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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ANTWAIN LAMOUR WILLIAMS, Defendant and Appellant.	B279010 (Los Angeles County Super. Ct. No. NA104093)

APPEAL from judgment of the Superior Court of Los Angeles County, Judith L. Meyer, Judge. Affirmed.

Steven A. Brody, 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, Margaret E. Maxwell, Supervising Deputy Attorney General, Gregory B. Wagner, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendant and appellant Antwain Lamour Williams guilty in count 2 of the attempted murder of E.S., and found true the allegation that the crime was willful, deliberate and premeditated. (Pen. Code, §§ 664, subd. (a), 187.)[1] Defendant was found guilty in count 7 of shooting into an inhabited dwelling. (§ 246.) As to the attempted murder count, the jury found defendant personally used a firearm and intentionally discharged a firearm, within the meaning of section 12022.53, subdivisions (b) and (c).[2]

The trial court sentenced defendant to life in prison in count 2, plus 20 years for the section 12022.53, subdivision (c) finding.[3] In count 7, the court imposed an upper term sentence of seven years, which it stayed pursuant to section 654.

Defendant contends the trial court erred in refusing to instruct the jury in count 2 on the lesser included offense of attempted voluntary manslaughter based on provocation and heat of passion. We affirm.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

[2] Defendant was found not guilty of attempted murder in counts 1, and 3 through 6.

[3] The court stayed the section 12022.53, subdivision (b) enhancement.

FACTS

Defendant and E.S. were in a relationship for approximately nine years. E.S. had full custody of their daughter. The three lived together in San Bernardino with defendant's mother.

Defendant regularly threatened E.S. throughout the relationship. On multiple occasions, defendant threatened to take E.S. to court to seek increased custody rights to their child. E.S. described defendant as having a "short fuse" and stated he would get "more upset" when they discussed their daughter. On one occasion, defendant threatened to kill E.S. He pointed a loaded gun at E.S.'s head and told her that if she wanted to leave, "he could end [her] life right now." The incident occurred in front of their daughter. E.S. did not end the relationship nor did she report the matter to police.

In April 2016, E.S. decided to move to the Long Beach area. E.S. stayed with a family friend in Long Beach for about three weeks while defendant remained in San Bernardino with his mother. E.S. and defendant argued over the phone about their daughter throughout the afternoon and into the evening on the day of the charged incident. Defendant wanted to pick up E.S. and their daughter that night and take them home to San Bernardino. E.S. asked defendant to come the following day instead because it was late and their daughter had a doctor's appointment the following morning in Long Beach.

Defendant became increasingly angry as the argument progressed. E.S. and defendant called and hung up on each other approximately four to five times. E.S. repeatedly asked defendant to calm down and told him that she did not understand why he was "so mad." Defendant accused E.S. of cheating on him and called her a "liar" and a "bitch." He threatened to go to the residence where E.S. was and "kick the door in." He also told E.S. to "watch what happens when you come outside." In the final phone call, defendant stated, "I may forget who I love in that house," and the bullets will "be flying." E.S. interpreted those statements to mean that defendant would come to the residence and "shoot up the place."

One to two hours after the last phone call, E.S., her daughter, and other family members were sitting in the living room watching television. They heard a loud bang and E.S. looked through the peephole of the door. E.S. believed defendant was at the door and yelled, "[i]t's him." E.S. ran to find her friend who owned the apartment. Defendant began kicking the door. E.S.'s mother stood on the opposite side of the door in an attempt to hold the door closed and keep defendant out. She yelled to E.S. that defendant was "about to break the door down." E.S.'s mother and the others in the living room began screaming, "[h]e's shooting." E.S. ducked as a bullet flew past her. She heard multiple gunshots.

The responding officer discovered cartridge casings outside of the apartment near the front door. He also found

spent bullets throughout the interior of the apartment. There was gunshot damage inside and outside the apartment. Bullet holes were found in the front door, the walls, a mounted heater, and a baby bathtub.

DISCUSSION

Refusal to Instruct on Heat of Passion for Attempted Voluntary Manslaughter

Defendant's sole contention is that the trial court erred in refusing to instruct on attempted voluntary manslaughter based on heat of passion as to the attempted murder charge in count 2. We conclude the court properly refused the instruction.

A defendant in a criminal action has the constitutional right to a jury determination of every material issue presented by the evidence. (*People v. Lewis* (2001) 25 Cal.4th 610, 645 (*Lewis*).) Accordingly, "[a] court must instruct sua sponte on general principles of law that are closely and openly connected with the facts presented at trial." (*People v. Lopez* (1998) 19 Cal.4th 282, 287.) "[A] trial court must instruct on lesser included offenses, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present." (*Lewis, supra,* at p. 645.) "[S]ubstantial evidence to support instructions on a lesser included offense may exist even in the face of inconsistencies presented by the defense itself." (*People v. Breverman* (1998)

19 Cal.4th 142, 162–163 (*Breverman*), fn. omitted.) "Conversely, even on request, a trial judge has no duty to instruct on any lesser offense *unless* there is substantial evidence to support such instruction." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008.) "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense . . . ." (*Breverman, supra,* at p. 162.) Evidence is substantial for this purpose if it could cause a jury of reasonable persons to conclude that the defendant committed the lesser but not the greater offense. (*Ibid.*)

Attempted voluntary manslaughter is a lesser included offense of attempted murder. (*People v. Gutierrez* (2003) 112 Cal.App.4th 704, 708 (*Gutierrez*).) Either imperfect self-defense or heat of passion will reduce an attempted killing from attempted murder to attempted voluntary manslaughter by negating the element of malice. (*Ibid.*)

To establish attempted voluntary manslaughter under a heat of passion theory, a defendant must demonstrate both provocation and heat of passion. (*Gutierrez, supra,* 112 Cal.App.4th at pp. 708–709.) "'First, the provocation which incites the [perpetrator] to act in the heat of passion case must be caused by the victim or reasonably believed by the accused to have been engaged in by the [victim]. [Citations.] Second, . . . the provocation must be such as to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection.' (*People v. Lujan* (2001) 92 Cal.App.4th 1389, 1411–1412.)" (*Ibid.*) "The test

of adequate provocation is an objective one . . . . The provocation must be such that an average . . . person would be so inflamed that he or she would lose reason and judgment. Adequate provocation and heat of passion must be affirmatively demonstrated." (*People v. Lee* (1999) 20 Cal.4th 47, 60, citing *People v. Sedeno* (1974) 10 Cal.3d 703, 719; *People v. Williams* (1969) 71 Cal.2d 614, 624.) ""[N]o specific type of provocation [is] required . . . ."" [Citations.] Moreover, the passion aroused need not be anger or rage, but can be any ""[v]iolent, intense, high-wrought or enthusiastic emotion"" [citations] other than revenge [citation]. 'However, if sufficient time has elapsed between the provocation and the [crime] for passion to subside and reason to return, the [attempted] killing is not [attempted] voluntary manslaughter . . . .' [Citation.]" (*Breverman, supra,* 19 Cal.4th at p. 163.)

Defendant argues legally adequate provocation can be found in E.S.'s statement that she did not want him to pick up their daughter until the following morning. This evidence is insufficient as a matter of law to establish the level of provocation required for heat of passion. An average person would not lose reason and judgment based on a minor family squabble. E.S. merely told defendant that she wanted him to wait until the next day to pick up their daughter. She did not threaten to take the child from him. She reasonably explained that it was late, and that the baby had a doctor's appointment in Long Beach the next morning.

"The claim of provocation cannot be based on events for which the defendant is culpably responsible." (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 83.) In this case, defendant harassed E.S. by calling her repeatedly and insisting that she allow him to pick up his daughter despite being told that he could see her the following morning. As the argument escalated, defendant threatened E.S. multiple times. E.S. asked defendant to calm down repeatedly and told him she did not understand why he was so upset, as he would see his daughter the following day. Defendant proceeded to drive to Long Beach from San Bernardino to commit the shooting. The volatile situation was of defendant's own making, rather than being the result of provocation by E.S.

Defendant asserts that in addition to the events that transpired just before the shooting, the "long history of contentious disputes" combined with E.S.'s refusal to allow him to pick up his daughter caused him to attack in a heat of passion. Defendant's contention is contrary to authority of our Supreme Court. In a relationship where "bickering, yelling, and cursing [is] the norm," evidence that the couple had argued throughout the day is not "substantial evidence to support a voluntary manslaughter instruction." (*People v. Cole* (2004) 33 Cal.4th 1158, 1216 [voluntary manslaughter instruction properly refused where a domestic disturbance on the day of the incident was indistinguishable from the many disputes that plagued the relationship].) E.S. testified that she and defendant regularly engaged in arguments,

specifically regarding their daughter. The argument that took place on the day of the shooting was "no different than the many other occasions on which they had argued in their . . . relationship." (*Ibid*.) The court "did not err in failing to instruct on voluntary manslaughter based on heat of passion." (*Ibid*.)

Defendant's reliance on *People v. Wright* (2015) 242 Cal.App.4th 1461 (*Wright*), is misplaced. In *Wright*, there was "concrete evidence of [] provocation from the victim" in the form of "repeated threats to take custody . . . away from defendant." (*Id.* at p. 1488.) Here, it was defendant who repeatedly threatened to take custody away, not the victim. E.S. never threatened to keep the child away from defendant for any extended period of time. Additionally, in *Wright*, the victim had "filed for custody" and the parties had engaged in a "court battle." (*Id.* at p. 1484.) There is no evidence in the record that defendant and E.S. were engaged in a heated custody dispute.

Defendant's reliance on *People v. Le* (2007) 158 Cal.App.4th 516 (*Le*), and *People v. Berry* (1976) 18 Cal.3d 509 (*Berry*), is similarly misplaced. In *Le*, the defendant was provoked by "the verbal taunts of an unfaithful wife and infidelity." (*Le, supra,* at p. 528.) Likewise in *Berry,* the victim "continually provoked defendant with sexual taunts and incitements, alternating acceptance and rejection . . . ." (*Berry, supra,* at p. 514.) The victim made "repeated references to her involvement with another man." (*Ibid*.) There is no evidence in the record that E.S. verbally taunted

defendant about infidelity or that defendant had knowledge of an ongoing affair. E.S. denied involvement in an affair.

Defendant's claim that he was entitled to a heat of passion instruction fails for a second reason—the evidence shows a sufficient cooling off period to negate heat of passion. There is undisputed evidence of the passage of between one and two hours between the time defendant last spoke with E.S. and his arrival at the residence. The time between the last call and defendant's arrival in Long Beach was more than sufficient to constitute a "cooling off" period that would negate any provocation due to the earlier events.

Finally, assuming there was instructional error, defendant did not suffer prejudice. The jury's finding that the attempted murder in count 2 was willful, deliberate, and premeditated "is manifestly inconsistent with having acted under the heat of passion. Thus, we conclude the instructional error was harmless beyond a reasonable doubt." (*People v. Speight* (2014) 227 Cal.App.4th 1229, 1246.)

DISPOSITION

The judgment is affirmed.

KRIEGLER, Acting P. J.

We concur:

BAKER, J.

DUNNING, J.*

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