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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. SCOTT KRATLIAN, Defendant and Appellant.	B268524 (Los Angeles County Super. Ct. No. BA421694)

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

Peter Gold, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Jaime L. Fuster and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Scott Kratlian, also known as Scott Porter, was convicted by jury of first degree murder (Pen. Code, § 187, subd. (a)), and the jury found true the special allegation that defendant's victim was over the age of 65 (§ 667.9, subd. (a)). Defendant admitted prior strike and prison term allegations (§§ 667, subd. (a)(1), 667.5, subd. (b), 1170.12), and was sentenced to a total term of 56 years to life. On appeal, defendant contends the trial court erroneously admitted evidence of a 1992 killing under Evidence Code sections 1101, subdivision (b) and 1109, subdivision (a)(2), violating his right to due process, and that section 1109, subdivision (a)(2) is unconstitutionally vague and overbroad. Defendant also contends the trial court erroneously refused to instruct the jury with the lesser included offense of voluntary manslaughter. Lastly, defendant contends the trial court failed to instruct the jury that it could consider evidence of provocation when determining whether defendant acted with premeditation and deliberation. Finding no merit in any of these contentions, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

James DiRocco was serving a lengthy prison term in a Nevada state prison when he answered Henry Major's ad seeking a gay pen pal. They corresponded for nearly two decades, and met in person for the first time in 2009, after Mr. DiRocco was released from prison. Following Mr. DiRocco's release from prison, Mr. Major visited him in Las Vegas several times, and they had sexual relations during their visits.

In January 2014, Mr. Major paid for Mr. DiRocco to travel to California to visit Mr. Major. Mr. DiRocco stayed at Mr. Major's Hollywood apartment for approximately two weeks. During Mr. DiRocco's visit, Mr. Major invited defendant to come

and stay with him as well. Defendant had recently been released from prison in New York, and Mr. Major and defendant had exchanged letters while defendant was incarcerated. Defendant was very feminine and his voice sounded like a woman, although he could make it sound "normal."

Mr. DiRocco stayed in Mr. Major's guest bedroom, and defendant stayed on the couch in the living room. Both Mr. DiRocco and defendant engaged in sex with Mr. Major.

Mr. DiRocco and defendant initially got along well, but Mr. DiRocco became concerned that defendant might steal from him. Defendant started acting "moody" and accused Mr. DiRocco of "following him around." One evening, while Mr. Major was sleeping, defendant and Mr. DiRocco got into an argument. Mr. DiRocco called defendant a "fat queen." Defendant put Mr. DiRocco in a headlock and "tried to strangle" him. Defendant told Mr. DiRocco, "I'm a murderer. Don't you know I could kill you?" Defendant released Mr. DiRocco before he lost consciousness. Mr. DiRocco went to his room and barricaded the door with a chair because he was scared. Later that night, defendant tried to enter Mr. DiRocco's room, but could not get in.

The next day, Mr. DiRocco told Mr. Major what had happened. He warned Mr. Major that defendant was dangerous, and asked Mr. Major to take him to the bus station. Mr. DiRocco left that day, on approximately February 2 or 3. Mr. DiRocco had daily phone contact with Mr. Major after he returned to Nevada. However, after three or four days, Mr. DiRocco was unable to reach Mr. Major.

Luz Briseno lived in the unit next to Mr. Major, and shared a common wall with him. She saw Mr. Major almost daily, and saw him for the last time on February 8 or 9. On the morning of

February 10, Ms. Briseno heard a loud noise coming from Mr. Major's apartment. It sounded like someone had fallen down the stairs. She ran to Mr. Major's front door and yelled, "Harry, Harry, are you okay?" A female voice responded, "Harry's not here. . . . Harry went to the store." Ms. Briseno asked if everything was okay, and the voice responded, "Everything is fine." Ms. Briseno then left to go to work.

Video from the complex's parking garage showed Mr. Major, Mr. DiRocco, and defendant together at various times between February 1 and 4, 2014. There was no video footage depicting Mr. DiRocco after February 5. Mr. Major last appeared in video footage on February 9, and a person resembling defendant appeared in a video on the morning of February 10.

Between February 10 and 11, multiple transactions were made or attempted using Mr. Major's credit card, including ATM withdrawals. Video depicted defendant using an ATM machine at a 7-Eleven store on Sunset Boulevard in the late morning of February 10, using an ATM at a different 7-Eleven store on Santa Monica Boulevard in the early afternoon, and making various transactions at a Los Angeles hotel later in the afternoon.

On February 12, Mr. Major's landlord received a phone call from one of Mr. Major's friends, who was upset because Mr. Major had missed a standing lunch date with her and had never called to cancel. At approximately 7:00 that evening, the landlord went to the apartment to check on Mr. Major. He and another owner entered the unit, and found Mr. Major dead in the upstairs master bathroom. The apartment was in disarray, and there was "blood everywhere." They called 911.

Police found multiple red stains resembling blood in the living room, kitchen, first floor bathroom, staircase, guest

bedroom, and an upstairs bathroom. They also found several red stains that could have been shoeprints. Twine was found in the bathroom's toilet.

An autopsy revealed injuries to Mr. Major's neck which were consistent with being strangled with a belt or strap. There was also blunt force trauma to his head, and ligature injuries to his arms indicating that he had been bound with a rope or cord. There were lacerations on his head, face, and neck. His legs were bruised. He had died within days of when his body was discovered, possibly on February 10. At the time of his death, Mr. Major was approximately 83 years old.

Defendant was arrested on February 18, 2014. Defendant had a bruise on one of his fingers, and told police it was a bite mark. He also had a bruise on his right forearm. There were bloodstains on the tops of his sneakers, and DNA testing confirmed that the blood belonged to Mr. Major. A comparison of defendant's shoes with the shoeprints left at the apartment revealed that defendant's shoes could have made the marks, although many shoes had a similar sole pattern.

Defendant told police that Mr. Major had asked him to leave around February 5, 2014, because defendant had stolen money from him, and had gotten into a fight with Mr. DiRocco. Mr. DiRocco also left Mr. Major's apartment on the 5th. Defendant returned to Mr. Major's home on February 10 to ask for money. Mr. Major was "pissed," and the two "struggled" downstairs for about 10 minutes. They fell to the ground, Mr. Major bit defendant's finger, and defendant bit Mr. Major. Mr. Major's nose was bleeding. After the fight, defendant went upstairs to change his clothes because his clothes were sweaty

and had blood on them. The fight was a "minor" "girl fight" and Mr. Major was alive when defendant left.

When confronted with photographic stills taken from surveillance videos from the hotel and 7-Eleven, defendant confirmed that he was the person depicted in those stills. When asked if he used Mr. Major's credit card, he said he did not remember.

The prosecution introduced evidence that defendant pled guilty to voluntary manslaughter in New York in 1993, based on a 1992 killing of a 66-year-old man. Defendant admitted to police that he had met that victim the day of the killing, and had returned to the victim's apartment to engage in sexual activity. He bound the victim's arms and feet with shoelaces, and strangled him with a belt. After the victim was dead, defendant dragged him to the bathroom, put a towel over his head, and lit the towel on fire. He quickly put the fire out with a pan of water "because he got scared."

Felix Briseno testified for the defense. She cleaned her sister Luz Briseno's unit on Mondays, Wednesdays and Fridays. On February 10, she arrived at her sister's unit sometime between 10:00 a.m. and 12:30 p.m., after Luz had left for work. She saw two men outside of Mr. Major's door. One was dressed like a woman. The person dressed in men's clothing was Mr. DiRocco. The men were knocking on Mr. Major's door. Felix entered her sister's apartment, and 30 to 45 minutes later heard "strange" noises coming from Mr. Major's apartment. She heard arguing, "loud knocking" on the wall, and the stairs being banged on. She also heard male voices talking about "paying or pay." The noises continued for approximately 30 minutes.

DISCUSSION

1. Past Crime Evidence

Defendant contends the court erroneously admitted evidence of the 1992 killing. He contends that Evidence Code section 1109, subdivision (a)(2), allowing admission of evidence of prior acts of elder abuse, is unconstitutionally vague and overbroad, and that the evidence was unduly prejudicial. We find no prejudicial error.

a. Relevant facts

Before trial, the People moved in limine to admit evidence of defendant's 1993 conviction for voluntary manslaughter under Evidence Code sections 1101, subdivision (b), as evidence of identity, and under section 1109, subdivision (a)(2) as a prior incident of elder abuse. According to the People's motion, the 1992 incident involved a 66-year-old victim who had paid defendant for sex. Defendant bound the victim with shoe laces, strangled him with a belt, and placed his body in the bathroom, where he attempted to light the body on fire, but later put the fire out. The prosecution argued that the two crimes were sufficiently similar to be probative of identity, as the victims were elderly men, defendant had sexual relations with each victim, they both had been bound and killed with a belt-like ligature, and their bodies were placed in the bathroom. The prosecutor also argued that the 1992 crime constituted a prior act of elder abuse within the meaning of section 1109, subdivision (a)(2).

Defendant moved to exclude the evidence, arguing that the probative value of the 1992 incident was substantially outweighed by the prejudicial effect under Evidence Code section 352, reasoning that the jury would be unable to "logically evaluate" the present case because of their emotional reaction to

the evidence of the past crime. Counsel also argued that the prior incident was "remote" and that the incidents were not "substantially similar."

At the hearing, the court concluded that the evidence was relevant, acknowledged that much time had passed since the prior act, but found that defendant had been incarcerated for the intervening years, explaining the remoteness of the crime. The victim of the 1992 killing was 66 years old, and Mr. Major was approximately 83 years old when he was killed in 2014. Twenty-two years had passed between the first and the second killing, and defendant was about 40 years younger than both victims. The court concluded the 1992 crime and the present crime were sufficiently similar to support identity, and determined that the evidence was admissible under Evidence Code section 1101, subdivision (b) and section 1009, subdivision (a)(2). The court, however, cautioned the prosecutor to "sanitize" the evidence and avoid delving into graphic details of the crime.

b. Constitutionality of Evidence Code section 1109, subdivision (a)(2)

Evidence Code section 1109, subdivision (a)(2) provides that "in a criminal action in which the defendant is accused of an offense involving abuse of an elder . . . , evidence of the defendant's commission of other abuse of an elder . . . is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." The statute defines abuse of an elder as "physical or sexual abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment that results in physical harm, pain, or mental suffering, the deprivation of care by a caregiver, or other deprivation by a

custodian or provider of goods or services that are necessary to avoid physical harm or mental suffering." (*Id*., subd. (d)(1).)

Defendant contends this section is unconstitutionally vague and overbroad because the statute defines elder abuse "broadly," and fails to define "elder." Defendant reasons the trial court could apply Evidence Code section 1109 "to admit as propensity evidence almost any sort of prior act involving abuse or neglect . . . against *anyone*."

A criminal statute that makes unlawful " 'a substantial amount of constitutionally protected conduct' " may be held invalid on its face as being unconstitutionally overbroad even if the statute may have legitimate, constitutional application. (See *Houston v. Hill* (1987) 482 U.S. 451, 458-459; see also *People v. Rubalcava* (2000) 23 Cal.4th 322, 333.) A statute is unconstitutionally vague when it fails to define an offense with sufficient certainty such that a person of ordinary intelligence is not able to understand what conduct is prohibited, and it encourages arbitrary or discriminatory enforcement. (*Kolender v. Lawson* (1983) 461 U.S. 352, 357-358.) "A statute will not be held void for vagueness if any reasonable and practical construction can be given its language or if its terms may be made reasonably certain by reference to other definable sources." (*In re Marriage of Walton* (1972) 28 Cal.App.3d 108, 116.) There is a " 'strong presumption that legislative enactments "must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears . . . ." ' [Citation.]" (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 568.)

There is nothing vague or overbroad about Evidence Code section 1109, subdivision (a)(2). Section 1109 clearly defines which specific acts of abuse and neglect are admissible. By its

express language, section 1109, subdivision (a)(2) applies in a criminal action in which the defendant is accused of an offense involving abuse of an elder. Penal Code section 368, criminalizing elder abuse, clearly defines the term "elder." (*Id.*, subd. (g) ["any person who is 65 years of age or older"].) We are satisfied that Evidence Code section 1109, subdivision (a)(2) provides fair notice of which acts may be admissible, and that the law does not sweep so broadly as to allow protected conduct to be used as evidence in a criminal action in which the defendant is accused of an offense involving elder abuse. In any event, defendant could not have been uncertain whether Mr. Major, who was 83 years old, was an elder.

c. Erroneous admission of evidence

Defendant next contends that evidence of the 1992 killing was erroneously admitted under Evidence Code sections 1101, subdivision (b) and 1109, subdivision (a)(2), arguing that the prejudicial nature of the evidence outweighed its probative value. Defendant argues that the crimes were different because in the 1992 killing, defendant attempted to burn the body, stayed at the scene of the crime, admitted to the killing, and was not accused of theft or use of credit card information.

"As a general rule, evidence the defendant has committed crimes other than those for which he is on trial is inadmissible to prove bad character, predisposition to criminality, or the defendant's conduct on a specific occasion." (*People v. Williams* (2009) 170 Cal.App.4th 587, 607; see also Evid. Code, § 1101, subd. (a).) However, section 1101, subdivision (b) permits evidence of a defendant's uncharged misconduct when relevant to prove "some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or

accident . . .) other than his or her disposition to commit such an act." (*Id*., subd. (b).) " 'The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1243.) Similar to section 1101, subdivision (b), section 1109, subdivision (a)(2) permits admission of past acts of elder abuse in cases "in which the defendant is accused of an offense involving abuse of an elder . . . ."

Admissibility under Evidence Code sections 1101 and 1109 is subject to section 352 analysis. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404; *People v. Williams* (2008) 159 Cal.App.4th 141, 147.) Section 352 gives the trial court the discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (§ 352.) " 'The "prejudice" referred to in section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging." ' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 320.)

A trial court's ruling under Evidence Code sections 1101, 1109, and 352 is reviewed for abuse of discretion. (*People v. Lewis* (2001) 25 Cal.4th 610, 637; *People v. Fruits* (2016) 247 Cal.App.4th 188, 202.)

In assessing relevance under Evidence Code section 1101, subdivision (b), the least degree of similarity between the charged

and uncharged offense is required to prove intent, a greater degree is required to prove a common design or plan, and "[t]he greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. . . . 'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.' [Citation.]" (*People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 402-403.)

We find no abuse of discretion in admitting the evidence under either Evidence Code section 1101, subdivision (b) or section 1109, subdivision (a)(2). The charged crime and the 1992 killing were sufficiently similar to be probative of identity. Both involved the killing of elderly men (in each case, the victim was approximately 40 years defendant's senior) after engaging in sexual relations. The killings involved strangulation with belt-like ligatures, the binding of extremities, and both bodies were placed in the bathroom. The testimony about the 1992 killing was brief, and the facts were not more inflammatory than the crime at issue here so as to invoke the passion or prejudice of the jury. (*People v. Bolin*, *supra*, 18 Cal.4th at p. 320.) Lastly, the court could reasonably conclude that evidence of the 1992 killing was admissible, notwithstanding the limitation of Evidence Code section 1109, subdivision (e),[1] because defendant was incarcerated throughout the intervening years between the killings.

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[1] "Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice." (Evid. Code, § 1109, subd. (e).)

Even assuming, arguendo, that the evidence should have been excluded, any error was necessarily harmless. The erroneous admission of evidence requires reversal only if it is reasonably probable that defendant would have obtained a more favorable result had the evidence been excluded. (Evid. Code, § 353, subd. (b); *People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Watson* (1956) 46 Cal.2d 818, 836.)[2] The evidence against defendant was substantial, and the 1992 incident was only a small part of the case. It is not reasonably probable that defendant would have received a more favorable result had the evidence of the prior killing been excluded.

2. Voluntary Manslaughter Instruction

Defendant argues the trial court wrongfully refused his request for a voluntary manslaughter instruction under a heat of passion or imperfect self-defense theory. The trial court found there was no substantial evidence of a lesser crime than first or second degree murder.

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[2] Defendant contends the error amounts to a violation of due process, and asks this court to apply the more stringent harmless error analysis applicable to constitutional errors. (See *Chapman v. California* (1967) 386 U.S. 18.) The admission of evidence may violate due process if there is no permissible inference a jury may draw from the evidence. (*People v. Steele*, *supra*, 27 Cal.4th at p. 1246.) As discussed above, there were clearly permissible inferences to draw from the evidence, as the evidence was probative of defendant's identity. Moreover, "the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*." (*People v. Partida* (2005) 37 Cal.4th 428, 439.) The evidence introduced here was limited and was not so prejudicial as to render defendant's trial fundamentally unfair.

Voluntary manslaughter is a lesser included offense of murder. (*People v. Blacksher* (2011) 52 Cal.4th 769, 832.) A killing resulting from a sudden quarrel or done in the heat of passion may be found to be voluntary manslaughter rather than murder. (*People v. Montes* (2003) 112 Cal.App.4th 1543, 1548.) A killing committed while acting in actual, but unreasonable, self-defense may also be found to be voluntary manslaughter rather than murder. (*People v. Breverman* (1998) 19 Cal.4th 142, 157.)

A trial court is required to instruct on a lesser included offense when the lesser offense is supported by evidence substantial enough to merit consideration by the jury. The trial court need not instruct, however, if there is no evidence that the offense committed was less than that charged. (*People v. Breverman*, *supra*, 19 Cal.4th at pp. 154-155; see also *People v. Barton* (1995) 12 Cal.4th 186, 196, fn. 5.) The trial court's failure to instruct on a lesser included offense is reviewed de novo. (*People v. Licas* (2007) 41 Cal.4th 362, 366.)

In order to show voluntary manslaughter under either of these theories, the standard is both subjective and objective. (See, e.g., *People v. Cole* (2004) 33 Cal.4th 1158, 1215.) The defendant must subjectively act in the heat of passion, and the claimed provocation must be sufficient to cause a reasonable person under the same circumstances to act rashly, without deliberation and reflection, from passion rather than from judgment. (*Ibid*.; see also *People v. Carasi* (2008) 44 Cal.4th 1263, 1306.) The provocation must be such that a "reasonable person in defendant's position would have reacted with homicidal rage." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1086.) Similarly, in order to show voluntary manslaughter due to imperfect self-defense, the evidence must show that the defendant actually

believed that he was in imminent danger of death or great bodily injury, although his belief at that time was not reasonably justified. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1116.)

We find no error here. There was absolutely no evidence that defendant killed Mr. Major in a fit of rage, that Mr. Major's conduct would put a reasonable person in a homicidal rage, or that defendant believed he needed to defend himself against a deadly attack by Mr. Major. Defendant told police that he and Mr. Major got into a minor "girl fight" after defendant asked Mr. Major for money. Accordingly, there was no error in refusing to instruct on voluntary manslaughter.

And, in any event, we can discern no prejudice. There was overwhelming evidence of premeditation. (*People v. Sakarias* (2000) 22 Cal.4th 596, 621.) The jury rejected that the crime was second degree murder, and therefore, the jury necessarily concluded that the crime did not result from "sudden" passion or self-defense, but instead resulted from deliberate reflection.

3. Provocation Evidence

As a corollary to defendant's voluntary manslaughter argument, defendant contends the trial court had a sua sponte duty to instruct the jury with CALCRIM No. 522, which provides that: "Provocation may reduce a murder from first degree to second degree. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder." Defendant did not request a pinpoint instruction on this theory, and therefore any claim of error has been forfeited. (*People v. Cole*, *supra*, 33 Cal.4th at p. 1211 [no sua sponte obligation to give pinpoint instruction on provocation, and the failure to

request such an instruction forfeits any claim of error on appeal].) And, in any event the claim lacks merit. As discussed *ante*, there was simply no evidence of provocation to merit such an instruction.

DISPOSITION

The judgment is affirmed.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.