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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. ANTONIO MEZA, Defendant and Appellant.	B238506 (Los Angeles County Super. Ct. No. PA069163)

APPEAL from a judgment of the Superior Court of Los Angeles County. Cynthia L. Ulfig, Judge. Affirmed.

Kim Malcheski, 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, Linda C. Johnson, Supervising Deputy Attorney General, and Ryan M. Smith, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Antonio Meza appeals from the judgment entered following a jury trial in which he was convicted of first degree murder and assault with a firearm, with personal firearm-use findings. Defendant contends the trial court erred by refusing to instruct upon provocation and intoxication and denying his motion contesting the prosecutor's use of peremptory challenges against two prospective jurors. We affirm.

BACKGROUND

About 9:30 p.m. on December 19, 2010, defendant fatally shot his 31-year-old stepson, Marco Hernandez, in the family home in Pacoima in front of Marco's brother William Hernandez and sister-in-law Yesenia Flores and other family members. Marco, Flores, and two other male family members were seated at the dining room table. There were three or four beer bottles on the table, in front of several individuals. Defendant entered the room and angrily said, "'I like shit said to my face.'" Marco did not respond. About that time, William, his wife Mayra Mendez, and their two young children entered the dining room from the yard. Defendant, who was wearing a serape, pulled out a knife, looked at it, shook his head or said, "No," then placed it on the floor. He then took out a BB gun, pointed it up, shook his head or said, "No," then placed it on the floor. Finally, he removed a handgun from his waistband, put it back in the waistband, then took it out again. He worked the slide to chamber a round and aimed at Marco. All eyewitnesses testified that Marco's hands were empty; he put his hands out, away from his body, with his palms facing out; and he did not reach for anything, fight with defendant, or lunge at defendant. As Marco either stood up or was partially standing, defendant fired three quick shots at him. Marco dropped to the ground, fatally wounded. Someone said, "Call the police." Mayra went outside and phoned 911. Flores reached for her mobile phone. Defendant pointed his gun at her and yelled, "What are you going to do? Call the fucking police. I don't give a fuck." Flores feared defendant was going to shoot her. Defendant then walked backward to his room, while continuing to watch the others in the dining room.

Defendant put the BB gun and knife on his 13-year-old son's bed and left the house. He parked his car four blocks from the Van Nuys apartment of his friend, Arquimides Funes, walked to Funes's apartment, and asked for a ride to Long Beach. Defendant told Funes he had problems with his wife, but said nothing about shooting anyone. Defendant lay in the back seat as Funes drove, and he directed Funes to an address in Compton. No one answered at that or a second location, so Funes drove defendant to a motel in Long Beach and paid for a room for defendant.

Police who responded to the house recovered three expended 9-millimeter casings from the dining room, a bullet embedded in the dining room wall, and the BB gun and knife. The medical examiner recovered two bullets during Marco's autopsy. Funes ultimately found the gun and two live rounds wrapped in a towel and hidden under the front seat of his truck. Ballistics testing established that the recovered casings and bullets were fired from that gun. Police arrested defendant at the Long Beach motel after tracking him through his mobile phone.

Flores told a police officer that she smelled tequila on defendant when he walked into the dining room the night of the shooting.

Defendant testified that just before the shooting, his relatives were listening to loud music in the dining room. He picked up his dagger and BB gun and went to speak to them. He asked them to lower the volume. Marco opened his hands and asked, "'What?'" Defendant said, "This is not good." He pulled out the dagger and the BB gun and asked, "'Which one?'" and "'With this one, or with this one?'" On cross-examination, defendant admitted he "gave . . . Marco a choice as to which weapon he should die with," but on redirect he claimed he was joking. Marco began to stand, and defendant thought Marco might fight. Defendant returned to his bedroom, unlocked the dresser drawer in which he kept his handgun and ammunition, and loaded the magazine with six rounds. He walked back into the dining room with his loaded gun. He thought Marco was angry. Marco's hand was on a beer bottle that was sitting on the table, and defendant feared Marco might strike him in the face with the bottle. Defendant also

claimed he was afraid because the three men at the table were younger than he was, but he admitted that none of them, including Marco, had ever exhibited any violence toward him. From a distance of six or seven feet, defendant fired two or three shots at Marco, who remained seated.

Defendant denied pointing the gun at Flores, challenging her to call the police, saying, "I like shit said to my face," and hiding his gun in Funes's truck.

Defendant testified that he "drank three cups of orange juice in a glass," and there was tequila in the juice, but he admitted he was not drunk at the time of the shooting.

The jury convicted defendant of first degree murder and assault with a firearm, and found defendant personally fired a gun, causing death, and personally used a gun (Pen. Code, §§ 12022.53, subd. (d), 12022.5, subd. (a)). The court sentenced defendant to prison for 50 years to life for the murder and firearm enhancement, plus 7 years for the assault with a firearm with firearm enhancement, for an aggregate term of 57 years to life.

DISCUSSION

1. Denial of *Wheeler-Batson* motion

Defendant contends the trial court erred by denying his motion based upon *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) and *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712], challenging the prosecutor's exercise of peremptory challenges against two male Hispanic prospective jurors.

A party violates both the California and United States Constitutions by using peremptory challenges to remove prospective jurors solely on the basis of group bias, that is, bias presumed from membership in an identifiable racial, religious, ethnic, or similar group. (*Wheeler*, *supra*, 22 Cal.3d at pp. 276–277; *People v. Lancaster* (2007) 41 Cal.4th 50, 74.) A party who believes his opponent is doing so must timely object and make a prima facie showing of exclusion on the basis of group bias. (*Wheeler*, at p. 280.)

If a prima facie case is shown, the burden shifts to the other party to show that the peremptory challenge was not based solely upon group bias, but upon a "specific bias," that is, one related to the case, parties, or witnesses. (*Wheeler*, *supra*, 22 Cal.3d at

pp. 276, 281–282.) "A [party] asked to explain his conduct must provide a '"clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges.' [Citation.] 'The justification need not support a challenge for *cause,* and even a "trivial" reason, if genuine and neutral, will suffice.' [Citation.] A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons. [Citations.] Nevertheless, although a [party] may rely on any number of bases to select jurors, a legitimate reason is one that does not deny equal protection." (*People v. Lenix* (2008) 44 Cal.4th 602, 613 (*Lenix*).) Although a party may exercise a peremptory challenge for any permissible reason or no reason at all, implausible or fantastic justifications are likely to be found to be pretexts for purposeful discrimination. (*People v. Huggins* (2006) 38 Cal.4th 175, 227; *Purkett v. Elem* (1995) 514 U.S. 765, 768 [115 S.Ct. 1769] (*Purkett*).)

The trial court must then make a sincere and reasoned attempt to evaluate the explanation for each challenged juror in light of the circumstances of the case, trial techniques, examination of prospective jurors, and exercise of peremptory challenges. (*People v. Fuentes* (1991) 54 Cal.3d 707, 718.) It must determine whether a valid reason existed and actually prompted the exercise of each questioned peremptory challenge. (*Id.* at p. 720.) The proper focus is the subjective genuineness of the nondiscriminatory reasons stated by the prosecutor, not on their objective reasonableness. (*People v. Reynoso* (2003) 31 Cal.4th 903, 924 (*Reynoso*).) "[T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 339 [123 S.Ct. 1029].) "In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her." (*Lenix*, *supra*, 44 Cal.4th at p. 613.)

Because *Wheeler* motions call upon trial judges' personal observations, we "review the decision of the trial court under the substantial evidence standard, according deference to the trial court's ruling when the court has made a sincere and reasoned effort to evaluate each of the stated reasons for a challenge to a particular juror." (*People v. Hamilton* (2009) 45 Cal.4th 863, 900–901, fn. omitted (*Hamilton*).) We also accord deference to the trial court's ability to distinguish sincere explanations from false ones. (*Id.* at p. 901.) "On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." (*Snyder v. Louisiana* (2008) 552 U.S. 472, 477 [128 S.Ct. 1203] (*Snyder*).)

Defense counsel made several *Wheeler-Batson* motions, all of which were denied after the trial court found defendant had made a sufficient prima facie showing and the prosecutor explained her reasons for excusing particular prospective jurors. Defendant's appellate claim is limited to two of three jurors addressed in his first *Wheeler-Batson* motion.

Prospective Juror No. 2707 was a married "I.T. manager" whose wife and one of his adult children worked for the post office. He had lived in Sylmar for 20 years. His other two adult children worked as a landscaper and an "apprentice in nutrition." He had no prior jury experience. His son had been stabbed six years earlier, and someone was convicted of that crime. Prospective Juror No. 2707 attended the court proceedings in that case, but nothing about that experience would affect his ability to sit as a juror on this case. Also, a brother-in-law of Prospective Juror No. 2707 had been charged with attempted murder about 15 years earlier, but was acquitted. The prospective juror felt that law enforcement dealt fairly with his brother-in-law. In subsequent questioning by the prosecutor, Prospective Juror No. 2707 stated that he had not attended or testified at his brother-in-law's trial, he felt the acquittal was "the right outcome," and nothing about that case would affect his "ability to find the defendant guilty in this case."

After defense counsel asked other prospective jurors about whether witnesses could be mistaken about their observations or have a bias or prejudice for or against

defendant, the prosecutor asked Prospective Juror No. 2707 if he had "a problem with eyewitness testimony." The prospective juror replied, "No. I don't think I would. I have heard that eyewitness testimony is less valid sometimes because of the persons you've talked about." The prosecutor asked Prospective Juror No. 2707 whether he would "want justice to be done" if someone killed him. The trial court sustained defense counsel's objection. The prosecutor then asked, "Would you want the eyewitness to come to court and tell the jury what they saw?" Prospective Juror No. 2707 replied, "If I'm dead, I guess it wouldn't really matter to me." The prosecutor stated that it would matter to his loved ones and again asked if Prospective Juror No. 2707 "would want someone to come to court and tell the jury what happened." He replied, "Yes." The prosecutor asked if he would "want the person to believe the jury [*sic*] when they said that, since you have no voice at that point." Prospective Juror No. 2707 replied, "Obviously, the truth is what you're looking for."

The prosecutor exercised her third peremptory challenge against Prospective Juror No. 2707.

Prospective Juror No. 1831 worked for FedEx, making deliveries. His wife was a pharmacy technician and they had no children. He had lived in Arleta for 15 years. He had no prior jury experience. In response to questioning by defense counsel, Prospective Juror No. 1831 said he would decide the case on the basis of the facts, not emotions. When asked whether he thought a startling event would affect a witness's memory and perceptions, he replied, "It's just on judgment on the facts. They're going to try to relive the moment and if it startled me, and would it jar my ability to make a judgment or just trying to stick to the facts would be—I would leave my emotions out of it." When defense counsel asked whether he would follow instructions not to consider defendant's failure to testify, Prospective Juror No. 1831 stated, "I would still have to rely on the facts and listen to the testimony from the stand."

The prosecutor asked Prospective Juror No. 1831 if he was the type of person who would be able to decide which arguments made sense and which did not. He replied,

"Seems like it's going to get confusing and pretty twisted, as far as both sides going at it." He then added, "But I'm not going to be alone. There's going to be my opinion, what I come up with, and there's 12 people that have to make a decision." He then confirmed that he would be able to "apply the evidence presented in court to the elements of" murder. The prosecutor asked Prospective Juror No. 1831 to elaborate on why he thought things would be confusing. He responded, "Well, one person wants justice, both sides want justice. And someone's—something's going to happen at the end, good or bad." The prosecutor asked, "If you are convinced by the evidence that the defendant is guilty beyond a reasonable doubt, what would be your verdict?" Prospective Juror No. 1831 replied, "I don't know." The prosecutor asked, "If you're convinced by the evidence that he's guilty, you wouldn't able [*sic*] to have a verdict?" Prospective Juror No. 1831 responded, "I mean, the evidence—I mean, if that's just what, hearsay or make believe that you're saying?" The prosecutor explained that eyewitness testimony is not hearsay, and hearsay was inadmissible. Prospective Juror No. 1831 then stated, "If it—if the evidence outweighs what's—I really can't tell you until—" The prosecutor interrupted to ask, "Can you say the word 'guilty'?" The prospective juror replied, "Yes."

The next day, the prosecutor exercised her eighth peremptory challenge against Prospective Juror No. 1831. Immediately after she did so, defendant made his first *Wheeler-Batson* motion, arguing the prosecutor had excused "three male Hispanics." The trial court found defendant had made a prima facie showing, and asked the prosecutor to respond. The prosecutor initially argued that she had no reason to exclude male Hispanics because the victim and at least three of her witnesses were male Hispanics. She noted that she had accepted the panel with a male Hispanic juror and complained that defendant should have objected the day before "when I could have actually remembered better of why I kicked certain people off."

With respect to Prospective Juror No. 1831, the prosecutor stated, "[H]e has a long beard and the way he looks at me through that beard made me uncomfortable and I do recall him yesterday, in response to my questioning, making comments about, 'Well, are

we going to be listening to hearsay? Is it going to be hearsay?[’] And from my recollection of that juror, at least I was planning on using a peremptory challenge as to him for that reason because he seemed to think that if witnesses come and testify that that somehow is hearsay. [¶] And from my recollection, it’s that I had to tell him, ‘No. That’s not hearsay because hearsay would not be admissible.’ So that answer was very troublesome to me, which is why I used my peremptory to kick him off my jury in this case.”

With respect to Prospective Juror No. 2707, the prosecutor stated, “I kicked him off not because he’s an older gentleman, but rather because he indicated that he had heard that there are issues or he’s heard things about eyewitness testimony being faulty. And the fact that he volunteered that information about his knowledge, whatever his knowledge is, of eyewitness testimony being faulty obviously brings me great concern, considering this case rests on eyewitness testimony. [¶] So I cannot, as a good prosecutor, want somebody who has knowledge of eyewitness testimony being problematic in other cases and bringing that into the jury room with him.”

The trial court denied the motion, stating “[T]he court does not find that the prosecutor is purposely using peremptory challenges or even challenges for cause against a specific ethnic group. There does not appear to be any ethnic bias, whatsoever. Additionally, it appears valid reasons have been given for those particular jurors. [¶] I know the prosecutor exercised eight peremptory challenges, five of them have been to non-Hispanics, so again there has been no pattern or practice of ethnic bias.”

Relying largely on *People v. Silva* (2001) 25 Cal.4th 345, defendant argues that the trial court failed to make a sincere and reasoned attempt to evaluate the credibility of the prosecutor’s explanations. He argues the prosecutor’s statement about Prospective Juror No. 1831’s beard was patently absurd because it was physically impossible for the prospective juror to look at the prosecutor through his beard, and Prospective Juror No. 2707’s awareness of instances of unreliable eyewitness identification simply showed he was honest and intelligent.

We do not agree that the trial court failed to perform its duty to make a sincere and reasoned attempt to evaluate the credibility of the prosecutor's explanations. As the California Supreme Court stated when rejecting a similar contention, the "court denied the motions only after observing the relevant voir dire and listening to the prosecutor's reasons supporting each strike and to any defense argument supporting the motions. Nothing in the record suggests that the trial court either was unaware of its duty to evaluate the credibility of the prosecutor's reasons or that it failed to fulfill that duty." (*People v. Lewis* (2008) 43 Cal.4th 415, 471.) We further note that "'[t]he trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine.'" (*Hamilton, supra*, 45 Cal.4th at p. 901.)

The prosecutor articulated ethnicity-neutral reasons for excusing the two prospective jurors in controversy. With respect to Prospective Juror No. 2707, the reason, which was supported by the record, related to his potential for skepticism regarding eyewitness testimony. While that skepticism may have been fully justified, the prosecutor was nonetheless permitted to exclude him in favor of less skeptical jurors. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1092 [doubt about convicting of murder where body not found].) "We need not examine the objective reasonableness of the prosecutor's stated basis for the challenge." (*Hamilton, supra*, 45 Cal.4th at p. 903.) The explanation need not be sufficient to justify a challenge for cause. (*Lenix, supra*, 44 Cal.4th at p. 613.) Even a hunch is sufficient, so long as it is not based on impermissible group bias. (*Ibid.*) The important point was the trial court's opinion of the "subjective *genuineness*" of the nondiscriminatory reasons stated by the prosecutor, "*not* . . . the objective *reasonableness* of those reasons." (*Reynoso, supra*, 31 Cal.4th at p. 924.)

With respect to Prospective Juror No. 1831, defendant focuses solely upon one of two explanations provided by the prosecutor. Although the prosecutor's statement regarding the beard was literally impossible, unless the prospective juror was pulling the beard up in front of his eyes, the gist of the explanation was that the prosecutor did not

like the juror's appearance and demeanor. Subjective matters, such as a prospective juror's grooming and clothing (*People v. Johnson* (1989) 47 Cal.3d 1194, 1218 [overweight, poorly groomed prospective juror]; *People v. Walker* (1988) 47 Cal.3d 605, 625 [prospective juror wearing metal-studded motorcycle garb]), body language, or sympathetic or hostile looks at a party or counsel (*Wheeler*, *supra*, 22 Cal.3d at p. 276 ["'bare looks and gestures'" cited as an example of a permissible specific bias]; *Johnson*, at pp. 1217–1219 ["tired" appearance, defensive body language, sympathetic looks at defendant]; *People v. Granillo* (1987) 197 Cal.App.3d 110, 117 [body language reflecting animosity to prosecutor, facial expression reflecting disdain for judicial system]) are permissible nondiscriminatory grounds for a peremptory challenge. Accordingly, although it was oddly phrased, the prosecutor's comment about Prospective Juror No. 1831's beard stated an ethnicity-neutral reason that fell within the scope of recognized permissible specific-bias factors. "'In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (*e.g.*, nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. We have recognized that these determinations of credibility and demeanor lie "'peculiarly within a trial judge's province,'" [citations], and we have stated that "in the absence of exceptional circumstances, we would defer to [the trial court]." [Citation.]'" (*Lenix*, *supra*, 44 Cal.4th at p. 614.)

The prosecutor also cited Prospective Juror No. 1831's statement regarding hearsay as a basis for her peremptory challenge. Even if the prosecutor may have misquoted the prospective juror, her mistake does not compel the conclusion that her stated reason was insincere. (*People v. Jones* (2011) 51 Cal.4th 346, 366 (*Jones*).) The record provides substantial evidence supporting her challenge. The prospective juror responded to a straightforward question with his own question about "hearsay or make

believe," leading the prosecutor to be concerned that the prospective juror "seemed to think that if witnesses come and testify that that somehow is hearsay." This was an ethnicity-neutral ground that pertained to the prospective juror's attitude toward a particular type of evidence upon which the prosecutor's case would rely.

What matters here is not whether the prosecutor articulated *objectively* persuasive grounds for excusing each of the prospective jurors, but that the grounds were ethnicity-neutral and that the trial court concluded that the prosecutor's explanations were genuine. In assessing the subjective genuineness of the prosecutor's explanation, the trial court had the benefit of its contemporaneous observations of both voir dire and the prosecutor's demeanor as she explained her reasons for excusing the two prospective jurors. The record provides substantial evidence supporting the stated reasons. Finally, although not conclusive, the trial court could consider—as an indication of the prosecutor's good faith in exercising peremptories—that the prosecutor had accepted the panel with an Hispanic male on it. (*Jones*, *supra*, 51 Cal.4th at pp. 362–363.) We conclude the trial court faithfully performed its duties in accordance with the *Batson* and *Wheeler* lines of authority, and its ruling was not clearly erroneous.

2. Refusal of provocation and intoxication instructions

At defendant's request, the trial court instructed the jury on self-defense and voluntary manslaughter based upon unreasonable self-defense (CALCRIM Nos. 505, 571).

Defendant requested that the court also instruct upon provocation using CALCRIM No. 522, which provides, "Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.]" He identified the purported provocation as Marco "going to grab a bottle." The trial court found no

evidence of adequate provocation by Marco and refused the instruction. On appeal, defendant contends that provocation was Marco standing up and that the court's refusal to instruct upon provocation violated due process.

Defendant further requested that the court instruct with CALCRIM No. 625, which, as requested provides, "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill[,] [or] [the defendant acted with deliberation and premeditation. [¶] A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] You may not consider evidence of voluntary intoxication for any other purpose." (Italics added.) The trial court concluded that insufficient evidence supported the requested instruction, and refused it. Defendant contends that the court's refusal to so instruct also violated due process.

The trial court need not give a requested instruction unless it is supported by substantial evidence, that is, evidence sufficient to deserve jury consideration. (*People v. Marshall* (1997) 15 Cal.4th 1, 39.) In deciding whether evidence is substantial enough to require an instruction, the court determines only its bare legal sufficiency, not its weight, and does not weigh the credibility of witnesses. (*People v. Flannel* (1979) 25 Cal.3d 668, 684, overruled on another ground by *In re Christian S.* (1994) 7 Cal.4th 768, 777.) It need not instruct on matters for which the evidence is minimal and insubstantial. (*Flannel*, at p. 684.) There is no constitutional right to instruction on theories unsupported by evidence. (*People v. Ayala* (2000) 23 Cal.4th 225, 283; *Hopper v. Evans* (1982) 456 U.S. 605, 611 [102 S.Ct. 2049].)

a. Provocation instruction

As noted in the requested instruction, a finding of adequate provocation can negate malice aforethought where an intentional and unlawful killing occurs "upon a sudden quarrel or heat of passion" (Pen. Code, § 192, subd. (a)), making the offense voluntary

manslaughter, or raise a reasonable doubt regarding premeditation and deliberation, making the offense second degree murder. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306 (*Carasi*.) "The evidentiary premise of a provocation defense is the defendant's emotional reaction to the conduct of another, which emotion may negate a requisite mental state." (*People v. Ward* (2005) 36 Cal.4th 186, 215.)

For heat of passion, the claimed provocation must be sufficient to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection, from passion rather than from judgment. (*People v. Moye* (2009) 47 Cal.4th 537, 550; *Carasi, supra*, 44 Cal.4th at p. 1306.) "'The provocation . . . must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim.'" (*Moye*, at pp. 549–550.) A defendant may not "'"set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused . . . ."' [Citation.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1215–1216.) In addition, "[T]he accused must be shown to have killed while under 'the actual influence of a strong passion' induced by such provocation." (*Moye*, at p. 550.) "[T]he passion aroused need not be anger or rage, but can be any '"'[v]iolent, intense, high-wrought or enthusiastic emotion"'" [citations] other than revenge." (*People v. Breverman* (1998) 19 Cal.4th 142, 163.)

Instruction on provocation negating premeditation and deliberation is required "where the evidence of provocation would justify a jury determination that the accused had formed the intent to kill as a direct response to the provocation and had acted immediately . . . . The fact that heated words were exchanged or a physical struggle took place between the victim and the accused before the fatality may be sufficient to raise a reasonable doubt in the minds of the jurors regarding whether the accused planned the killing in advance." (*People v. Wickersham* (1982) 32 Cal.3d 307, 329, disapproved on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 201.) "Generally, it is a question of fact for the jury whether the circumstances were sufficient to arouse the passions of the ordinarily reasonable person. [Citations.] However, where the

provocation is so slight or so severe that reasonable jurors could not differ on the issue of adequacy, then the court may resolve the question." (*People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1705.)

Here there was neither evidence of provocative conduct by Marco nor evidence that defendant formed his intent to kill as a direct response to provocation and acted upon it immediately. In his own testimony, defendant admitted brandishing a dagger and BB gun at Marco and "gave" Marco "a choice as to which weapon he should die with" before Marco ever stood up from his seat. Defendant then—according to his own testimony—went back to his bedroom, unlocked his dresser drawer, retrieved and loaded his handgun, and returned to the dining room. It was only then that defendant saw Marco's hand on a beer bottle that was sitting on the table. Defendant's conduct amply demonstrated that he had already formed his intent to kill Marco before the purported provocation. Having a hand on a beer bottle sitting on a table while seated at the table with other family members does not constitute provocation. In addition, Marco's conduct in standing up was a response to defendant's criminal act of brandishing a weapon and thus could not constitute provocation. (*People v. Rich* (1988) 45 Cal.3d 1036, 1112.) Accordingly, the trial court properly denied defendant's request for a provocation instruction.

b. Intoxication instruction

A defendant is entitled to an instruction on intoxication only when there is substantial evidence of both the defendant's voluntary intoxication and the effect of such intoxication on the defendant's actual formation of the relevant mental state. (*People v. Williams* (1997) 16 Cal.4th 635, 677.) Merely showing that the defendant drank alcohol before committing a crime is insufficient to warrant an instruction. (*People v. Cain* (1995) 10 Cal.4th 1, 40.)

This record reflects no evidence that defendant was actually intoxicated and no evidence of the effect of such intoxication on his actual mental state. Defendant himself testified he was not drunk when he shot Marco. The only alcohol-related evidence in the record was that at some unidentified time during the day, defendant had consumed "three

cups of orange juice" with an unspecified quantity of tequila in it, and Flores had told the police that she smelled tequila on defendant. Viewing this evidence in the light most favorable to defendant, it showed he had consumed tequila. It did not rise to the level of showing that he was intoxicated, let alone showing the effect of the tequila on his mental state. Accordingly, the trial court properly denied defendant's request for a provocation instruction.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.