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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. MARIO MEZA, Defendant and Appellant.	2d Crim. No. B233912 (Super. Ct. No. 2003040967) (Ventura County)

Mario Meza appeals the judgment entered after a jury convicted him of second degree murder (Pen. Code,[1] §§ 187, subd. (a), 189). The jury also found true allegations that appellant personally used a firearm and personally and intentionally discharged a firearm, which proximately caused great bodily injury and death within the meaning of section 12022.53, subdivisions (b), (c) and (d).[2] The trial court sentenced appellant to a state prison term of 15 years to life with the possibility of parole plus 25 years to life. Appellant contends his trial attorney provided constitutionally ineffective

[1] All further undesignated statutory references are to the Penal Code.

[2] Appellant's first trial ended in a mistrial after the jury was unable to reach a verdict. The minute order reflects there was one holdout for a verdict of voluntary manslaughter, with the remaining jurors voting to convict appellant of first degree murder.

assistance of counsel by failing to object during closing argument when the prosecutor misstated the law regarding voluntary manslaughter. We affirm.

STATEMENT OF FACTS

Appellant moved to the United States from Mexico in 1975.[3] In 1976, he and his wife Angelina purchased a house in Oxnard. Appellant subsequently converted the detached garage and a room addition into separate residences with a total of 30 beds that were rented to male farm workers.

Angelina died in December 2002. In May 2003, appellant began dating Maria Elena Gonzales. Gonzales moved in with appellant a month later. Appellant was "in love" with Gonzales and believed they were in an exclusive relationship.

Victim Alberto Lopez began renting a room in the converted garage in or around 2001. Appellant became a "father figure" to Lopez and often gave him money, food, and advice. In October 2003, appellant was walking away from a conversation with Lopez and another tenant when he heard Lopez say, "I am banging his woman." Appellant understood this to mean that Lopez was having sex with Gonzales. On another occasion, appellant suspected that Gonzales was planning to meet with Lopez while appellant was taking a shower.

On or around November 10th, 2003, appellant returned home early from a citizenship class to find Lopez in his house. After Lopez ran out the front door, appellant went to the bathroom and saw Gonzales washing semen off her face.[4] Appellant told Gonzales, "I [don't] want any whores in my house" and said he was taking her back to Los Angeles where he had picked her up. Appellant told Lopez he had three days to move out.[5]

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[3] Appellant testified at the first trial that ended in a hung jury. His testimony was then read to the jury at the second trial as part of the prosecution's case.

[4] Appellant initially testified that Lopez ran out the front door and "jumped the fence." He subsequently testified that he confronted Lopez at the kitchen door after he ran out of the house and said, "hold on, don't leave. I need to talk to you."

[5] Appellant was "upset" when he found Lopez with Gonzales, but he was not angry. He also thought Gonzales was more to blame for the affair than Lopez. When

Appellant drove Gonzales back to Los Angeles two days later. When appellant returned home, Lopez was still there. Every morning for the next five days, Lopez knocked on appellant's kitchen window and taunted him. Lopez yelled that appellant was "too old to have sex with" Gonzales, called him a "dumb ass" and a "cuckold," and told him to "bring her so I can fuck her right in front of you." Although Lopez's yelling usually woke appellant up, appellant "wouldn't pay attention to him."

On the morning of November 18th, appellant was asleep in his bed when he heard Lopez start yelling at him again. Lopez told appellant to bring Gonzales back so he "could fuck her in front of [him], to show [him] that he was able, that he really did make her feel." Appellant got out of bed and retrieved the loaded gun he kept next to his bed for protection.[6] He went to the kitchen, opened the door, and said, "please, I don't want problems. Leave. Leave."[7] Lopez continued taunting appellant and told him "[he] was an asshole, that [he] couldn't even kill a fly . . . ." Lopez walked toward appellant with his jacket open and his arms extended and said, "Kill me. You're an asshole. You don't kill anyone." Lopez also repeated that he wanted Gonzales there so "he could fuck her" in front of appellant.

At that point, appellant "lost [his] head" and fired the gun at Lopez. After the first bullet hit Lopez in the chest, appellant fired two more times. When Lopez tried to grab appellant's arm, appellant fired again. Appellant fired the first shot with the intent to kill Lopez, but he was not thinking when he continued firing. Appellant estimated that he was about eight feet away from appellant when he fired the first shot.

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asked whether he was upset at Lopez for "betraying [his] trust," appellant replied, "I was upset, but I had already, you know, taken the woman back. I didn't want anymore [*sic*] problems."

[6] Appellant testified that he retrieved his gun "[b]ecause it was [his] custom" to do so whenever "someone called out."

[7] Appellant testified that he put the gun "in [his] back" after he picked it up and was not holding it when he opened the kitchen door. When counsel asked whether appellant meant he had put the gun in the back waistband of his pants, appellant replied, "I don't remember."

Appellant returned to the kitchen and said, "my God, what did I do." He then "controlled [him]self," put his dogs in his truck, and immediately drove to Mexico without his wallet or passport. Later that day, his truck was seen crossing the San Ysidro border into Mexico.

A neighbor called 911 after hearing the gunshots. When the police arrived, Lopez's dead body was lying in the driveway. Three spent bullets and several shell casings were found on the ground. It was later determined that Lopez had been shot a total of six times and that the shooter was moving either forward or backward while the gun was being fired. Two of the bullets entered Lopez's upper back, and one entered his lower back just about the hip bone. One of the bullets entered the seat of Lopez's pants, while another entered the outer ankle bone on his left foot. The remaining bullet entered Lopez's right forearm below the palm of his hand.

The .38-caliber handgun appellant used to shoot Lopez was found on the kitchen counter. The weapon was in a cocked position and was loaded with three rounds. Six live .38-caliber bullets were found nearby on the kitchen table. Several additional rounds were lying on top of the microwave oven. An empty magazine similar to the one found in the handgun was found on the headboard in appellant's bedroom. The police also collected numerous empty beer cans found lying on the living room floor.

One of appellant's tenants testified that he had never seen or heard Lopez bang on appellant's window or yell insults at him. Several neighbors who heard the gunshots did not hear any yelling or fighting prior to the shootings. Appellant killed Lopez on a Tuesday. The previous Sunday, Lopez told his girlfriend he was moving on Tuesday.

DISCUSSION

Appellant contends that his trial attorney provided ineffective assistance of counsel by failing to object when the prosecutor misstated the law regarding voluntary

manslaughter during closing argument.[8] Although the prosecutor misstated the law, counsel's failure to object was harmless.

To prove ineffective assistance, a defendant must show (1) that counsel's performance was inadequate, and (2) there is a reasonable likelihood the result would have been different absent the deficient performance. (*Strickland v. Washington* (1984) 466 U. S. 668, 687, 690-694 (*Strickland*).) "If a defendant has failed to show that the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient. [Citation.]" (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1008, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Appellant's ineffective assistance claim is premised on the allegation that the prosecutor committed misconduct by misstating the law during closing argument. "When a claim of misconduct is based on the prosecutor's comments before the jury, '"the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion."' [Citations.]" (*People v. Friend* (2009) 47 Cal.4th 1, 29.) The defendant must also show a reasonable likelihood that the prosecutor's alleged misconduct contributed to the verdict or was so severe that it resulted in an unfair trial. (*Id.* at pp. 29-30.)

The jury was instructed pursuant to CALCRIM No. 570 that appellant could be found guilty of voluntary manslaughter only if the provocation he faced "would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment."[9] The instruction further stated that

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8 It is not disputed that appellant cannot directly challenge the prosecutor's alleged misconduct because the issue is forfeited due to his attorney's failure to object. (*People v. Maury* (2003) 30 Cal.4th 342, 418.)

9 The jury was instructed as follows: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of a sudden quarrel or in the heat of passion if: [¶] 1. The defendant was provoked; [¶] 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; [¶] AND [¶] 3. The provocation would have caused a person of average disposition to act rashly and without due

"[i]n deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment." (*Ibid.*)

Our Supreme Court recently recognized that CALCRIM No. 570, as given here, correctly states the law by "focus[ing] upon whether the person of average disposition would be induced to react from passion and not from judgment." (*People v. Beltran* (2013) 56 Cal.4th 935, 939 (*Beltran)*.) In doing so, the court rejected the People's position that "the provocation must be of a kind that would cause an ordinary person of average disposition *to kill*." (*Id.* at p. 938.)

Appellant correctly notes that the prosecutor's closing argument included numerous references to the standard of provocation rejected in *Beltran*. On four different occasions, the prosecutor told the jury that appellant could be found guilty of voluntary manslaughter only if the provocation he faced would have led a reasonable person in the same situation to engage in "homicidal conduct." On two other occasions, she identified the standard as whether a reasonable person in appellant's position would "have done the same thing" or "act[ed] the same way." In her rebuttal argument, the prosecutor asked the jury, "Is that the type of thing that can provoke heat of passion in someone that causes them to act from intense emotion to kill? Is that the kind of provocation that can lead to

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deliberation, that is, from passion rather than from judgment. [¶] Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection. [¶] In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time. [¶] It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment. [¶] If enough time passed between the provocation and the killing for an ordinary person of average disposition to 'cool off' and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder." (CALCRIM No. 570.)

homicidal conduct? Would an ordinary person kill because of that type of conduct if they were standing in the same shoes?"[10]

Appellant argues that his attorney's failure to object to these misstatements amounts to ineffective assistance of counsel. He claims that by repeatedly tying the incorrect standard to the correct standard, the prosecutor may have led the jury to believe that appellant could only be found to have acted in the heat of passion if the provocation he faced would have led a reasonable person to kill.

We are not persuaded. Although defense counsel did not object, he repeatedly emphasized the proper standard during his closing argument. On one such occasion, immediately after stating that the jury had to determine whether "the person of average disposition, [in] the same situation knowing the same facts would have reacted from passion rather than from judgment," counsel added that the issue was not whether "[s]omebody . . . in that same situation . . . would go kill somebody or shoot somebody . . . ." The proper mental state was also set forth in CALCRIM No. 570, pursuant to which the jury was instructed. Contrary to appellant's assertion, the prosecutor's argument plainly conflicted with those instructions because it purported to compel an additional and distinct finding as a prerequisite to convicting appellant of voluntary manslaughter. The instructions clearly provided that the relevant determination was whether a reasonable person in appellant's position would have acted from passion rather than judgment, not whether he would have killed. The instructions also make clear that the jury was to disregard any arguments by the attorneys that conflicted with the

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10 Appellant also takes issue with the prosecutor's statement that "[v]oluntary manslaughter is murder with an excuse." He notes that an "excusable homicide" committed in the heat of passion is not a crime, much less a voluntary manslaughter. (§ 195; CALCRIM Nos. 510, 511.) According to appellant, the prosecutor's remark "implied that the burden shifted to the defense to prove a sufficient 'excuse' for the killing, instead of properly focusing the jury on the *People's burden* to prove the *absence* of heat of passion beyond a reasonable doubt." We are not persuaded. When considered in context, the prosecutor's reference to voluntary manslaughter as "murder with an excuse" would have merely been construed by the jury to mean that the crime is one is which malice has been negated by the heat of passion. Moreover, the jury instructions made clear that the People had the burden of proving appellant did not kill Lopez in the heat of passion. (CALCRIM No. 570.) We presume the jury understood and followed these instructions. (*People v. Boyette* (2002) 29 Cal.4th 381, 436 (*Boyette*).)

instructions. We presume the jury understood and followed these instructions. (*Boyette, supra*, 29 Cal.4th at pp. 435-436; *People v. Najera* (2006) 138 Cal.App.4th 212, 224.)[11]

Even if the prosecutor's misstatements may have caused the jury to misconstrue the law, the error was harmless. To establish prejudice under *Strickland*, appellant must show there is a reasonable probability that he would have achieved a more favorable result if counsel had objected to the prosecutor's comments. (*Strickland, supra*, 466 U.S. at p. 694.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Ibid.*) Under this standard, appellant "must carry his burden of proving prejudice as a 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel." (*People v. Williams* (1988) 44 Cal.3d 883, 937.)

Appellant fails to make such a showing. His claim of voluntary manslaughter was based solely on his uncorroborated testimony, which was prone to inconsistencies and conflicted with the physical evidence in several respects. For

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11 In *Beltran, supra*, 56 Cal.4th at page 955, the court concluded that the prosecutor's arguments regarding the mental state required for voluntary manslaughter "may have confused the jury's understanding of the court's instructions." The instruction at issue in that case, however, was a former version of CALCRIM No. 570 which stated: "'In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked *and how such a person would react in the same situation knowing the same facts*.'" (*Id.* at p. 954, italics added.) Although the court declined to deem this portion of the instruction inherently ambiguous, it concluded the prosecutor's argument had "muddied the waters on this point" in that it "seemed to suggest that the jury should consider the ordinary person's conduct and whether such a person would kill." (*Id.* at p. 954.) The court went on to conclude it was not reasonably probable the jury construed the instruction in this manner because the jury requested clarification of the relevant standard and "[t]he trial court responded with a correct statement of law, that '[t]he provocation involved must be such as to cause a person of average disposition in the same situation and knowing the same facts to do an act rashly and under the influence of such intense emotion *that his judgment or reasoning process was obscured*.' This response properly refocused the jury on the relevant mental state, properly set out in CALCRIM No. 570, and away from whether an ordinary person of average disposition would kill in light of the provocation." (*Id.* at p. 956.)

Subsequent to the defendant's trial in *Beltran*, CALCRIM No. 570 was modified to state that "[i]n deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, *would have reacted from passion rather than from judgment*." (*Beltran, supra*, 56 Cal.4th at p. 954, fn. 14, italics added.) This modification eliminated any concern that the jury in this case may have construed the instruction to require a finding that a person of average disposition in appellant's position would have killed.

example, appellant testified that he picked his loaded gun up from his nightstand, placed it in his "back," and walked to the kitchen door. When Lopez continued taunting appellant and challenged him to "kill" him, appellant "lost his head" and fired at Lopez, hitting him in the chest. Appellant fired two more shots without thinking, then fired again when Lopez tried to grab his gun. The police, however, found several live bullets on the kitchen table and microwave oven, which strongly supports the inference that appellant loaded the gun before he confronted Lopez and thus acted with some deliberation. Appellant's claim that Lopez walked toward him and challenged appellant to "kill" him logically suggests that appellant had the gun in his hand, although appellant testified that he was *not* holding the gun. The physical evidence also established that Lopez was repeatedly shot in the *back*, not the front as claimed by appellant, that all of the shots were fired from a distance of at least two feet, and that the shooter was moving toward or away from the victim as he fired. Appellant also gave conflicting testimony regarding the incident in which he purportedly caught Lopez with Gonzales. Moreover, none of the neighbors who heard the gunshots heard any yelling, which undermines appellant's claim that Lopez was yelling immediately prior to appellant shooting him.

Appellant's credibility was also undermined during cross-examination. When the prosecutor asked whether appellant had told a family member he did not shoot Lopez, appellant replied, "No. I didn't say anything. I don't remember." Appellant also said he did not remember telling one of his stepsons that he could not recall what had happened. When asked to admit he never told another stepson "the story [he] told today," appellant replied, "I don't know. I don't remember."

Even if the jury found appellant's testimony credible, that testimony more logically supports the inference that he was *not* acting in the heat of passion when he killed Lopez. Appellant testified that he "wouldn't pay attention" when Lopez knocked on his kitchen window and yelled at him. He made a point of emphasizing that he was not angry when he caught Lopez with Gonzales, but rather was "[u]pset only." He also declined to say he was angry at Lopez and said he simply "didn't want any more problems" after he took Gonzales back to Los Angeles. This testimony does not tend to

support a heat of passion theory of manslaughter, which has both an objective and a subjective component. (*People v. Moye* (2009) 47 Cal.4th 537, 549; *People v. Wickersham* (1982) 32 Cal.3d 307, 326–327, disapproved on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 201.) The subjective component requires the defendant to have killed while under the actual influence of a strong passion induced by the victim's provocative conduct. (*Moye*, at pp. 549-550.) Although the passion need not be anger or rage, it must be a "' . . . "[v]iolent, intense, high-wrought or enthusiastic emotion" . . . '" other than the desire for revenge. (*Wickersham*, at p. 327; *People v. Breverman* (1998) 19 Cal.4th 142, 163.) Furthermore, "if sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter . . . ." (*Ibid.*) Put another way, """[i]f sufficient time has elapsed for the passions of an ordinarily reasonable person to cool, the killing is murder, not manslaughter."""" (*People v. Avila* (2009) 46 Cal.4th 680, 705.) Appellant's testimony, coupled with the physical evidence, more logically supports a finding that he killed Lopez out of revenge rather than in the heat of passion. It is thus not reasonably probable that the jury would have found appellant guilty of the lesser offense of voluntary manslaughter had his attorney objected to the prosecutor's misstatements regarding the mental state required for that crime.

In attempting to demonstrate prejudice, appellant offers that (1) the jury in his first trial was deadlocked; (2) the jury requested a readback of his testimony; and (3) the prosecutor's misstatements pertained to "the most hotly contested issue in the case," namely, whether appellant was guilty of second degree murder or voluntary manslaughter. When considered in context, none of these factors renders it reasonably probable that appellant would have achieved a more favorable result had his attorney objected to the prosecutor's erroneous arguments. With regard to the hung jury in the first trial, the record demonstrates that there was one holdout for voluntary manslaughter and 11 votes for *first* degree murder. Although a hung jury in a previous trial might demonstrate the closeness of a particular case, the fact that appellant narrowly avoided a first degree murder conviction is not particularly helpful to his position here. Moreover,

the existence of a single holdout juror is more likely indicative of an anomaly than a close case. That 11 jurors in the first trial voted to convict appellant of first degree murder also tends to demonstrate the most hotly-contested issue was whether appellant was guilty of first or second degree murder, not whether he was guilty of second degree murder or voluntary manslaughter. This also tends to undermine the significance of the jury's request for a readback of appellant's testimony.

In light of the jury instructions and the evidence presented at trial, it is not reasonably probable that the prosecutor's misstatements of law regarding the required mental state for voluntary manslaughter had any effect on the jury's verdict. Even if defense counsel had objected, it is not reasonably probable that appellant would have achieved a more favorable result. Nor can it be said that the prosecutor's comments or defense counsel's failure to object rendered the trial fundamentally unfair, such that appellant did not receive a fair trial. (See *Strickland, supra,* 466 U.S. at pp. 686-687.) Appellant's claim of ineffective assistance of counsel accordingly fails.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Patricia M. Murphy, Judge

Superior Court County of Ventura

Danalynn Pritz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Rama R. Maline, Deputy Attorney General, for Plaintiff and Respondent.