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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT HERNANDEZ, Defendant and Appellant.	B262851 (Los Angeles County Super. Ct. No. KA101369)

APPEAL from a judgment of the Superior Court of Los Angeles County, George Genesta, Judge. Affirmed.

Derek K. Kowata, 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, Scott A. Taryle and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

Robert Hernandez appeals from the judgment entered following a jury trial in which he was convicted of first degree murder and possession of a firearm by a felon. Hernandez argues the trial court erred in refusing to instruct on the heat of passion form of voluntary manslaughter. He also argues there was no substantial evidence that he acted deliberately and with premeditation to support his conviction for first degree murder. We affirm.

BACKGROUND

On the night of August 1, 2012, Jose Garcia entered a liquor store at a strip mall in La Puente. The store owner, Tae Yong Byun, and Byun's employee, Jose Martinez, were working at the store that night. Both were familiar with Garcia. Almost immediately after Garcia entered the store, Ray Aguilar entered and talked with Garcia at the check-out counter. To Byun and Martinez, they appeared to be friends. The customers bought beer, Garcia paying for Aguilar's beer, and then left the store together and talked in the parking lot.

About a minute later, Hernandez approached the store with another man and then entered alone while his companion stayed in the parking lot. Byun testified, and video from the liquor store showed, that Hernandez bought various items including ice, plastic cups, and cigarettes. Byun bagged the items, and Hernandez left the store.

Shortly thereafter, Byun and Martinez heard people arguing outside the store. They observed three men standing together by the open driver's door of a pickup truck parked in the lot between the store and a taco shop. Byun identified two of the men as Garcia and his friend, and he believed the third man was the man who had just bought ice, cups, and other items from him.

Aguilar stood close to Garcia with his arms crossed while Garcia and the third man argued. Martinez observed the argument as he went in and out of the store cleaning up, and Byun stood outside the store entrance watching. Several other people from nearby businesses also watched. Martinez saw the men arguing heatedly and thought they might start fighting, but he did not see them exchange any blows or push each other.

As Byun continued to watch, the third man picked up one or more bags from the ground and started to walk away. Garcia said something to him, which Byun did not hear. The third man turned around, took a gun from his waistband, and shot Garcia. As Garcia tried to run behind the bed of his truck, the third man shot him again. Martinez also heard the shots, and went outside to see what was happening. He and Byun saw Aguilar grab Garcia and sit on the ground, holding him.

Byun saw the shooter run away through the parking lot between the liquor store and taco shop, and northward along the road. Surveillance video from a nearby store in the strip mall also showed two men running in that direction several seconds apart, one of them dressed like Hernandez was dressed in the liquor store video.

A Los Angeles County Sheriff's deputy, who responded to the scene first, saw Garcia and Aguilar behind the pickup truck, Garcia bleeding from the stomach and back as Aguilar held him. Garcia, who was unresponsive, was transported by emergency personnel. He later died.

Later that evening, while detectives reviewed the store's video with Byun watching, Byun identified the person who bought ice and other items as the shooter. Byun also identified plastic bags and ice found in an area of the parking lot northward

along the road as having come from his store, and some DNA samples taken from the bags and their contents matched DNA from Hernandez.

A forensic specialist recovered one fired bullet and two fired cartridges at the scene, and the medical examiner recovered one bullet from Garcia's body. The medical examiner identified five gunshot wounds to Garcia. One wound was fatal, entering the abdomen and traveling to the right and downward through Garcia's body, severing blood vessels to the lower extremities. The other wounds were from one nonfatal shot that entered Garcia's back, exited, and then entered and exited his arm.

Hernandez presented testimony of a witness who had been at the taco shop during the shooting. That witness testified that while seated on the restaurant patio, facing the parking lot, he heard the first shot and then saw the gunman fire the second shot as the victim tried to hide behind a truck. He testified that the gunman tried to shoot again, unsuccessfully. He saw the gunman stand with the gun pointed at Garcia for what felt like a minute or two. The witness ran around the front of the taco shop, from where he saw a person run to the right of the shop, followed by another person some seconds later. He thought the first person to run was the shooter, but was not certain. He also testified that the shooter had tattoos on his face, and he was positive Hernandez was not the shooter. When shown photographs of the man who had accompanied Hernandez to the parking lot—who had tattoos on his face—the witness testified that man could be the shooter, although his tattoos were different from those the witness recalled the shooter having.[1]

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[1] This witness's testimony about seeing one or two people running, the location of the shooting, the number of shots fired,

Hernandez was convicted of first degree murder and possession of a firearm by a felon. The trial court sentenced him for those offenses and various sentence enhancements to 135 years to life under the "Three Strikes" law. He appeals.

DISCUSSION

I. Refusal to Instruct on Heat of Passion Voluntary Manslaughter

Hernandez requested that the trial court instruct the jury on manslaughter, based on evidence that there was an argument between him and the victim that may have provoked him to kill. The court noted there was no evidence of legally adequate provocation to support a heat of passion theory, and declined to give the instruction. The court instead offered to give an instruction on provocation reducing first degree murder to second degree, to which counsel agreed.[2]

We conclude the trial court properly refused to give the requested instruction on heat of passion voluntary manslaughter.

Homicide is divided into murder and manslaughter. (*People v. Beltran* (2013) 56 Cal.4th 935, 941.) Murder is an "unlawful killing" with "malice aforethought." (Pen. Code, § 187, subd. (a).) Voluntary manslaughter is an "unlawful killing . . . without malice," including a killing "upon a sudden quarrel or heat of passion." (§ 192, subd. (a).) Because heat of passion

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and the location and size of the shooter's tattoos was inconsistent with his prior statements.

[2] The court instructed on homicide with CALCRIM No. 500 (Homicide: General Principles), CALCRIM No. 520 (First or Second Degree Murder with Malice Aforethought), CALCRIM No. 521 (First Degree Murder), and CALCRIM No. 522 (Provocation: Effect on Degree of Murder).

negates malice, reducing an intentional killing from murder to voluntary manslaughter, heat of passion voluntary manslaughter is a lesser included offense of murder. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

Voluntary manslaughter on a heat of passion theory has both subjective and objective components. (*People v. Moye* (2009) 47 Cal.4th 537, 549.) "To satisfy the subjective element of this form of voluntary manslaughter, the accused must be shown to have killed while under 'the actual influence of a strong passion'" induced by the victim's provocation. (*Id.* at p. 550.) The passion aroused may be any """violent, intense, high-wrought or enthusiastic emotion"" [citations] other than revenge." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 163, brackets omitted.)

To satisfy the objective element, the heat of passion must be a result of sufficient provocation—that is, conduct by the victim "sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*People v. Moye*, *supra*, 47 Cal.4th at pp. 549-550.) "To be adequate, the provocation must be one that would cause an emotion so intense that an ordinary person would simply *react*, without reflection." (*People v. Beltran*, *supra*, 56 Cal.4th at p. 949.) Thus, to reduce murder to voluntary manslaughter, the provocation must be sufficient to produce heat of passion of "extreme intensity" in a person of ordinary disposition. (*Id.* at p. 950.) Both heat of passion and adequate provocation "must be affirmatively demonstrated." (*People v. Lee* (1999) 20 Cal.4th 47, 60.)

"In criminal cases, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence." (*People v. Koontz* (2002) 27 Cal.4th 1041,

1085.) This includes an obligation to instruct on lesser included offenses when substantial evidence raises a question as to whether all elements of the charged offense are present. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 154.) "Substantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive." (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.) In the context of lesser included offenses, substantial evidence is evidence from which a reasonable jury could conclude the lesser included offense was committed but the greater offense was not. (*People v. Breverman*, *supra*, at p. 162.)

However, "the existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 162.) The obligation to instruct on a lesser included offense does not arise "when the evidence is 'minimal and insubstantial.'" (*People v. Barton*, *supra*, 12 Cal.4th at p. 201.)

"We review de novo a trial court's failure to instruct on a lesser included offense," viewing the evidence "in the light most favorable to the defendant." (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137.)

Here, Hernandez argues there is evidence from which a jury could reasonably conclude he acted in the heat of passion: he was seen in a heated argument with Garcia, during which at one point it appeared they would fight, and as Hernandez turned and started to walk away, Garcia said something causing him to turn around and shoot Garcia twice.

Even viewing the evidence in the light most favorable to the defense, no reasonable juror could conclude Hernandez acted under the heat of passion based on adequate provocation. (*People*

v. Breverman, *supra*, 19 Cal.4th at p. 163.) First, no substantial evidence exists that Hernandez's reason was subjectively obscured by an intense passion. The evidence shows only that he argued with Garcia. The men spoke in raised voices but were not shouting, and although Martinez thought they might start fighting, he saw no physical contact between them. Hernandez presented no other evidence that he acted under a subjective heat of passion.

Second, there was no substantial evidence of objectively adequate provocation. To reduce murder to manslaughter, provocation must be sufficient to cause "anger or . . . passion . . . so strong that the defendant's reaction bypassed his thought process to such an extent that judgment could not and did not intervene." (*People v. Beltran*, *supra*, 56 Cal.4th at p. 949.) Although verbal conduct may be sufficient provocation (*People v. Lee*, *supra*, 20 Cal.4th at p. 59), it generally has been found insufficient to require the court to instruct on heat of passion voluntary manslaughter. (See, e.g., *People v. Avila* (2009) 46 Cal.4th 680, 705-706 [gang-related reference or challenge]; *People v. Gutierrez* (2009) 45 Cal.4th 789, 826-827 [verbal argument in which defendant and victim used profanity]; *People v. Manriquez* (2005) 37 Cal.4th 547, 585-586 [victim called defendant a "mother fucker" and taunted defendant repeatedly to use his weapon]; *People v. Lucas* (1997) 55 Cal.App.4th 721, 739-740 [yelling out names and taunts, along with smirks and dirty looks].)

Here, the only evidence to which Hernandez points is that there was a heated argument that one witness thought might lead to a fight, Garcia said something as Hernandez started to walk away, and Hernandez turned around and shot Garcia once

in the abdomen and a second time in the back as Garcia attempted to hide. There was no evidence of what Garcia said before Hernandez shot him.

Under these circumstances, no reasonable jury could be persuaded Hernandez's reason was obscured by passion as a result of provocation sufficient to produce such passion in an ordinary person of average disposition. (See *Lucas*, *supra*, 55 Cal.App.4th at p. 739 [absence of evidence of what names were yelled at defendant].) Given the absence of substantial evidence supporting a heat of passion theory, the trial court did not err by refusing to instruct on it.

Assuming for argument that the trial court erred by failing to instruct on a heat of passion theory, the error was harmless under either the *Watson* or *Chapman* test. (*People v. Watson* (1956) 46 Cal.2d 818; *Chapman v. California* (1967) 386 U.S. 18.)

Given the paucity of evidence of a heat of passion caused by adequate provocation, it is beyond reasonable doubt that Hernandez would not have obtained a more favorable outcome had the jury been instructed on that theory of voluntary manslaughter. Moreover, the jury was instructed that provocation may reduce a murder from first to second degree, and that a decision to kill made rashly or impulsively is not deliberate and premeditated, yet the jury found Hernandez guilty of first degree murder. These considerations reinforce our conclusion that the jury would not have returned a different verdict even if instructed on heat of passion voluntary manslaughter. (See *People v. Manriquez*, *supra*, 37 Cal.4th at p. 586.)

Hernandez argues the refusal to instruct on voluntary manslaughter prevented trial counsel from fully arguing the concept of provocation and heat of passion. The argument is

unpersuasive: Trial counsel did not attempt to argue provocation at all—the only defense theory was that Hernandez was not the shooter.

II. Substantial Evidence of Deliberation and Premeditation

Hernandez argues there was no substantial evidence that he acted deliberately and with premeditation to support the first degree murder finding. He contends there was no explanation for the killing other than Hernandez acting rashly as a result of the escalating confrontation with Garcia and Garcia's provocation. We disagree.

"On appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Koontz*, *supra*, 27 Cal.4th at p. 1078.) We presume the existence of every fact the jury could reasonably deduce and make all reasonable inferences that support the judgment. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Catlin* (2001) 26 Cal.4th 81, 139.) The "direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact." (Evid. Code, § 411.) "We do not reevaluate witness credibility nor do we reweigh the evidence. [Citation.] The same standard of review applies to prosecutions relying upon circumstantial evidence." (*People v. Ramos* (2011) 193 Cal.App.4th 43, 53.)

The crime of murder is divided into degrees. First degree murder includes murder that is perpetrated by any kind of willful, deliberated, and premeditated killing. (§ 189.) The word

"willful" means intentional.[3] (*People v. Moon* (2005) 37 Cal.4th 1, 29.) "'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance. [Citations.] 'The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly."'" (*People v. Koontz*, *supra*, 27 Cal.4th at p. 1080.)

Three types of evidence that typically support a finding of premeditation and deliberation are planning activity, motive, and a manner of killing from which a preconceived plan could be inferred. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27.) These categories provide a framework to assess whether the evidence supports an inference that a murder was the result of preexisting reflection and weighing of considerations, rather than an unconsidered or rash impulse. (*People v. Koontz*, *supra*, 27 Cal.4th at p. 1081.) These are descriptive aids to analysis, not exclusive categories. (*Ibid.*; *People v. Anderson*, *supra*, 70 Cal.2d at p. 27.)

Here, the record reveals evidence that, viewed in a light most favorable to the judgment, is sufficient to support the jury's finding of deliberation and premeditation.

Hernandez carried a loaded gun on the night of the argument. From that, the jury could have inferred that he anticipated he might use the gun to kill someone. Moreover, he and Garcia argued for some time before the shooting. Although there was evidence Hernandez had started to walk away before

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[3] Hernandez concedes on appeal that the evidence supports a finding that the killing was intentional.

Garcia said something leading him to turn and shoot, the jury may have inferred that during the course of the argument, Hernandez formed a plan to use his gun to kill Garcia. Even in cases where the evidence of planning is not extensive, our Supreme Court has upheld jury findings of deliberation and premeditation. (See, e.g., *People v. Brady* (2010) 50 Cal.4th 547, 563-564; *People v. Lee* (2011) 51 Cal.4th 620, 636.)

The argument also served as evidence of a motive to kill Garcia. In particular, the evidence showed Garcia said something just before Hernandez turned around, pulled out a gun, and shot him twice. The jury could reasonably infer that Hernandez wished to kill Garcia because of the argument or Garcia's last statement.

Further, the manner of killing supported an inference that Hernandez killed deliberately. Hernandez shot Garcia in the abdomen and the back. Firing at a vital area of the body is indicative of deliberation. (See, e.g., *People v. Koontz*, *supra*, 27 Cal.4th at p. 1082; *People v. Manriquez*, *supra*, 37 Cal.4th at p. 577.) Finally, there was some evidence that after he fired the two shots, Hernandez stood with his gun pointed at Garcia for some time. From that, the jury could have reasonably inferred he was trying to make certain he had fatally wounded Garcia.

Our task on appeal is to determine whether "*any* rational trier of fact could have been persuaded beyond a reasonable doubt" that the murder was deliberate and premeditated. (*People v. Perez* (1992) 2 Cal.4th 1117, 1127.) Viewing the evidence as a whole, we conclude there was substantial evidence from which a rational jury could find deliberation and premeditation. We therefore affirm the conviction for first degree murder.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

JOHNSON, J.

LUI, J.