**PEOPLE v. DANIELS**

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*THE PEOPLE, Plaintiff and Respondent, v. JAMES C. DANIELS, Defendant and Appellant.*

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

Filed March 11, 2011.

***Attorney(s) appearing for the Case***

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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

CHANEY, J.

Appellant James C. Daniels was convicted of second-degree murder using a deadly weapon, a knife. (Pen. Code, §§ 187, subd. (a), 12022, subd. (b)(1).) He contends on appeal that the trial court erred to his prejudice by refusing to instruct the jury on the lesser included offenses of voluntary manslaughter by reason of sudden quarrel or heat of passion, and involuntary manslaughter—both of which theories he contends are supported by evidence. We agree.

**Background**

We recite the underlying facts that are required to understand the issues on appeal, in light of the applicable standards of review. (See *People v. Wilson* (1967) [66 Cal.2d 749](https://www.leagle.com/cite/66%20Cal.2d%20749), 762 [in evaluating whether defendant was entitled to jury instruction, court must assume jury would find evidence that supports defendant's hypothesis to be true]; see *Henderson v. Harnischfeger Corp.* (1974) [12 Cal.3d 663](https://www.leagle.com/cite/12%20Cal.3d%20663), 674 [in determining whether jury instructions are correct, court "must assume that the jury might have believed the evidence upon which the instruction favorable to the losing party was predicated"].)

On the morning of October 8, 2007, Derrick Wesley and others were at a bus stop near the corner of Vernon and Washington, a neighborhood meeting place. Daniels arrived at the bus stop, and about 15 minutes later approached Wesley, asking him, "`When are you going to pay me the money that you owe me?'" Wesley responded that he did not then have the funds (which Daniels had earlier loaned him as a favor), and that he would repay Daniels when he could. Daniels then left the bus stop with a woman who had arrived with his bicycle.

When Wesley and his girlfriend returned that afternoon, Daniels was at the bus stop across the street. After Daniels yelled something in their direction, Wesley went across the street, either to see what Daniels was saying, or to "confront" Daniels. From across the street Wesley's girlfriend saw them arguing, face-to-face. Wesley then threw his arm up. Wesley started to walk away from Daniels, then staggered and fell. He was able to get up once or twice again, leaving blood on the ground. Staggering further back toward his girlfriend, he then, again, fell and did not get up. Daniels rode away on his bicycle.

Another witness saw the events a little differently, interpreting Wesley's arm movement as raising his arm and striking a blow against Daniels's chest with a closed fist. Daniels then struck Wesley, and Wesley took off running, back in the direction of the bus stop. After Daniels swung to strike Wesley, the witness saw a knife in his hand for the first time.[1](https://www.leagle.com/decision/incaco20110311021#fid1)

When Wesley arrived at the hospital by ambulance, he had a large stab wound to his neck, shattered bones in the back of his neck, and a large laceration to his arm. He was unconscious, he had bled severely, and he had no vital signs. Wesley never regained consciousness, and was pronounced dead when life-support was withdrawn two weeks later.

Police detectives questioned Daniels after finding him riding his bicycle some blocks from the bus stop. He told the police that Wesley owed him $10, that Wesley had come to him "messing with my bike," and that he had then turned and hit Wesley in the nose. In a trash bin about two blocks from the bus stop the police found an open knife with a three and one-half inch blade, with blood on it that was consistent with both Wesley and Daniels.

The trial court instructed the jury on murder in the first and second degree, and on voluntary manslaughter by reason of imperfect self defense. It denied Daniels's request for an instruction on voluntary manslaughter by reason of sudden quarrel or heat of passion. The defense did not seek an instruction on the lesser included offense of involuntary manslaughter, and that option was not offered to the jury.

The jury found Daniels guilty of second-degree murder, using a deadly weapon, a knife. Daniels was sentenced to 15 years to life for the second-degree murder of Wesley (Pen. Code, § 187, subd. (a)), plus an additional one year for use of a knife (Pen. Code, § 12022, subd. (b)(1)), for a total sentence of 16 years to life (plus applicable fines and restitution, not at issue in this appeal).[2](https://www.leagle.com/decision/incaco20110311021#fid2)

**Discussion**

In criminal cases the trial court must instruct the jury on the principles of law relevant to the issues raised by the evidence, including the principles of law applicable to any lesser included offenses that are supported by evidence. In a murder prosecution, this includes the obligation to instruct on every supportable theory of the lesser included offense of voluntary manslaughter. (*People v. Breverman* (1998) [19 Cal.4th 142](https://www.leagle.com/cite/19%20Cal.4th%20142), 148-149.)

**1. The Trial Court Erred By Refusing To Instruct The Jury On Sudden Quarrel Or Heat Of Passion As A Basis For A Voluntary Manslaughter Verdict.**

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) A defendant who commits an intentional and unlawful killing, but who lacks malice, may be guilty of the lesser included offense of voluntary manslaughter. (§ 192.)

Explicitly defined circumstances are required in order to negate the element of malice, and thus to reduce the crime from murder to voluntary manslaughter. To constitute voluntary manslaughter, in killing the victim the defendant must either have acted in the unreasonable but good faith belief that the act was required in self-defense ("imperfect self-defense") or his conduct must have resulted from a "sudden quarrel or heat of passion." (§ 192, subd. (a).) When a defendant kills in the actual but unreasonable belief that he is in imminent danger of death or great bodily injury, the doctrine of imperfect self-defense applies to reduce the crime from murder to voluntary manslaughter. (*People v. Lasko* (2000) [23 Cal.4th 101](https://www.leagle.com/cite/23%20Cal.4th%20101), 108; *People v. Michaels* (2002) [28 Cal.4th 486](https://www.leagle.com/cite/28%20Cal.4th%20486), 529.) And when an intentional and unlawful killing occurs upon a sudden quarrel or heat of passion, the malice required for murder is negated and the offense is reduced to voluntary manslaughter. (*People v. Carasi* (2008) [44 Cal.4th 1263](https://www.leagle.com/cite/44%20Cal.4th%201263), 1306.)

An intentional unlawful homicide is a voluntary manslaughter upon a sudden quarrel or heat of passion if the defendant acted through strong passion rather than judgment, aroused by a provocation sufficient to cause an ordinary person to act rashly or without due deliberation and reflection. (*People v. Breverman, supra,* 19 Cal.4th at p. 163.) No specific type of provocation is required, and the passion aroused can be any "`"`[v]iolent, intense, high-wrought or enthusiastic emotion'"'" other than revenge. (*Ibid.*) "Thus, a person who *intentionally* kills as a result of provocation, that is, `upon a sudden quarrel or heat of passion,' lacks malice and is guilty not of murder but of the lesser offense of voluntary manslaughter." (*People v. Lasko, supra,* 23 Cal.4th at p. 108.)

The heat of passion requirement for manslaughter has both an objective and a subjective component. In order to fulfill the subjective requirement, the defendant must actually kill under the heat of passion. But the circumstances giving rise to the heat of passion are also viewed objectively. (*People v. Steele* (2002) [27 Cal.4th 1230](https://www.leagle.com/cite/27%20Cal.4th%201230), 1252.) In order to negate malice and to show voluntary manslaughter, the provocation of the defendant to act in heat of passion cannot be trivial. The circumstances giving rise to his conduct must be objectively sufficient to provoke an ordinarily reasonable person to act rashly and without deliberation, from passion rather than judgment. (*People v. Cruz, supra,* 44 Cal.4th at p. 664.)

Moreover, the defendant cannot have been the source of that provocation; it must be the victim who initiated the provocation that incites the defendant to homicidal conduct in the heat of passion. (*People v. Carasi, supra,* 44 Cal.4th at p. 1306.) Nevertheless, no specific type of provocation is required in order to satisfy this test; verbal provocation may be sufficient. (*People v. Wickersham* (1982) [32 Cal.3d 307](https://www.leagle.com/cite/32%20Cal.3d%20307), 326; *People v. Verdugo* (2010) [50 Cal.4th 263](https://www.leagle.com/cite/50%20Cal.4th%20263) [victim must taunt defendant or otherwise initiate the provocation].)

When a defendant kills upon a sudden quarrel or heat of passion sufficient to support a voluntary manslaughter finding, the malice that is required to establish murder is *presumptively* absent. In the face of evidence sufficient to show that the defendant was provoked to action upon a sudden quarrel or heat of passion, it is the prosecution, not the defense, that must establish the existence of malice, beyond a reasonable doubt, in order to overcome that presumption and to justify a murder verdict. (*People v. Moye* (2009) [47 Cal.4th 537](https://www.leagle.com/cite/47%20Cal.4th%20537), 549-550 [where evidence shows possibility that killing resulted from heat of passion or imperfect self defense, malice must be affirmatively proved to justify verdict of murder]; *People v. Cruz* (2008) [44 Cal.4th 636](https://www.leagle.com/cite/44%20Cal.4th%20636), 664 [malice is presumptively absent when a defendant kills upon sudden quarrel or heat of passion].)

At trial, Daniels contended that the evidence was sufficient to support a verdict of voluntary manslaughter on the theory that he had been provoked by Wesley's conduct to act as a result of sudden quarrel or heat of passion, as well as on the theory that his conduct amounted to imperfect self-defense. However, the trial court refused that request.

Noting the evidence that Wesley had "swung and struck the defendant and that the defendant retaliated," the trial court instructed the jury on the theory of imperfect self-defense—that either premeditation or malice was negated because Daniels actually believed he was in imminent danger of being killed or badly injured, and that the use of deadly force was necessary for his defense; but that one or both those beliefs were objectively unreasonable. Thus it instructed the jury to find Daniels guilty of voluntary manslaughter if it determined that in stabbing Wesley he acted in an unreasonable but good faith belief that his conduct was required in self-defense. But the court refused to instruct the jury that it could find Daniels guilty of voluntary manslaughter on the theory proffered by Daniels, concluding that the evidence could not support Daniels's theory that he had acted on the basis of a sudden quarrel or heat of passion in striking out at Wesley with a knife.

On appeal, Daniels contends that the evidence was sufficient to support a finding that he acted out of a sudden quarrel or heat of passion; that he therefore was entitled to have the jury instructed on that theory as a factor negating malice and justifying a verdict of voluntary manslaughter; and that the error in refusing that instruction was prejudicial to him.[3](https://www.leagle.com/decision/incaco20110311021#fid3) Viewing the evidence most favorably to Daniels, as we must, we agree.[4](https://www.leagle.com/decision/incaco20110311021#fid4)

The trial court did not explicitly identify the basis on which it ruled that the evidence, although sufficient to support a verdict of voluntary manslaughter based on a theory of imperfect self-defense, would be insufficient to support that verdict based on a sudden quarrel or heat of passion.[5](https://www.leagle.com/decision/incaco20110311021#fid5) However in refusing the sudden-quarrel-or-heat-of-passion instruction, the court necessarily concluded as a matter of law that Wesley's conduct, while provocative, was not provocative enough to justify Daniels's violent reaction, and thus could not support the theory of sudden quarrel or heat of passion.[6](https://www.leagle.com/decision/incaco20110311021#fid6)

At the same time, however, in order to justify the instructions it gave, the court must have found the evidence sufficient to support a finding that Daniels honestly (though perhaps unreasonably) believed that he was in fact threatened with great bodily harm by Wesley's conduct, and that he honestly (though perhaps unreasonably) believed that his use of deadly force in response was justified. And in finding Daniels guilty of second degree murder rather than first degree murder, the jury very likely found that to be true. But in refusing to instruct the jury on the theory of reasonable self-defense (rather than imperfect self-defense), the court necessarily also found the evidence insufficient to support a determination that Daniels was reasonably justified in concluding that he faced a threat of great bodily injury requiring deadly force in response. If the evidence could have supported that finding, Daniels would have been entitled to the self-defense instruction that would have permitted the jury to find the killing justified and to acquit him on that basis. (§ 197, subd. 3; *People v. Moye, supra,* 47 Cal.4th at p. 660.)

The trial court thus must have found the evidence sufficient to support a finding that Wesley's conduct was aggressive and provocative enough to *in fact* have provoked Daniels's violent reaction—in other words, to have induced him to honestly believe (unreasonably) that he was threatened with great bodily injury requiring deadly force in response; while at the same time that Wesley's conduct *was not* aggressive or provocative enough to justify Daniels's violent reaction, despite his arguably honest belief to the contrary. Unless the evidence could support both those conclusions, there would be no basis for the court to instruct the jury on *imperfect* self defense while refusing to instruct it on reasonable self-defense.

The trial court's instructions reflect a conclusion that the degree of provocation that justifies a finding on the sudden quarrel or heat of passion theory is the same as that required for a finding on the separate theory of imperfect self defense. The court necessarily must have concluded that because Wesley's aggressive and provocative conduct could not support a determination that Daniels had resorted to deadly force in reasonable self-defense, his conduct necessarily also could not show that Daniels's response had resulted from a sudden quarrel or heat of passion. The court's comment to counsel reflects its equation of these theories: "I'm giving you [the instruction on] imperfect self-defense. I don't know why you can't be content with [CALCRIM No.] 571."

We conclude that the court erred in equating the evidence required to invoke these separate theories. The fact that the evidence does not show a degree of provocation sufficient to reasonably justify the use of deadly force in self defense does not preclude a finding that the defendant's response actually did result from that provocation. The law does not condone violence in response to a sudden quarrel or heat of passion as a complete justification for criminal conduct (as it does reasonable self defense) (§§ 197, subd. 3, 199); but it recognizes that conduct done in response to provocation and in the heat of passion often lacks the premeditation, and even the intention, that otherwise can be inferred from a defendant's conduct. (§§ 189, 192.)

Unless the degree of aggression and provocation required in order to justify a defendant's honest (though unreasonable) belief that he faced mortal danger from his victim were different from the aggression and provocation required in order to justify his reaction based on sudden quarrel or heat of passion, the theory of sudden quarrel or heat of passion could rarely (if ever) be invoked. If there were no such distinction, evidence that could justify the use of the sudden quarrel or heat of passion theory would also show that the defendant's violent conduct was either actually justified, or honestly believed to be so. (§ 195.) If the same aggression and provocation were sufficient to trigger both theories, then sudden quarrel or heat of passion would be subsumed within the defense of self-defense, rather than being a separate element showing the absence of malice or intention, as set forth in the statutory definition of voluntary manslaughter. (§ 192.)

No one has suggested that the evidence in this record would be sufficient to support a finding that the homicide was justifiable as reasonable self-defense. (§ 197, subd. (3).) However, we believe that it could support a finding that Wesley had provoked Daniels to violence in heat of passion, thus negating malice, if the jury had been instructed with respect to that option. The jury could have concluded that Daniels had earlier loaned Wesley money to prevent him from being "whoop[ed]," and that Wesley had refused to repay the loan; that Wesley had come across the street to confront Daniels about his demands for repayment; that Wesley had engaged in a face-to-face argument with Daniels and had "mess[ed] with" Daniels's bicycle; and that Wesley had raised his arm, threatening violence, and striking Daniels on the chest with his closed fist during the course of the argument.[7](https://www.leagle.com/decision/incaco20110311021#fid7)

The jury certainly did not have to accept this version of the facts, or to draw all possible inferences in Daniels's favor, and we do not suggest that it should have done so. But Daniels was entitled to have the jury instructed on the law that would apply if it were to accept his version of the facts. (*People* v. *Wickersham, supra,* 32 Cal.3d at pp. 323-324.)

If the jury were to find in Daniels's favor with respect to all that evidence, it could then foreseeably have found that Daniels had been provoked by Wesley into a sudden quarrel, to act with violence through heat of passion. If it had been instructed that it could do so, it could have concluded, for example, that Wesley had initiated a quarrel that provoked Daniels to react in heat of passion, although not with a belief that he was actually facing death or great bodily injury. That finding would negate Daniels's imperfect self-defense theory, while at the same time negating malice and entitling Daniels to a verdict of voluntary manslaughter rather than murder.

**2. Daniels Was Prejudiced By The Absence Of An Instruction To The Jury On The Theory Of Sudden Quarrel Or Heat Of Passion.**

If the jury had concluded that Daniels's violent conduct resulted from a sudden quarrel or heat of passion, the instruction sought by Daniels would have justified a verdict of voluntary manslaughter rather than murder. That, Daniels argues, demonstrates the prejudice resulting from the trial court's refusal to instruct the jury as to sudden quarrel or heat of passion.

While Daniels was entitled to have the jury instructed on lesser included offenses supported by evidence, reversal for error in failing to give the sudden-quarrel-or heat-of-passion instruction is not automatic. We review the record for prejudice under the test of *People v. Watson* (1956) [46 Cal.2d 818](https://www.leagle.com/cite/46%20Cal.2d%20818), 836: an erroneous failure to instruct on heat of passion to show voluntary manslaughter is harmless if a review of the record shows that it was not reasonably probable defendant would have obtained a more favorable outcome had the jury been so instructed. (*People v. Moye, supra,* 47 Cal.4th at pp. 555-556; see Cal. Const., art. VI, § 13.)

The error meets the test for prejudice. It is clear that the jury found that Daniels's conduct in killing Wesley was less than "willful, deliberate, [or] premeditated"; if it had not, its verdict would have been murder in the first degree. (§ 189.) And the jury's verdict of second-degree murder might also have resulted from a conclusion that Wesley had provoked Daniels to honestly believe that deadly force was justified under the circumstances.

The court's failure to instruct on the sudden-quarrel-or-heat-of-passion theory could not have prejudiced Daniels if either the jury's verdict, or Daniels's own theory of the evidence, necessarily negates some essential element of that defense. (*People v. Moye, supra,* 47 Cal.4th at p. 555.) But here, the jury's verdict is not inconsistent with the theory that he might have acted as a result of a sudden quarrel or heat of passion, though not with an honest fear for his life; the factual question posed by the omitted instruction—whether Daniels's use of deadly force arose from sudden quarrel or heat of passion—was not necessarily resolved by the jury under other properly given instructions. Nor is Daniels's own theory of the evidence inconsistent with the theory that he might have acted as a result of a sudden quarrel or heat of passion, as it was in *People v. Moye, supra,* 47 Cal.4th at p. 555 [defendant's testimony of lack of panic and intentional acts in self-defense is inconsistent with theory that he acted in heat of passion].)

The jury would have been entitled to conclude, if it had been properly instructed and permitted to do so, that Daniels's conduct did in fact result from heat of passion, spurred by Wesley's aggressive provocation. That leaves a reasonable probability that Daniels could have achieved a more favorable result if the jury had been properly instructed with respect to sudden quarrel or heat of passion resulting from Wesley's provocation, and if Daniels's counsel had been permitted to explain and argue that theory to the jury. (*People v. Moye, supra,* 47 Cal.4th at pp. 555-556.) The trial court's error in failing to instruct on that theory cannot be deemed to be harmless, and requires the judgment's reversal.

**3. Daniels Was Prejudiced By The Trial Court's Failure To Instruct The Jury On The Lesser Included Offense Of Involuntary Manslaughter.**

At trial, Daniels's counsel expressly and purposefully declined to request that the jury be instructed on the theory of involuntary manslaughter. However, the trial court is required to instruct the jury on lesser included offenses that are supported by substantial evidence, even if it is not requested to do so, when the evidence would support a finding that an element of the charged offense is missing. (*People v. Webster* (1991) [54 Cal.3d 411](https://www.leagle.com/cite/54%20Cal.3d%20411), 443.) On appeal, Daniels therefore contends that the trial court erred by failing to instruct on that theory sua sponte because the evidence was sufficient to support a conviction on that theory, and that the error was prejudicial.[8](https://www.leagle.com/decision/incaco20110311021#fid8)

As relevant here, "involuntary" manslaughter "is the unlawful killing of a human being without malice. . . . in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (§ 192, subd. (b).) Both voluntary and involuntary manslaughter are lesser included offenses of murder, however involuntary manslaughter is not a lesser included offense of voluntary manslaughter. (*People v. Orr* (1994) [22 Cal.App.4th 780](https://www.leagle.com/cite/22%20Cal.App.4th%20780), 784, 785 [voluntary manslaughter can be committed without committing involuntary manslaughter, because the "unlawful" element of involuntary manslaughter differs significantly from that element of voluntary manslaughter].)

Daniels's theory is that if the jury in this case had been instructed with respect to involuntary manslaughter, it could have found that Daniels had intended his conduct to result only in the return of the money he had loaned to Wesley, amounting to an unintentional killing, without malice aforethought, "in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (§ 192, subd. (b).) Because this theory is not inconsistent with the evidence, nor is it inconsistent with the jury's rejection of the defense of imperfect self defense, we must conclude that the jury should have been instructed on the theory of involuntary manslaughter.

A conviction for involuntary manslaughter might have been possible, and appropriate, for example, if the jury concluded that in stabbing Wesley, Daniels had acted in response to Wesley's aggression and provocation, but that he did not intend to kill Wesley and he did not act with conscious disregard for human life, yet his use of force exceeded what was reasonably necessary under the circumstances. These conclusions would be consistent with the evidence; they would negate the defense of imperfect self defense; and they would justify a verdict of involuntary manslaughter. (*People v. Cameron* (1994) [30 Cal.App.4th 591](https://www.leagle.com/cite/30%20Cal.App.4th%20591), 604 [If homicide is unlawful and malice is lacking, it is manslaughter; and if it cannot be voluntary manslaughter, it must be involuntary manslaughter]; *Peoplev. Clark* (1982) [130 Cal.App.3d 371](https://www.leagle.com/cite/130%20Cal.App.3d%20371), 382 ["When a homicide is not intentional, but arises out of the criminal negligence of the perpetrator, then the homicide is involuntary manslaughter"].)

Because a conviction for involuntary manslaughter might have been appropriate under a reasonable construction of the evidence, we cannot conclude that the error in failing to instruct the jury on that theory was harmless, and this error, too, requires the judgment's reversal. While we understand that a retrial is appropriate, however, we are also aware both that the jury has already rejected a verdict of acquittal, and that there is an always-present possibility that a retrial might be unduly difficult under the circumstances.

A retrial is not the only option. (See *People v. Cameron, supra,* 30 Cal.App.4th at p. 605; *People v. Garcia* (1972) [27 Cal.App.3d 639](https://www.leagle.com/cite/27%20Cal.App.3d%20639), 647-648.) We will direct that in the event the People elect not to retry the defendant, Daniels's conviction of murder in the second degree be reduced to involuntary manslaughter, the least offense for which he would have been convicted but for the error identified in this opinion.

**Disposition**

Daniels's conviction of the crime of second-degree murder is reversed, with these directions: If the People file a written demand for a new trial within 30 days after the remittitur issues, Daniels shall be retried; if no such demand is filed, the trial court shall proceed to resentence defendant as if the remittitur constituted a finding of guilty of involuntary manslaughter (Pen. Code, § 192, subd. (b)) on the 30th day.

We concur.

ROTHSCHILD, Acting P. J.

JOHNSON, J.

**FootNotes**

1. Daniels did not testify at trial; a tape recording of his police interview was played as part of the prosecution's case-in-chief. Daniels said in the recorded interview that he had turned around and hit Wesley in the nose when he "came to me messing with my bike."

2. All unspecified statutory references are to the Penal Code.

3. Daniels does not challenge the trial court's refusal to instruct the jury on the theory of self defense, rather than merely on imperfect self defense.

4. "Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused." (*People v. Tufunga* (1999) [21 Cal.4th 935](https://www.leagle.com/cite/21%20Cal.4th%20935), 944.) However, whether the facts that the jury could find from the evidence are sufficient to support the defendant's theory is a question of law. (*People v. Romo* (1990) [220 Cal.App.3d 514](https://www.leagle.com/cite/220%20Cal.App.3d%20514), 519.)

5. The court found that "[t]he testimony is [Wesley] walked over there to confront, there was an argument, he took a swing at the defendant, the defendant stabbed him." From that, the court concluded—ambiguously—that on those facts "imperfect self-defense based on sudden quarrel" is the appropriate instruction. The record therefore leaves some doubt whether the trial court understood that the "sudden quarrel" basis for voluntary manslaughter is distinct from imperfect self-defense, and that "heat of passion" is not limited to "the classic example" the court cited, "when someone comes home and finds their spouse in an amorous embrace and they lose all sense of reason and strike out. . . ."

6. The trial court necessarily found the evidence sufficient to support a finding that Wesley provoked Daniels, for it instructed the jury that a finding of provocation "may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. . . . If you conclude that the defendant . . . was provoked, . . . consider the provocation in deciding whether the defendant committed murder or manslaughter." But by instructing the jury as to the findings required for it to find Daniels guilty of imperfect self-defense resulting in a voluntary manslaughter verdict, the court impliedly precluded it from finding voluntary manslaughter on any other basis.

7. As noted (fn. 5, above), the trial court characterized these facts as showing "imperfect self-defense based on sudden quarrel . . . ."

8. As our Supreme Court has admonished, "the jury should not be confronted with an `all or nothing' choice when it believes that the accused is guilty only of a lesser included offense," for that might cause the jury to opt to convict for a greater offense despite its belief that an element is missing, "rather than acquit the defendant entirely." (*People v. Webster, supra,* 54 Cal.3d at p. 444, fn. 17; *People v. Wickersham, supra,* 32 Cal.3d at pp. 324-325.) We cannot rule out that possibility in this case. During its deliberations the jury asked the trial court "Is a complete acquittal an option or is guilty of voluntary manslaughter the least charge?" While the court correctly responded to the jury's inquiry with an instruction that a complete acquittal was an available option, the inquiry might have reflected some jurors' belief that Daniels should not be absolved of culpability for Wesley's death, but that the evidence showed a lack of malice and intent to kill, as well as a lack of evidence to support the theory of imperfect self defense.