fn. 11.) Further, a defendant does not forfeit the right to obtain a reversal based on instructional error when the defendant establishes that his substantial rights have been affected by the error, and that analysis also requires us to consider the merits of the argument. (§ 1259.)⁷ Moreover, we would need to consider the merits in addressing Atherley's alternative claim that if the issue were forfeited, his trial counsel was ineffective for failing to object.⁸

D. The Asserted Error Was Not Prejudicial

Assuming without deciding that CALCRIM No. 625 is erroneous for the reason Atherley asserts, on this record any such error is harmless. The California Supreme Court has held that an instructional error that limits the jury's consideration of voluntary intoxication evidence "is thus subject to the usual standard for state law error [under which] the court must reverse only if it also finds a reasonable probability the error affected the verdict adversely to defendant." (*People v. Mendoza* (1998) [18 Cal.4th 1114](#), 1134-1135.)⁹

Under this standard, to establish prejudice Atherley must show that "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Mower* (2002) [28 Cal.4th 457](#), 484, superseded by statute on other grounds as stated in *Kirby v. County of Fresno* (2015) [242 Cal.App.4th 940](#), 958.) "There is a reasonable probability of a more favorable result . . . when there exists `at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error affected the result.'" (*Mower, supra*, 28 Cal.4th at p. 484.) Under this standard, "review focuses not on what a reasonable jury could do, but what such a jury is likely to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so relatively strong, and the evidence supporting a different outcome is so comparatively weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*People v. Breverman* (1998) [19 Cal.4th 142](#), 177, italics omitted.)

Atherley has not established a reasonable probability that he would have obtained a more favorable result had the jury been instructed that it could consider voluntary intoxication in deciding whether Atherley killed in imperfect self-defense. Atherley did not testify that he was intoxicated when he stabbed Ashley. He testified that earlier that afternoon or evening, he poured himself a drink (whiskey) and was "chain-smoking cigarettes and drinking"—but never claimed he was intoxicated. He did not know how long he was drinking.

Thus, apart from the bare fact that Atherley testified he drank some unspecified amount of whiskey over some unspecified amount of time on November 29, the record contains no evidence whatsoever regarding the effect that consumption could have had on his mental state. During Atherley's testimony, he was not asked, and did not comment upon how his mental state was affected by the consumption of any alcohol or drugs at the time Ashley was killed.

Moreover, to the extent Atherley did comment upon his mental state when Ashley was killed, he attributed his disorientation and lack of memory *not* to intoxication, but rather due to the trauma and shock of stabbing Ashley and its bloody aftermath.

The probative value of evidence of voluntary intoxication depends on evidence of how the defendant's mental state was impacted by the intoxicating substance. Here, the jury learned nothing more than the fact Atherley consumed an unspecified amount of an intoxicating substance at an unspecified time around the time of the crime.

Moreover, when given the opportunity to tell what happened, Atherley did not mention being intoxicated when he stabbed Ashley. He never claimed to have acted with an unreasonable belief in the need for self-defense. Rather, he claimed his self-defense was reasonable because Ashley attacked him with a butcher knife. He testified he was "caught off guard" and Ashley "surprised" him by attacking. He tried to "fend her off, to push her back," but she "just kept coming." They landed on the bed, he "had her hand with the knife," and he remembers nothing else.

Additionally, in closing argument, Atherley's lawyer did not state or even hint that Atherley was intoxicated when Ashley was killed. Counsel said Atherley had "a drink" while Ashley was icing her broken nose. Counsel asked the jury to find Atherley not guilty on the grounds of either *perfect* self-defense, or because the stabbing was accidental.

In asserting the error was prejudicial, Atherley points to e-mails he sent Ashley on October 7. In some of those e-mails, Atherley attributes his violence to what happens when he mixes alcohol, Benadryl and Nyquil. Atherley's appellate counsel asserts, "It is obvious from the emails that [Atherley] was addicted to alcohol and/or pills so it's logical to assume that [Atherley] was under the influence of alcohol and/or pills at the time of the stabbing."

Atherley's argument fails for several reasons. First and foremost, at trial Atherley testified he was *not* intoxicated during the October 6 choking incident, but was only having a "night cap" to help sleep—a "couple of whiskeys." Atherley did *not* testify he consumed Benadryl, Nyquil, or any other drugs on October 6. Moreover, the jury could have reasonably disbelieved Atherley's assertions in the e-mails because the domestic violence expert testified abusers frequently seek to excuse their conduct by claiming "they either were drunk or under the influence of some drugs." Additionally, Atherley's condition on October 6 sheds no light about his intoxication, if any, almost two months later when he killed Ashley on November 29 or November 30.

During deliberations, the jury asked the court to explain differences between second degree murder and voluntary manslaughter. The jury also asked for a read-back of the testimony from a crime lab technician who swabbed DNA from Atherley and the individual conducting Ashley's autopsy. Atherley also contends the error in CALCRIM No. 625 was prejudicial because the jury's question and requests for read-backs show the jury was considering voluntary manslaughter on an imperfect self-defense theory.

The record does not support Atherley's argument. As noted *ante*, there was no evidence Atherley was intoxicated when Ashley was killed. Moreover, in closing argument, defense counsel told the jury it could return a voluntary manslaughter conviction based on heat of passion, not imperfect self-defense caused by voluntary intoxication. Specifically, defense counsel directed the jury to CALCRIM No. 570 (voluntary manslaughter: heat of passion)

and told jurors that if they believed Atherley "lost control" as indicated in the October 7 e-mails, "*that's heat of passion.*" (Italics added.) Moreover, in discussing self-defense, defense counsel framed the issue as one involving perfect self-defense, not imperfect self-defense based on voluntary intoxication. Specifically, counsel argued, "I don't know if any of you [can] tell me with a straight face that someone is coming at you with a knife, cut in the hand and you are cut in the forearm in a significant manner and you are bleeding profusely, that you don't believe there is imminent harm. That belief is reasonable." Counsel concluded by telling the jury, "In this case, because the act was self-defense in the course of an accident, because there were also evidence of heat of passion here and because there's one reasonable conclusion, the only reasonable verdict here is not guilty."

II

NO ABUSE OF DISCRETION IN ANSWERING JURY QUESTION

A. Additional Factual Background

During deliberations the jury sent a note to the court asking for an "[e]xplanation between 2nd [*sic*] degree murder and voluntary manslaughter and how it is applied." The jury sent this question at 11:25 a.m. and the court notified all parties at that time. At 11:53 a.m., the court responded by stating, "Please refer to the CAL CRIM 500 series of instructions for guidance." There is no record of what the court and counsel discussed about this jury question, nor any objection to the court's response.

For the first time on appeal, Atherley contends the court abused its discretion by merely referring the jury to the standard CALCRIM homicide instructions. Atherley contends the court "was required to ask the jury questions to clarify the source of their confusion so that [the response] could actually help them."

B. Forfeiture

The Attorney General contends Atherley forfeited this issue on appeal because Atherley's lawyer did not object to the court's response when given. Although the record reflects counsel were notified of the jury's question, there is no record either of counsel's assent or of counsel's objection to the court's response. Thus, we presume there was no objection, and the failure to object may be construed as tacit approval of the court's response to the question. (*People v. Kageler* (1973) [32 Cal.App.3d 738](#), 746.) When counsel consents to the court's response, the claim of error is forfeited. (*People v. Rodrigues* (1994) [8 Cal.4th 1060](#), 1193.)

C. Merits

Even if we were to find the issue preserved on appeal, we would reject it on its merits, finding no abuse of discretion. (See *People v. Waidla* (2000) [22 Cal.4th 690](#), 745-746 [abuse of discretion standard of review].)¹⁰ Section 1138 provides that when the jurors "desire to be informed on any point of law arising in the case . . . the information required must be given." However, this does not mean the court must always elaborate on the standard instructions. ""Where . . . the original instructions are themselves full and complete, the court has discretion . . . to determine what additional explanations are sufficient to satisfy the jury's request for information."" (*People v. Boyce* (2014) [59 Cal.4th 672](#), 699.)

Atherley contends, however, that by referring to the instructions already given, the court effectively "thr[e]w up its hands" and told the jury it could not assist it. (See *People v. Beardslee* (1991) [53 Cal.3d 68](#), 97 [when faced with a question from a deliberating jury on the law given to it, the court "must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least consider how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given, italics omitted"].)

We disagree with Atherley's argument because the jury's question regarding second degree murder and voluntary manslaughter "and how it is applied" was inherently fact specific and did not lend itself to a simple answer. A direct and complete answer to the question would have required some comment on the evidence under various factual scenarios (e.g., who was the aggressor? what led to the knife attack? what were the circumstances leading to Ashley's blunt force injuries? how was Ashley's neck stabbed?) and would have run the risk of being unduly argumentative, inviting the jury to draw inferences favorable to one of the parties from specified evidence. (See *People v. Battle* (2011) [198 Cal.App.4th 50](#), 85 ["An instruction is argumentative when it recites facts drawn from the evidence in such a manner as to constitute argument to the jury in the guise of a statement of law."].) Under these circumstances, the court did not abuse its discretion by declining to expand on the language of the standard CALCRIM homicide instructions.¹¹

DISPOSITION

The judgment is affirmed.

AARON, J., and GUERRERO, J., concurs.

FootNotes

1. Because Edly and Ashley have the same surname, for clarity we refer to Ashley by her first name only.

2. Undesignated statutory references are to the Penal Code.

3. Hereafter, unspecified dates refer to 2013.

4. In response to defense counsel's questions, Father testified he meant that Atherley was killing Ashley's "spirit" and he did not mean that Atherley would actually kill her. However, after Father learned that Ashley had been killed inside his son's apartment, he told a detective that he warned Ashley his son "would eventually kill her."

5. S.E. testified that Atherley was drinking whiskey that night and was intoxicated; however, Atherley denied that, testifying he only had a "night cap" to help him sleep.

6. Atherley's account of the October 2013 incident was contradicted by one of his coworkers, Karla T., who testified that Atherley told her he grabbed Ashley by the throat "in a choking manner."

7. Section 1259 provides in part: "Upon an appeal taken by the defendant . . . [t]he appellate court may also review any instruction given . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

8. Because the issue was not forfeited, it is unnecessary to consider Atherley's alternative argument that trial counsel rendered ineffective assistance in failing to request a modification of CALCRIM No. 625.

9. Atherley's brief correctly concedes this is the applicable standard.

10. Because we consider the merits, it is unnecessary to address Atherley's assertion that his counsel rendered ineffective assistance by forfeiting this issue.

11. Because the trial court did not abuse its discretion in responding to the jury's question, Atherley's assertion that the court's response violated his due process rights also fails. (*Weeks v. Angelone* (2000) [528 U.S. 225](#), 234.)

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Patty Hall on *Mon Aug 27 2018* commented:

This is clearly murder in the first degree and Ashley was poorly represented . Atherley is clearly a danger to society. He should never be allowed to be released.

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