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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

KARIEFT MCDONALD,

Defendant and Appellant.

B276494

(Los Angeles County  
Super. Ct. No. BA432319)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dennis J. Landín, Judge. Affirmed.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, and Victoria B. Wilson and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

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Karieft McDonald appeals from his judgment of conviction of one count of second degree murder (Pen. Code,<sup>1</sup> § 187, subd. (a).) McDonald raises the following arguments on appeal: (1) the trial court erred in admitting evidence that McDonald had a prior conviction involving domestic violence; and (2) the trial court erred in failing to instruct the jury on voluntary manslaughter as a lesser included offense of murder. We affirm.

## **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

### **I. The People’s Evidence**

#### **A. The Hoover Street Apartment**

On December 1, 2011, the body of Clarice Williams<sup>2</sup> was discovered in the upstairs unit of a duplex located on South Hoover Street in Los Angeles. Clarice had lived in the unit with her sister, Carla Williams. The unit was a one-bedroom apartment. At various times, different people occupied the bedroom. Carla primarily resided in the living room. Clarice used the kitchen as her bedroom, and covered the entrance to that area with a curtain for privacy.

The apartment was known as a “dope spot,” a place where various illegal activities were conducted, including drug sales and prostitution. Drugs were sold at the apartment throughout the day and night. Crack cocaine was the main drug sold, and many of the customers were prostitutes and panhandlers. The

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<sup>1</sup> Unless otherwise stated, all further statutory references are to the Penal Code.

<sup>2</sup> For clarity and convenience, and not out of disrespect, we refer to the members of the Williams family by their first names.

apartment also was known as a “hangout spot if you were homeless and wanted somewhere to smoke.”

William Roy was in charge of the drug sales operation at the apartment. Roy supplied the cocaine and arranged for other people to sell it for him. Clarice and Carla initially sold the drugs for Roy. At some point, Mario Gonzalez took over the drug sales, but that arrangement ended in late November 2011 when he went to jail. After Gonzalez left, Roy asked Markita Washington to manage the drug sales. Even after they stopped selling drugs for Roy, Clarice and Carla continued to reside in the apartment.

## **B. The Events Preceding the Murder**

### **1. Carla Williams’s Testimony**

Carla was Clarice’s older sister. Carla began living in the Hoover Street apartment in 2010, and Clarice moved in a few months later. Clarice was an alcoholic and addicted to crack cocaine. In November 2011, Clarice began spending time with McDonald. He visited her at the apartment about twice a week. At that time, Clarice was in a relationship with a man named “Eddie.” Clarice also spent time with a man named “Albert” with whom she had a previous relationship.

Carla and Clarice planned to spend Thanksgiving of 2011 with their family. Carla went to their parents’ home in Pasadena two days before the holiday. Clarice was supposed to join them the following day, but she never showed up.

### **2. Mario Gonzalez’s Testimony**

Gonzalez was in charge of selling drugs at the Hoover Street apartment for nine months in 2011. He often stayed in the apartment during that time. Clarice began bringing McDonald to

the apartment in August 2011. McDonald would “come and go, stay a week at a time or two and leave and come back.” When McDonald visited the apartment, he always stayed with Clarice in her room. Gonzalez believed that Clarice and McDonald were in an intimate relationship because he would hear them having sex in Clarice’s room.

On Thanksgiving, November 24, 2011, McDonald came to the apartment and stayed with Clarice over the Thanksgiving weekend. On Sunday, November 27, 2011, at about 10:00 p.m., Gonzalez left the apartment to drive to northern California to turn himself into the authorities there on a prior conviction for cashing a fraudulent check. When Gonzalez left that night, Clarice and McDonald were together in her room. There was no one else in the apartment at that time. Gonzalez last spoke with Clarice over the telephone at about 2:00 a.m. that night. Clarice sounded normal and did not appear to be angry or upset.

### **3. Markita Washington’s Testimony**

In 2011, Washington was homeless and working as a prostitute. She was addicted to crack cocaine and often went to the Hoover Street apartment to buy drugs. Washington met Clarice there and was friendly with her. In November 2011, when Gonzalez went to jail, Roy asked Washington to take over the drug sales in exchange for a supply of drugs and a place to stay. Washington accepted the offer.

One night in late November 2011, Washington drove to the apartment to move in some of her belongings. Clarice was there and seemed happy and high on drugs. Clarice had a male guest in her room, but Washington only caught a glimpse of him. After Washington cleaned the living room area where she would be

staying, she drank alcohol and smoked crack cocaine with Clarice and some friends who were visiting.

Throughout the night, Clarice's male guest stayed inside her room with the curtain closed. Clarice periodically returned to the room to spend time with him. At one point, Washington heard Clarice and the man arguing about drugs. Washington also heard noises coming from the room that sounded like Clarice and the man were having sex. Washington twice heard the man call out for Clarice in a "jealous-sounding" voice when Clarice was spending time outside the room. Although the man's voice did not sound angry, Clarice seemed to be getting "stressed out."

Later that night, Roy came to the apartment and got into a physical altercation with Washington over the proceeds from her drug sales. Roy punched Washington in the face, which caused her nose to bleed profusely. After Roy hit her, Washington left the apartment and did not return.

#### **4. William Roy's Testimony**

Roy moved into the Hoover Street apartment in 2009. He first met Clarice when she was staying in the downstairs unit. Clarice and Carla later moved into the upstairs unit where Roy and his girlfriend lived. Clarice was an alcoholic and addicted to crack cocaine. She did not have any money and would get drugs from the people who hung out with her.

On the night Gonzalez left the area to serve a jail sentence, Roy dropped off Washington at the apartment and gave her some drugs to sell. Later that night, at about 3:00 a.m., Washington called Roy and said that Clarice was arguing with her and another person. Washington also complained that people in the apartment were "tripping on her." The following day, at about 6:00 p.m., Roy went to the apartment to pick up the proceeds

from the drug sales. When Washington came out, Roy hit her in the face because he believed she was stealing from him. Washington took off and ran down the street. A few hours later, at about 1:00 a.m., Roy received a call from Washington's friend, Luis, who sounded hysterical and said that Clarice was dead in her bed.

## **C. The Police Investigation**

### **1. Discovery of Clarice's Body**

On November 29, 2011, at 1:05 a.m., an anonymous call was made to 911. The female caller requested that the police come to the Hoover Street apartment because her friend was dead in her bed; however, no police units responded to this call. On December 1, 2011, at 9:07 a.m., another anonymous call was made to 911. The male caller reported that there was a dead body at the Hoover Street apartment.

In response to the second 911 call, two officers went to the apartment. Because the front door was slightly ajar, they announced their presence and entered. The officers found Clarice deceased in the kitchen area. Her body was on the bed and covered with clothing and a blanket. A shard of glass was in her hand and a plastic bag was covering her face. She was wearing a dress that had been pulled above her waistline, and an object was protruding from her rectum. There was a large pool of blood in the kitchen. No one else was in the apartment at that time.

### **2. Autopsy Findings**

An autopsy was performed on Clarice on December 3, 2011. The cause of death was asphyxia due to facial occlusion; Clarice's nose and mouth had been blocked causing a lack of oxygen to her

brain. Clarice had lacerations on the left corner of her mouth and her upper lip. The laceration to her mouth was caused by significant blunt force trauma inflicted prior to her death. This injury was consistent with someone placing a hand over Clarice's nose and mouth and applying substantial pressure.

Clarice had a large hematoma on the back of her head, which indicated that she hit her head against a hard flat surface. This injury was inflicted when Clarice was alive and likely near the time of her death. Clarice also had two stab wounds on the inside of her upper left arm, which were inflicted before she died. In addition, Clarice had scratches and abrasions on her lower back, which were caused by a mild degree of blunt force from an unknown object.

A flashlight covered by a condom was found in Clarice's lower abdomen about 10 inches up from her anal opening. It had perforated the colon and extruded into the peritoneal cavity. A considerable amount of force would have been required to place the flashlight in that area, and it appeared to have been inserted post-mortem. A large wooden brush, a nail polish bottle, and a small lotion bottle were found inside the rectal cavity. Clarice also had a stab wound on the left side of her anal area, which likely was inflicted after she died. Toxicology tests showed the presence of cocaine, marijuana, and alcohol in Clarice's liver at the time of death.

### **3. DNA Testing**

Various items of evidence found on Clarice's body or recovered from the crime scene were tested for DNA. A blood stain found on Clarice's left forearm contained a mixture of DNA of two people: Clarice and a male contributor. Although only 2.7 percent of African American men could have contributed to the

DNA found in this bloodstain, McDonald could not be excluded as a contributor. Clarice's fingernails contained a mixture of DNA from at least two people. Clarice was a major contributor, and there also was a male contributor. While 99.95 percent of African American men could be excluded as a contributor to the DNA found on Clarice's fingernails, McDonald could not be excluded as a contributor.

Clarice's DNA was found in blood that was recovered from the kitchen floor, the plastic bag that covered her face, and the glass fragment that was in her hand. McDonald was excluded as a contributor to the DNA found on these items. A sexual assault evidence kit was collected from Clarice, but no male DNA was found.

McDonald's DNA was found in blood recovered from a bandage left in the bathroom sink. McDonald's DNA also was on a cigarette butt found on the kitchen floor near Clarice's body. Washington's DNA was found in blood recovered from the hallway, the stairway landing, and a tissue in the bathroom trash can. Clarice was not a contributor to the blood found in these areas.

#### **4. Cell Phone Records**

Law enforcement officers examined the cell phone records for Clarice and McDonald from the time around her death. On October 21, 2011, Clarice sent a text message to McDonald that stated, "I am falling in love with you, Kariest McDonald." On November 24, 2011, Clarice and McDonald called each other multiple times, and their cell phones were in the same geographic area. On November 26 and 27, 2011, McDonald's cell phone also was in the vicinity of the Hoover Street apartment.



On November 28, 2011, at 5:38 a.m., Clarice's cell phone made a call to McDonald's cell phone. At the time of the call, their phones were in the same geographic area. This was the last outgoing call made by Clarice's phone, and the last contact it had with McDonald's phone. On November 29, 2011, Clarice's phone went "off network," which is caused by someone powering off the phone, the battery dying, or the phone being outside the coverage area. McDonald's phone never tried to communicate with Clarice's phone after November 28, 2011.

### **5. McDonald's Jailhouse Calls**

Amey Storm began dating McDonald around Thanksgiving of 2011. Storm spent Thanksgiving that year with her family in Las Vegas; McDonald did not accompany her. She returned to Los Angeles on Sunday, November 27, 2011, and saw McDonald the next day. Storm and McDonald later began living together.

After McDonald was arrested, he made several recorded telephone calls to Storm from the jail. During one of the calls, Storm told McDonald the police had taken some items from their apartment. In response, McDonald stated, "Don't talk to them about nothing, and keep them away from her. Nothing about nothing." When Storm noted the police were asking questions about November 2011 when they had "just got together," McDonald replied, "Well, don't tell them that. Tell them that . . . everything is regular and we been together." Later, Storm said she had told the police that they were together in Las Vegas that Thanksgiving weekend. McDonald responded, "Yeah. There you go." McDonald instructed Storm not to tell the police the year when they started their relationship. He then added, "If you give them a year, give them a year that's off. Give them '08 or '09 or something like that." At the end of the call, McDonald stated,

“[T]he thing about it, I can’t really say much, but it’s some old dope spot stuff. . . . And stuff that happens in the dope spot, you feel me? . . . That’s what it is.”

## **6. McDonald’s Recorded Interviews**

Los Angeles Police Detective David Ross conducted recorded interviews with McDonald. In the first interview on July 9, 2012, McDonald denied he had been in a romantic relationship with anyone for many years. He acknowledged sharing an apartment with Storm, but described her as his roommate. When shown a photograph of Clarice, McDonald denied he knew her or had ever heard her name. At the end of the interview, however, he asked if he could keep the photograph.

In the second interview on December 18, 2014, following his arrest, McDonald told police he had been a relationship with Storm for five to six years. He also stated he had spent the Thanksgiving holiday of the year they met with Storm’s family. McDonald was shown another photograph of Clarice, and he again denied knowing her. Detective Ross repeatedly accused him of lying, but McDonald maintained he had never met Clarice.

That same day, Detective Ross arranged for a confidential informant (“CI”) to be placed in McDonald’s cell. During their recorded conversation, McDonald told the CI that he was in jail for a “[t]hree-year-old hot one.” He said the police were “trying to get [him] to say something,” but “everything they done told [him] today was a lie.” He also said the police had accused him of lying when he denied knowing the victim, and they were “trying to put it in [his] head that [he was] lying.” McDonald told the CI he had no interest in taking a plea deal, and the prosecution would “have to get every morsel of evidence.”

## II. The Defense Evidence

A phlebotomist at KED Plasma Donation Center in Reseda, California testified that McDonald was a plasma donor. The phlebotomist drew blood from McDonald on November 25, 2011, at 5:15 p.m. McDonald also donated blood at the center on November 17, 21, and 28, 2011.

Tyrone Johnson testified as a witness for the defense. At the time of trial, he was married to Washington. He had a prior conviction for second degree murder. According to Johnson, he met Washington in April 2010 following his release from prison, and they began a dating relationship. In late November 2011, Johnson received a call from Washington after she had been hit by Roy. Johnson picked up Washington, and they checked into the Snooty Fox Motel.<sup>3</sup> About two months later, Washington told Johnson that she had strangled a woman named “Mimi” to death with a towel because Mimi had disrespected her.<sup>4</sup> In April 2012, Johnson contacted the police about Washington’s confession. He was interviewed by the police three times, and on each occasion, he told them Washington had confessed to the murder. Johnson admitted that, at the time of these interviews, he was angry at Washington and they were having issues in their relationship.

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<sup>3</sup> Guest registration records from the Snooty Fox Motel showed that Johnson checked into the motel at 10:33 p.m. on November 28, 2011.

<sup>4</sup> Clarice’s nickname was “Mimi.”

### **III. Verdict and Sentencing**

The jury found McDonald guilty of second degree murder. McDonald was sentenced to a term of 15 years to life in state prison.

### **DISCUSSION**

McDonald raises two arguments on appeal. First, he asserts the trial court erred in admitting evidence of his prior conviction for a felony involving domestic violence pursuant to Evidence Code section 1109. Second, he argues the trial court erred in failing to instruct the jury on voluntary manslaughter as a lesser included offense of murder.

#### **I. Admission of Prior Act of Domestic Violence**

McDonald first contends the trial court erred when it admitted evidence that he previously had been convicted of inflicting a corporal injury on a spouse or cohabitant in violation of section 273.5. McDonald claims the evidence was insufficient to establish that the current offense involved domestic violence based on a dating relationship, which was required for the prior offense to be admissible under Evidence Code section 1109.

##### **A. Relevant Proceedings**

Prior to trial, the prosecutor moved for an order allowing the presentation of evidence of McDonald's 2002 conviction for willful infliction of a corporal injury upon a spouse or cohabitant in violation section 273.5. McDonald's prior offense reportedly involved strangling the mother of one of his children. The prosecutor sought to present the evidence pursuant to Evidence Code section 1109 as a prior act of domestic violence. At a pretrial hearing on the motion, the prosecutor contended that the

“present crime is clearly a crime of domestic violence,” and that “the evidence will establish that Mr. McDonald was in a dating relationship with the named victim . . . for several months, that they sometimes spent numerous days together at a time at the crime scene, and the prior conviction is for a crime of domestic violence.”

Defense counsel argued that evidence of McDonald’s prior conviction should be excluded under Evidence Code section 352 for three reasons. First, defense counsel asserted that, because the prior incident occurred almost 10 years earlier, it did not show a propensity for domestic violence. Second, defense counsel argued that the current offense was “significantly more complex” than McDonald’s prior crime because it involved “evidence of postmortem body mutilation.” Third, defense counsel contended that, because the victim of the prior offense was unavailable to testify, any police testimony about the incident would be hearsay and any photographic evidence of the victim’s injuries would lack an adequate foundation.

The trial court ruled that the evidence of McDonald’s prior conviction was admissible under Evidence Code section 1109. The court stated: “[M]y view is the probative value of that evidence is strong, and there’s independent sources of evidence for the charged and uncharged offense. The defendant has already been punished, and I’m assuming the jurors will be told that through either the court records or some stipulation. The uncharged offense, even though it’s serious, it’s less inflammatory than the current charge. I do agree that the acts are somewhat remote in time but not so much that they should preclude jurors from hearing this evidence.”

At trial, the parties stipulated that McDonald “was convicted of a felony violation of Penal Code section 273.5 subdivision (a), known as corporal injury to a spouse, date of conviction on or about November 25, 2002, in Los Angeles County, Case Number KA059073.”

## **B. Evidence Code Section 1109**

Evidence Code section 1109 “permits the admission of [the] defendant’s other acts of domestic violence for the purpose of showing a propensity to commit such crimes. [Citation.]” (*People v. Hoover* (2000) 77 Cal.App.4th 1020, 1024.) It provides, in relevant part, that “in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant’s commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.” (Evid. Code, § 1109, subd. (a).) As used in Evidence Code section 1109, the term “domestic violence” has the meaning set forth in Penal Code section 13700, which defines “domestic violence” as “abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship.” (§ 13700, subd. (b); see Evid. Code, § 1109, subd. (d)(3).) The trial court’s decision whether to admit evidence, including evidence of the commission of other crimes, generally is reviewed for an abuse of discretion. (*People v. Leon* (2015) 61 Cal.4th 569, 597.)

In *People v. Rucker* (2005) 126 Cal.App.4th 1107, the Court of Appeal considered the meaning of the term “dating relationship” for purposes of determining whether evidence of a prior incident of domestic violence was properly admitted under

Evidence Code section 1109. (*Id.* at pp. 1114-1117.) The court noted that the Domestic Violence Prevention Act defined the term “dating relationship” as “‘frequent, intimate associations primarily characterized by the expectation of affection or sexual involvement independent of financial considerations.’ (Fam. Code, § 6210.)” (*Id.* at p. 1116.) The court concluded that, under Evidence Code section 1109, “[t]he definition of a dating relationship adopted by the Legislature does not require ‘serious courtship,’ an ‘increasingly exclusive interest,’ ‘shared expectation of growth,’ or that the relationship endures for a length of time.” (*Ibid.*) Rather, “[t]he statutory definition requires ‘frequent, intimate associations,’ a definition that does not preclude a relatively new dating relationship.” (*Ibid.*; accord, *People v. Upsher* (2007) 155 Cal.App.4th 1311, 1322-1323.)

**C. McDonald’s Prior Act of Domestic Violence Was Admissible Under Evidence Code Section 1109**

McDonald argues that the trial court erred in admitting the evidence of his prior conviction because the current offense did not involve domestic violence based on a “dating relationship” as required by Evidence Code section 1109. As McDonald concedes, however, his trial counsel never objected to the admission of the evidence on this ground. In order to preserve evidentiary issues for appeal, the objecting party must make a timely objection stating the specific ground on which it is made. (Evid. Code § 353, subd. (a); *People v. Williams* (2008) 43 Cal.4th 584, 620.) “Although no ‘particular form of objection’ is required, the objection must ‘fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the

party offering the evidence can respond appropriately and the court can make a fully informed ruling.” [Citation.]’ [Citation.]” (*People v. Valdez* (2012) 55 Cal.4th 82, 130.) In the absence of a specific, timely objection in the trial court, ““questions relating to the admissibility of evidence will not be reviewed on appeal.”” (*People v. Williams, supra*, at p. 620.) Because McDonald did not object to the evidence on the ground that he lacked a “dating relationship” with the victim within the meaning of Evidence Code section 1109, he has forfeited this claim of error on appeal.

Alternatively, McDonald contends that his trial counsel was ineffective in failing to object to the evidence of his prior conviction on this ground, either in opposing the prosecution’s pretrial motion to present such evidence or when it was offered as a stipulation during trial. “To secure reversal of a conviction for ineffective assistance of counsel, a defendant must establish that counsel’s performance fell below an objective standard of reasonableness and that, to a reasonable probability, defendant would have obtained a more favorable result absent counsel’s shortcomings. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-694 [104 S.Ct. 2052, 2064-2068, 80 L.Ed.2d 674].)” (*People v. Kraft* (2000) 23 Cal.4th 978, 1068.) On this record, we cannot conclude that McDonald’s counsel was ineffective in failing to argue that the statutory requirement of a “dating relationship” was not satisfied in this case. Rather, any such objection would have been futile because the prosecution presented sufficient evidence to establish that McDonald and Clarice were in a “dating relationship” within the meaning of Evidence Code section 1109. (See *People v. Anderson* (2001) 25 Cal.4th 543, 587 [“[c]ounsel is not required to proffer futile objections”]; *People v.*



*Smithey* (1999) 20 Cal.4th 936, 992 [counsel is not ineffective in failing to object where “any objection would have been futile”].)

Specifically, the evidence at trial reasonably supported a finding that, as of November 2011, McDonald and Clarice were engaged in a relationship that involved frequent and intimate associations and was independent of financial considerations. Carla testified that McDonald visited Clarice at the Hoover Street apartment about twice a week. Gonzalez testified that Clarice started bringing McDonald to the apartment in August 2011, and that McDonald would “come and go, stay a week at a time or two and leave and come back.” Gonzalez believed McDonald and Clarice were in a “boyfriend, girlfriend” relationship because he would hear them having sex in Clarice’s room. Gonzales also testified that McDonald came to visit Clarice on Thanksgiving Day of 2011, that he stayed with Clarice in her room, and that he was still there the following Sunday when Gonzalez left. The evidence further showed that, in October 2011, Clarice sent a text message to McDonald, stating, “I am falling in love with you, Kariest McDonald.” Clarice and McDonald continued to exchange text messages until November 26, 2011, a few days before her death.

McDonald argues on appeal that he did not have a dating relationship with Clarice because she had ongoing relationships with at least two other men. However, as stated above, a “dating relationship” within the meaning of Evidence Code section 1109 does not require exclusivity, nor does it preclude a relatively new dating relationship. Rather, the relevant inquiry is whether the relationship at issue involved “frequent, intimate associations primarily characterized by the expectation of affection or sexual involvement.” (*People v. Rucker, supra*, 126 Cal.App.4th at

p. 1116.) Here, the trial court reasonably could have concluded that the relationship between McDonald and Clarice met the statutory definition of a “dating relationship” because it was sexual in nature, McDonald stayed with Clarice for days at a time, and Clarice told McDonald that she was falling in love with him. Accordingly, McDonald has not shown that his trial counsel rendered ineffective assistance in failing to object to the evidence of his prior conviction on this ground.

McDonald also has not established that the admission of the evidence resulted in prejudice. The evidence of his prior act of domestic violence consisted of a stipulation by the parties that McDonald was convicted of a felony offense of inflicting corporal injury on a spouse in 2002. No other evidence was presented at trial about McDonald’s prior conviction or the act of domestic violence on which it was based. The evidence that McDonald was convicted of inflicting corporal injury on a spouse almost 10 years before the charged offense was far less inflammatory than the evidence concerning the brutal murder of Clarice. McDonald’s prior conviction also was a very small portion of the evidence presented against him, which included eyewitness testimony and cell phone records placing McDonald with Clarice shortly before her death, DNA evidence showing the presence of McDonald’s DNA on Clarice’s body and on a blood-stained bandage in her bathroom, McDonald’s false statements to the police about whether he knew Clarice, and McDonald’s jailhouse calls to his girlfriend in which he sought to suppress evidence against him. In addition, the jury was instructed with CALCRIM No. 852 that McDonald’s prior act of domestic violence was “only one factor to consider along with all the other evidence,” and was “not sufficient by itself to prove that the defendant is guilty of the

crime of murder.” Therefore, on this record, McDonald has not demonstrated a reasonable probability that the outcome of his trial would have been any different had the evidence of his prior conviction been excluded.

## **II. Failure to Instruct on Voluntary Manslaughter**

McDonald also asserts that the trial court erred in failing to instruct the jury *sua sponte* on voluntary manslaughter as a lesser included offense of murder. McDonald specifically argues that a voluntary manslaughter instruction was warranted because there was substantial evidence from which the jury could have concluded that Clarice was killed in a sudden quarrel or heat of passion.

### **A. Relevant Law**

“[I]t is the [trial] ‘court’s duty to instruct the jury not only on the crime with which the defendant is charged, but also on any lesser offense that is both included in the offense charged and shown by the evidence to have been committed.’ [Citation.]” (*People v. Gutierrez* (2009) 45 Cal.4th 789, 826.) “Conversely, even on request, the court ‘has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction.’ [Citation.]” (*People v. Cole* (2004) 33 Cal.4th 1158, 1215.) Substantial evidence “is not merely ‘*any* evidence ... no matter how weak’ [citation], but rather “‘evidence from which a jury composed of reasonable [persons] could ... conclude[]’” that the lesser offense, but not the greater, was committed.” (*People v. Cruz* (2008) 44 Cal.4th 636, 664; see also *People v. Burney* (2009) 47 Cal.4th 203, 250 [“[t]o justify a lesser included offense instruction, the evidence supporting the instruction must be

substantial — that is, it must be evidence from which a jury . . . could conclude that the facts underlying the particular instruction exist”). “[W]e review independently whether the trial court erred in failing to instruct on a lesser included offense. [Citation.]” (*People v. Booker* (2011) 51 Cal.4th 141, 181.)

Voluntary manslaughter is “the unlawful killing of a human being without malice . . . upon a sudden quarrel or heat of passion.” (§ 192, subd. (a).) “Heat of passion arises if, “at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.” [Citation.]” (*People v. Beltran* (2013) 56 Cal.4th 935, 942.) “The heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion,” and the “heat of passion must be due to “sufficient provocation.”” (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1143-1144.) “[T]he factor which distinguishes the ‘heat of passion’ form of voluntary manslaughter from murder is provocation. The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim. [Citations.] The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.]” (*People v. Lee* (1999) 20 Cal.4th 47, 59.)

“Adequate provocation and heat of passion must be affirmatively demonstrated. [Citations.]” (*Id.* at p. 60.)

**B. The Trial Court Did Not Err in Failing to Give a Voluntary Manslaughter Instruction**

McDonald contends the evidence was sufficient to support a voluntary manslaughter instruction because there was testimony that, on the night Clarice was killed, she got into arguments with several people at the Hoover Street apartment, including a male guest who argued with Clarice about drugs and spoke to her in a jealous manner. McDonald asserts that this evidence of Clarice’s demeanor that night, along with the violent manner of her death, reasonably could have supported a finding that her killing was the result of mutually provocative and passionate behavior.

Contrary to McDonald’s claim, however, none of the evidence showed that Clarice engaged in any legally sufficient provocation which could have led McDonald to kill her in a sudden quarrel or heat of passion. Washington testified that Clarice was happy in the company of her male guest, and at most, Clarice appeared to get “stressed out” when her guest twice called for her in a “jealous-sounding” voice because she was spending too much time away from him. Washington also testified that the argument she overheard between Clarice and her guest appeared to be about the fact that Clarice was smoking crack cocaine with other people outside her room and was not sharing the drugs with him. The only other evidence about Clarice’s demeanor that night came from Roy’s testimony that Washington called him to complain that Clarice was arguing with her and “somebody else.” Washington also told Roy that people at the apartment were “tripping” or “flipping out” on her because they were drunk.

There was no evidence from which a jury reasonably could have concluded that Clarice engaged in provocative conduct that would cause an ordinary person of average disposition to lose reason and judgment. At most, the evidence showed that, on the night she was killed, Clarice argued with McDonald about whether she was sharing enough of her drugs with him, and later argued with Washington and another unidentified person about an unknown subject. Even assuming that Clarice provoked these arguments, it is settled law that “[a] voluntary manslaughter instruction is not warranted where the act that allegedly provoked the killing was no more than taunting words, a technical battery, or slight touching.” (*People v. Gutierrez, supra*, 45 Cal.4th at pp. 826-827; see also *People v. Manriquez* (2005) 37 Cal.4th 547, 586 [victim’s actions in “call[ing] defendant a ‘mother fucker’ and . . . repeatedly asserting that if defendant had a weapon, he should take it out and use it . . . plainly were insufficient to cause an average person to become so inflamed as to lose reason and judgment”]; *People v. Cole, supra*, 33 Cal.4th at p. 1216 [“[e]vidence that defendant was intoxicated and jealous, and . . . went ‘berserk’ after victim said she would put a ‘butcher knife in your ass,’ . . . ‘does not satisfy the objective, reasonable person requirement, which requires provocation by the victim’”].) Because there was no substantial evidence to support a finding that McDonald killed Clarice in a sudden quarrel or heat of passion based on legally sufficient provocation, the trial court did not err in failing to instruct the jury on voluntary manslaughter.

## DISPOSITION

The judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

FEUER, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.