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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CAMERON ALEX COLE, Defendant and Appellant.	B275421 (Los Angeles County Super. Ct. No. YA090039)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark S. Arnold, Judge. Reversed in part, affirmed in part, and remanded.

David Andreasen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Cameron Alex Cole (defendant) appeals from his murder conviction. He contends that the trial court abused its discretion in excluding evidence of the victim's drug use, and it gave incorrect murder and manslaughter jury instructions. He also contends that the cumulative effect of such errors was so prejudicial as to deny him a fair trial. In addition defendant contends, and respondent agrees, that substantial evidence did not support the restitution order. Though we find no merit to defendant's claims of evidentiary and instructional error, and thus find no prejudicial cumulative effect, we agree that substantial evidence did not support the restitution order. The restitution order is thus reversed and remanded for a new restitution hearing. We otherwise affirm the judgment.

BACKGROUND

Defendant was charged with the murder of Joseph Shorty (Shorty), in violation of Penal Code section 187, subdivision (a).[1] The information alleged that defendant had suffered one prior serious or violent felony conviction, a violation of section 211, within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)), and within the meaning of section 667, subdivision (a)(1). The information also alleged that defendant had served two prior prison terms within the meaning of section 667.5, subdivision (b). The information was amended during trial to allege pursuant to section 12022, subdivision (b)(1), that defendant had personally used a deadly weapon, a screwdriver, in the commission of the crime.

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[1] The information described the crime as both murder and attempted murder. This was obviously a clerical error, and did not mislead defendant, as he was arraigned and tried only on a charge of murder.

All further statutory references are to the Penal Code, unless otherwise indicated.

A jury convicted defendant of willful, deliberate, and premeditated murder, and found that defendant had personally used a deadly weapon. Defendant waived trial on the prior convictions and admitted them. On June 3, 2016, the trial court sentenced defendant a total term of 56 years to life in prison, comprised of 25 years to life, doubled as a second strike, plus a consecutive term of five years pursuant to section 667, subdivision (a), and one year under section 12022, subdivision (b). The prior prison term enhancements were dismissed pursuant to section 1385, and defendant was ordered to pay mandatory fines and fees, and restitution. Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

On Monday, April 20, 2009, Shorty's dead body was discovered by cleaning staff in his motel room. Gardena police were called and found Shorty lying face down, "hogtied" with several telephone cords. Two cords were found around Shorty's neck, one went around his neck and down to his belt, and another "went all the way . . . from his neck area . . . down to his ankle, and then . . . around his left hand where it was kind of caught on his . . . metal watch. And then it . . . loop[ed] around both ankles." An undershirt was stuffed into Shorty's mouth, and a long-sleeved shirt was tied very tightly around his head, covering his nose and mouth. A bloody shower curtain loosely covered the left side of the body.

Blood spatter suggested a struggle in the area where the body was found. Police located a bloodied Phillips screwdriver in the alleyway not far from the motel bathroom window. Testing revealed Shorty's DNA on the screwdriver, and that defendant was a possible minor contributor to DNA on the screwdriver. The motel's security cameras recorded defendant with a woman in the area of Shorty's room on April 19.

Deputy Medical Examiner Ajay Panchal found six lacerations on Shorty's face, and four on the back of his head, all caused by the same object prior to death. Dr. Panchal could not identify the object, but testified that a screwdriver could not be excluded as the cause. Petechia in the eyes indicated neck compression, and the thyroid cornu cartilage was fractured, which was consistent with ligature strangulation. Dr. Panchal testified that the victim was alive at the time of the neck compression and died of asphyxia, but could not determine whether death was caused by airway obstruction or neck compression. The doctor explained that it was certain the neck compression caused asphyxia, and the shirt in the mouth contributed to asphyxia if it was there prior to death and obstructed part of the pharynx. Once the victim was no longer getting oxygen, the maximum amount of time he could survive would have been five minutes.

Defendant was taken into custody in April 2014, in Inyo County. Gardena Detective Michael Ross and his partner, Detective Goodpaster drove to the Independence sheriff's station to interview him. Detective Ross secretly recorded the interview, and the recording was played for the jury. Defendant did not say much at the station, but when the detectives led him out to their black-and-white police car marked, "Gardena Police," he stopped, choked up a bit, and volunteered to talk to them after a cigarette. They drove to a quiet area, gave defendant a cigarette, and again secretly recorded the conversation.

Portions of the recording were played for the jury. Defendant told the detectives, "Sometimes people fuckin' have like fits of fucking -- I mean, pretty simple. It was fuckin' jealousy shit. You know what I mean? [¶] . . . [¶] Mother fucker, niggers ain't into hanging shit. You know what I mean with this pimping shit? You know what I mean? Fuckin', you can't hang.

You know what I mean? And when we fucking run off, do our thing. It's like in the box, but you know what I mean?"

Defendant also told the detectives, "It just shit gone bad, fool. You know what I mean? That's all it is straight up, like. Either way you put it, it's all bad, fool. You know what I mean?" Asked whether he meant for it to happen, defendant replied, "Of course not." The recording also contained the following exchange:

> "[Detective Goodpaster]: You didn't mean for him to die and you didn't plan it.
>
> "[Defendant]: Fuck, no. Man, I'll tell you this, dog. . . . You know what I mean? I'm not going to fuckin' -- I don't want to lose. You know what I mean? . . .
>
> "[Detective Goodpaster]: So you were fighting for your life, too.
>
> "[Defendant]: Yeah, I mean, what the fuck? You know what I mean?
>
> ". . .
>
> "[Detective Goodpaster]: . . . [W]as it like a one-sided fight (inaudible) or you guys were fighting each other?
>
> "[Defendant]: Fighting each other, shit. It shows how he died.
>
> ". . .
>
> "[Defendant]: You guys know how he died.
>
> ". . .
>
> "[Defendant]: So, I mean, that -- that shows right there like, you know what I mean, grapple, you know?

"[Detective Goodpaster]: . . . [W]hat sparked it off, dope or pussy?

"[Defendant]: Pussy.

"[Detective Goodpaster]: So he didn't pay or he just pushed up on your chick without permission.

"[Defendant]: Pushed up on without permission.[2]

". . .

"[Defendant]: [W]hen we were wrestling, he and me, like I said (inaudible) passed away. You know what I mean?

". . .

"[Defendant]: 'Cause I know for a fact that I didn't fuckin' whack him. I know for a fact. I know for a fact I didn't pass him. I know for a fact I didn't fuckin', you know what I mean? None of that shit.

"[Detective Goodpaster]: And what about -- what about the screwdriver?

"[Defendant]: All I remember is he passed out.

"[Detective Goodpaster]: And what about the screwdriver?

"[Defendant]: That -- that didn't kill him."

The jury also heard a recorded phone call that defendant made from jail to a woman, apparently his mother. Defendant told her that he was going to court regarding something that had happened some years ago, and that he was "probably going to

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[2] Detective Ross explained that "pushed up on" was slang for came on to, or made a pass.

take a deal." He explained that all they had on camera were people coming out, but an acquaintance was "running his mouth" and that people did not "know how to keep their mouth shut." Defendant said that he would "be gone for a long time, not life hopefully." When defendant's father got on the telephone, he reminded defendant that he was innocent until proven guilty. Defendant replied, "Oh, no. I was already due."

DISCUSSION

I. Exclusion of toxicology evidence

Defendant contends that the trial court abused its discretion under Evidence Code section 352 by excluding evidence of the victim's drug use. The issue was first raised in the prosecution's pretrial motion to exclude evidence of the victim's intoxication on grounds of relevancy. The prosecutor argued that such evidence was irrelevant, could confuse the jury, and had the potential for undue prejudice.

Evidence Code section 352 provides that the trial "court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (See also *People v. Valdez* (2012) 55 Cal.4th 82, 138.)

"'"'The trial court has broad discretion in determining the relevance of evidence [citations] but lacks discretion to admit irrelevant evidence.'"' [Citation.]" (*People v. Thornton* (2007) 41 Cal.4th 391, 444.) "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

We review the trial court's evidentiary rulings for abuse of discretion, and its discretion will not be disturbed unless it was

exercised "'in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

At the hearing on the motion the trial court inquired of defense counsel about the relevance of the evidence. Counsel noted that a toxicology analysis had shown the presence of methamphetamine, alcohol, and cocaine in the victim's system at the time of his death, and that the coroner had indicated that drug use could have hastened his death or have made him more vulnerable to asphyxiation. The trial court ruled that whatever minimal relevance the victim's intoxication might have, it was substantially outweighed by the potentially prejudicial effect.

Defense counsel brought up the issue again after the direct examination of Dr. Panchal. Prior to cross-examination, defense counsel told the court that she wanted to raise the issue of methamphetamine and cocaine in the victim's system, not as to cause of death, but as to vulnerability. She explained: "I think if counsel hyotheticals [*sic*] to show evidence of malice aforethought, I would be able to get in the fact that his methamphetamine use may have made him more vulnerable." The trial court denied the request.

Defendant contends that his trial counsel's request was made after the prosecutor asked Dr. Panchal: "Hypothetically, if someone were to apply pressure solely for the purpose of rendering someone unconscious and then release the pressure, that person could survive the initial application of neck pressure?" Dr. Panchal answered, "Yes," and explained that on average a person would pass out within six to fifteen seconds of tight compression to the neck, and that a person could possibly regain consciousness if the neck were released immediately.

Defendant contends that evidence of drugs in the victim's system was "highly relevant to the crucial issue of whether [defendant] intended to kill and premeditated and deliberated." He argues that relevance was later demonstrated by the prosecutor's closing argument in which she noted Dr. Panchal's testimony that it took six to fifteen seconds to pass out, suggesting that defendant continued to apply pressure to the victim's neck long after he passed out, until he was no longer breathing. By relying on Dr. Panchal's testimony and opinions, defendant argues, the prosecutor implied that if defendant had not intended to kill, he would have released the victim's neck as soon as he passed out.

Defendant takes the position that to overcome such an inference, it was necessary to show that the victim could have died sooner than the average person, because it can reasonably be inferred "that a longer period of neck compression is more consistent with a preformed intent and deliberate action than is a shorter period." Thus, defendant argues, the evidence of drug use would have "severely undermined the argument that had [defendant] only intended to make Shorty pass out, he could have accomplished that goal without causing Shorty to die from asphyxiation."

Even with the intoxication evidence, there would remain no evidence of how long Shorty was without oxygen, how long his neck was compressed, when the undershirt was placed in his mouth, how long it was there, whether it contributed to Shorty's death, or how long it would take to sufficiently loosen the ligatures around his neck and remove the shirt, in order to allow him to regain consciousness. The intoxication evidence would only raise the possibility that Shorty might have died sooner than if he had not taken the drugs. The possibility that Shorty might have died an unknown number of seconds less than six to fifteen,

would have no tendency in reason to prove that defendant made any attempt to release the pressure on Shorty's neck or remove the shirt from his mouth, or that defendant acted upon some mistaken idea about how much time he might have to revive the average person.

It follows that a quick death from asphyxiation would have obviated the need to use the screwdriver. The possibility of a quicker than average death would have done nothing to undermine the inference that defendant first used the screwdriver, and then hogtied, gagged, and strangled Shorty, since 10 blows to the head with a screwdriver failed to have had a lethal effect.

We also reject defendant's claim that his constitutional rights to due process, confrontation, or to present a defense were implicated, thus affecting the test for harmless error. (See *People v. Babbitt* (1988) 45 Cal.3d 660, 684-685, 688.) Regardless, we would find the exclusion of the evidence harmless under either the standard for state law error or the standard for federal constitutional error. (See *People v. Watson* (1956) 46 Cal.2d 818, 836 [reasonable probability of different result]; *Chapman v. California* (1967) 386 U.S. 18, 24 [harmless beyond a reasonable doubt].)

First, we find no merit to defendant's argument that the jury's note and short deliberation demonstrated prejudice. After about 20 minutes of deliberation, the jury sent out a request for further instruction, indicating that all agreed defendant had committed murder, but not on the degree. As defendant observes, the jury apparently had difficulty with the concept of premeditation, and how it related to committing an act with the intent to cause death and committing an act knowing it would cause death. After the jury continued to deliberate for more than and hour, the court responded by referring the jury to its

instruction on premeditation. Less than an hour later the jury reached its verdict.

We do not infer from this timeline that the prosecution's case was weak. We instead assume that the jurors followed the direction of the court, read and considered their instruction regarding premeditation, and understood the concept. Jurors are presumed to be intelligent and capable of understanding and applying the court's instructions. (See *People v. Lewis* (2001) 26 Cal.4th 334, 390.)[3]

To support his claim that this was a close case, defendant also refers to the recorded interview in which he told detectives that he did not intend to kill Shorty and that Shorty was not dead but merely passed out when he left him. Defendant also refers to Dr. Panchal's testimony that there is a "narrow threshold" between unconsciousness and death. Defendant concludes from such evidence that, "even disregarding Shorty's

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[3] The instruction read, in relevant part: "The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with premeditation if he decided to kill before completing the acts that caused death. The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time. . . . The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder and the murder is second degree murder."

increased vulnerability to asphyxiation," the belief that Shorty was unconscious but alive gave rise to a reasonable inference that Shorty was bound and gagged only to incapacitate him, as it would make little sense to leave him alive if defendant had meant to kill Shorty.

Defendant's reasoning amounts to an argument that *even without intoxication evidence*, the jury could have inferred an absence of express malice from leaving Shorty bound and gagged. We agree that the intoxication evidence was unnecessary to permit such an inference, but defendant's argument only serves to demonstrate that the intoxication evidence was of limited relevance. However, assuming the jury believed that Shorty was still alive when defendant left him with a shirt in his mouth and cords wound tightly around his neck, any evidence that Shorty could have or might have died sooner than the average sober person would have added nothing to the jury's understanding of premeditation. In fact, evidence that Shorty could have died sooner serves more to refute the claim that he was alive when defendant left him, and does nothing to support it. As the jury expressly found that defendant premeditated the murder, it apparently drew the inference that Shorty was dead or defendant believed he was dead before leaving. We conclude beyond a reasonable doubt that the absence of intoxication evidence did not contribute to the verdict.

II. Murder and manslaughter instructions

Defendant contends that jury instructions had the effect of relieving the prosecution of its burden to prove the absence of heat of passion beyond a reasonable doubt.

Voluntary manslaughter based on heat of passion is a lesser included offense of murder. (*People v. Moye* (2009) 47 Cal.4th 537, 549.) "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." (§ 187, subd. (a).)

Malice is negated, and murder reduced to voluntary manslaughter, when the defendant kills "upon a sudden quarrel or heat of passion." (§ 192, subd. (a).) "Heat of passion arises when '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.' [Citations.]" (*People v. Barton* (1995) 12 Cal.4th 186, 201.)

"[I]n a murder case, unless the People's own evidence suggests that the killing may have been provoked or in honest response to perceived danger, it is the *defendant*'s obligation to proffer some showing on these issues sufficient to raise a reasonable doubt of his guilt of murder. [Citations.]" (*People v. Rios* (2000) 23 Cal.4th 450, 461-462; § 189.5, subd. (a).) "If the issue of provocation . . . is thus 'properly presented' in a murder case [citation], the *People* must prove *beyond reasonable doubt* that these circumstances were *lacking* in order to establish the murder element of malice. [Citations.]" (*Rios*, at p. 462.)

Defendant argues that the murder instructions regarding first and second degree murder (CALCRIM Nos. 520, 521) are "facially erroneous" when given in conjunction with the instruction regarding heat of passion (CALCRIM No. 570), and that Nos. 520 and 521 contained incomplete and conflicting language, causing them to be misleading and ambiguous. In addition, defendant suggests that because the trial court repeated the elements of first degree murder at the beginning of CALCRIM No. 570, the jury probably did not go on to apply No. 570.

CALCRIM Nos. 520, 521, and 570 correctly state the law and sufficiently explain murder and heat of passion manslaughter. (See *People v. Jones* (2014) 223 Cal.App.4th 995,

999-1001.) If defendant had believed an additional or clarifying instruction was necessary, he was required to request one. (*Id*. at pp. 1001-1002.)

Defendant did not object to the instructions, and did not argue that the language was misleading, repetitious, incomplete, or ambiguous. Moreover, he does not point to the particular language in the instructions that contained a "facially erroneous" statement of law. Instead, he argues that the trial court erroneously omitted from CALCRIM Nos. 520 and 521, any mention of the prosecution's burden of disproving heat of passion. Such omission, defendant argues, implied to the jury that it did not need go further after finding an intent to kill.

As absence of heat of passion is not an element of murder, a statement of the prosecution's burden of proof did not belong in the murder instructions, and defendant has not cited authority holding otherwise. Moreover, "a single instruction is not to be viewed in 'artificial isolation'; instead, it must be evaluated 'in the context of the overall charge.' [Citations.]" (*People v. Espinoza* (1992) 3 Cal.4th 806, 823-824.) CALCRIM No. 570, read immediately after Nos. 520 and 521, clearly set forth: "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."

As the instructions correctly state the law and CALCRIM No. 570 correctly explains the prosecutor's burden of proof, defendant has forfeited his challenge to the instructions, unless it appears that his substantial rights were affected by the claimed errors. (See § 1259; *People v. Smithey* (1999) 20 Cal.4th 936, 976.) The test to determine whether defendant's substantial rights were affected asks whether the claimed error resulted in "a miscarriage of justice, making it reasonably probable the

defendant would have obtained a more favorable result in the absence of error. [Citations.]" (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) We conclude that it did not.

We discern no "reasonable likelihood that the jury misunderstood and misapplied the instruction." (*People v. Mayfield* (1997) 14 Cal.4th 668, 777, citing *Boyde v. California* (1990) 494 U.S. 370, 380-381.) We begin with the presumption jurors are able to understand and correlate instructions and that they followed the court's instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) The trial court told the jury to consider all the instructions together. As respondent notes, the court read CALCRIM No. 500, explaining that an unlawful killing is either murder or manslaughter, and that the court would instruct the jury on the different types of murder and on manslaughter. The court then immediately read CALCRIM No. 520, which set forth the elements of first and second degree murder, explained the prosecutor's burden to prove malice aforethought, and defined express and implied malice. The instruction advised the jury that if it found that defendant committed murder, the verdict must be second degree murder unless the prosecutor proved beyond a reasonable doubt that it was first degree murder. That is, committed with deliberation and premeditation, as defined in the next instruction, CALCRIM No. 521. CALCRIM No. 570 was read after that: "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 instruction went on to define heat of passion and explain the prosecution's burden to prove beyond a reasonable doubt that defendant did not act under a heat of passion.

Thus the disputed instructions, when read together and with other instructions, did not imply that the jury should or could stop with a finding of intentional, unlawful killing, as

defendant contends, but instead clearly directed the jury to continue to consider whether the prosecution proved an absence of heat of passion beyond a reasonable doubt.

In addition, the evidence of heat of passion was slight and so insubstantial that no rational jury would return a verdict of manslaughter on that theory. There are two components to the theory, one subjective and the other objective. (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.) The objective component consists of legally sufficient provocation, which may be physical or verbal conduct by the victim or reasonably believed by defendant to have been caused by the victim, but must be such that "would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.]" (*People v. Moye*, *supra*, 47 Cal.4th at pp. 549-550.) The subjective component is the defendant's state of mind, and requires evidence establishing that he in fact acted in the heat of passion. (*People v. Steele*, *supra*, at p. 1252.)

Here, defendant was apparently the only witness to the events, but chose not to testify. The only evidence of provocation and state of mind came from defendant's statement to the detectives, that sometimes people have fits, that it was jealousy, sparked by "pussy" and the victim's having "pushed up on [his 'chick'] without permission." Defendant said something about "pimping," but it was not clear whether the "chick" was his girlfriend or a prostitute he controlled, or both. Defendant did not mean for "it" to happen, told the detectives there was a fight during which he and Shorty grappled, and agreed with the detective's suggestion that defendant had fought for his life. Assuming defendant's statements meant that he killed Shorty in a jealous rage because Shorty made a pass at defendant's girlfriend, and that at sometime during the struggle, defendant felt that his life was in danger, such facts do not amount to

substantial evidence of either the subjective or objective components of heat of passion.

Jealousy will not support a heat of passion theory unless the victim's provocation "'would stir such a passion of jealousy, pain and sexual rage in an ordinary man of average disposition as to cause him to act rashly from this passion. [Citation.]' [Citation.]" (*People v. Lujan* (2001) 92 Cal.App.4th 1389, 1415; see *People v. Hyde* (1985) 166 Cal.App.3d 463, 473-474.) The objective component was not satisfied here, as there was no evidence of just what Shorty did or said to make a pass at the woman. As there was simply no way to gauge the victim's provocation under a reasonable person standard, the only reasonable inference left to the jury was that defendant was an abnormally jealous man with a short temper.

The subjective component requires evidence showing that defendant's reason was *actually* obscured by the passion, such that it caused him to act rashly or without due deliberation and reflection. (*People v. Breverman* (1998) 19 Cal.4th 142, 163.) The evidence must thus show that defendant *actually*, subjectively, killed under the influence of the passion. (*People v. Steele*, *supra*, 27 Cal.4th at p. 1252.) Defendant told detectives that he had a fit of jealously, but did not say that he acted without reflection. Defendant did not say what was in his mind when he began fighting with Shorty, or when he took the steps of striking him with the screwdriver, wrapping two cords around Shorty's neck, stuffing an undershirt into his mouth, tying a long-sleeved shirt around his nose and mouth, and then leaving him for dead.

Defendant argues that the choking occurred while he was fighting for his life, apparently suggesting that Shorty's aggression aroused his passion. Defendant's state of mind is of no consequence without evidence of the objective component, legally sufficient provocation by the victim. (See *People v. Steele*,

supra, 27 Cal.4th at p. 1252.) There was no evidence that Shorty initiated the physical fighting, and defendant did not explain to the detectives at what point during the fight he felt that he was fighting for his life. "'It may not be reasonably contended . . . that one who has instigated a quarrel, who is himself the aggressor and who in good faith has failed to desist and withdraw from the fistic encounter, may resort to the use of . . . deadly [force] and . . . [claim] that the fatal act was the result of mere heat of passion.' [Citations.]" (*People v. Johnston* (2003) 113 Cal.App.4th 1299, 1312.)

In sum, the evidence fails to show what sort of pass Shorty made or other facts to suggest his conduct was of the sort that would cause an ordinarily reasonable person to act rashly and without reflection. Further, the evidence failed to show that defendant did in fact act rashly and without reflection due this conduct. The evidence of sufficient provocation was so slight as to leave the prosecutor with nothing to disprove, and the trial court could have reasonably found the instruction on heat of passion to be irrelevant. The murder verdict demonstrates that the jury was not misled by the instructions regarding murder and manslaughter, and we conclude beyond a reasonable doubt that the verdict was not the result of any misunderstanding.

III. Cumulative effect

Defendant contends that the cumulative effect of the alleged errors heretofore discussed was to deny him a fair trial. As "[w]e have either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial," we must reject defendant's claim of prejudicial cumulative effect. (*People v. Sapp* (2003) 31 Cal.4th 240, 316.)

IV. Restitution award

Defendant contends that the restitution award of $7,500 was not supported by substantial evidence.

At sentencing, the prosecutor presented a request from the Victim Compensation Board for the amount of restitution paid from the Restitution Fund to the victim's family. The request was not accompanied by copies of bills paid by the Board, as required by section 1202.4, subdivision (f)(4)(B). Over defendant's objection and request for an evidentiary hearing, the court ordered payment without requiring the necessary evidence. Defendant claims the award should be reversed.

Respondent agrees that the award is unsupported by substantial evidence and urges us to remand for a new restitution hearing. We agree. (See *People v. Thygesen* (1999) 69 Cal.App.4th 988, 994-996; [reversal and remand for new restitution hearing required where substantial evidence failed to support restitution order]; *People v. Vournazos* (1988) 198 Cal.App.3d 948, 958-959 [same].)

DISPOSITION

The $7,500 restitution order is reversed and the matter remanded for a new restitution hearing. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.*
GOODMAN

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