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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. VAGEN VARDAZARYAN, Defendant and Appellant.	B231200 (Los Angeles County Super. Ct. No. BA363231)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Kennedy, Judge. Affirmed.

Donald R. Tickle, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Scott A. Taryle and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Vagen Vardazaryan challenges his conviction for second degree murder, arguing that instructional error precluded the jury from appropriately considering voluntary manslaughter and instead created a presumption of murder. We find no error and affirm.

FACTS AND PROCEDURE

On October 8, 2009, at approximately 8:30 a.m. Reginald Hendrix entered a cellphone store owned by appellant. Appellant, his girlfriend and their daughter were inside. Hendrix asked to buy a charger, and appellant looked for an appropriate charger, but was unable to locate it. When other customers entered the store, appellant asked Hendrix to wait. Hendrix became irate and accused appellant of refusing to help him because he was black. Hendrix called appellant a "mother fucker" and a "bitch." Hendrix may have taken a cellphone from the case in appellant's store. Appellant asked Hendrix to leave the store, but Hendrix refused.

Appellant pushed Hendrix, and a fight ensued. Appellant was hit several times and his nose bled. Appellant's wallet fell out of his pocket, and Hendrix picked it up. After the wallet was returned to appellant, appellant thought a credit card had been stolen. According to appellant's girlfriend, when Hendrix left the store after the fight, he threatened to return with his homeboys and to burn down the store.[1] Also, according to appellant's girlfriend, appellant saw Hendrix try to hit appellant's and her daughter. Appellant thought Hendrix may have been "gangbanging."[2]

After the fight, appellant and his brother searched for Hendrix. Prior to their search, appellant armed himself with a gun. Also prior to the search, appellant's girlfriend asked him not to leave the store because she did not want appellant to get into another fight. Appellant ignored his girlfriend's request because Hendrix had made him "mad" and had "disrespect[ed]" his girlfriend and daughter.

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[1] The prosecutor argued that this testimony was not credible.

[2] Appellant's statements were made in a pretrial interview, which was recorded and played for the jurors. Appellant did not testify at trial.

About 8:50 on the morning of October 8, 2009, appellant shot Hendrix multiple times. Appellant admitted shooting three times. According to one witness, appellant shot Hendrix three or four times, then put his gun in his pocket, and subsequently retrieved the gun and shot Hendrix again. Hendrix died of a gunshot wound to his back.

Appellant was charged with the murder of Hendrix (Pen. Code, § 187, subd. (a)) and with firearm enhancements (§§ 12022.53, subds. (b), (c), (d), 12022, subd. (a)(1)). Appellant was also charged with assault with a deadly weapon (§ 245).[3]

The only real issue at trial was whether appellant committed a second degree murder or a voluntary manslaughter. In his opening statement and closing argument, appellant's counsel argued that appellant committed only a voluntary manslaughter. In his closing argument, appellant's counsel emphasized his view that appellant did not harbor malice aforethought. In contrast, the prosecutor argued that appellant harbored malice aforethought.

Jurors found appellant guilty of second degree murder and found the firearm enhancements true. The jury also found appellant guilty of assault with a deadly weapon. The court sentenced appellant to prison for 15 years to life for the murder and a consecutive 25 years to life for intentionally discharging a firearm. The court also sentenced appellant to a concurrent term of three years for the assault with a deadly weapon.

DISCUSSION

Appellant argues that CALCRIM No. 570 – an instruction on voluntary manslaughter – created an impermissible presumption in favor of murder. He also contends that CALCRIM No. 640 – another instruction on voluntary manslaughter – violated his due process rights. Appellant did not raise these issues in the trial court, but we consider them on the merits because they affected appellant's substantial rights. (*People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.)

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[3] Appellant's brother was also charged and the two were tried together. Appellant's brother is not a party to this appeal.

When considering a challenge to a jury instruction, we review the instructions as a whole. (*People v. Lopez* (2011) 198 Cal.App.4th 698, 708.) We must presume the jurors were capable of understanding the instructions and that jurors followed the instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

1. CALCRIM No. 570

The challenged jury instruction provides:

"*A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion.*

"The defendant killed someone because of a sudden quarrel or in the heat of passion if:

"1. The defendant was provoked;

"2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment;

"AND

"3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.

"Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection.

"In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time.

"It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment.

> "If enough time passed between the provocation and the killing for a person of average disposition to 'cool off' and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis.
>
> "The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder."[4] (Italics added.)

Appellant argues that the italicized portion at the beginning of the instruction "set[s] up a presumption that the killing of Hendrix was murder rather than manslaughter instead of permitting the jury to begin deliberations on a blank slate with murder and manslaughter presented as worthy of even-handed consideration." According to appellant, the instruction "improperly implied that the prosecution had proven murder."

Appellant's argument the instruction conveyed the prosecution had established murder is not persuasive. The instruction refers to a "killing that would otherwise be murder." It does not state that the killing was murder or that the evidence tended to show the killing was murder. The instruction in no manner suggested that jurors *should* or *must* find that the killing in this case was murder. The language appellant emphasizes is not reasonably susceptible to the interpretation he advances.

Additionally, when the instructions are considered as a whole, a reasonable juror could not find that appellant committed a murder without finding each element of murder. Jurors were instructed that to find murder, "the People must prove that [¶] 1. The defendant committed an act that caused the death of another person; [¶] AND [¶] 2. When the defendant, acted he had a state of mind called malice aforethought." Additionally, the challenged instruction provides that 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." A reasonable juror would have understood these

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[4] Jurors asked whether "to reduce a murder to voluntary manslaughter must all 3 items [in CALCRIM No. 570] be a 'yes?'" (Underscoring omitted.) The trial court answered affirmatively.

instructions to mean that he or she could convict appellant of murder only if he or she found malice aforethought and only if the People proved appellant did not act in the heat of passion. Jurors could not reasonably have understood the instructions as a whole as creating a presumption of murder.

The authority appellant relies on for a contrary result is not analogous. For example, in *People v. Owens* (1994) 27 Cal.App.4th 1155, the instruction at issue informed jurors that the "People have introduced evidence *tending to prove* that there are more than three acts of substantial sexual conduct or lewd and lascivious conduct upon which a conviction in Count I may be based." (*Id*. at p. 1158, italics added.) The court found that the language "tending to prove" carried "the inference that the People have, in fact, established guilt." (*Ibid.*) CALCRIM No. 570 contains no similar language suggesting an inference that the People had established guilt.

In *Mullaney v. Wilbur* (1975) 421 U.S. 684, the high court held that placing the burden of proof to show provocation on a defendant violated due process. (*Id*. at p. 704.) In contrast, CALCRIM No. 570 instructs jurors that the People had the burden to prove an absence of provocation. Specifically, jurors were instructed as follows: "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."

2. CALCRIM No. 640

Consistent with CALCRIM No. 640, the jury was instructed as follows:

> "As to the charge of Murder as alleged in Count One, you will be given verdict forms for guilty and not guilty of first degree murder[,] second degree murder and voluntary manslaughter. [¶] You may consider these different kinds of homicide in whatever order you wish, but I can accept a verdict of guilty or not guilty of Second Degree Murder only if all of you have found the defendant not guilty of first degree murder, and I can accept a verdict of guilty or not guilty of voluntary manslaughter only if all of you have found the defendant not guilty of both first and second degree murder."

Appellant argues that the instruction required the jury to acquit him of second degree murder before considering voluntary manslaughter, and in so doing violated his rights to due process. According to appellant, it precluded a "fair and reliable jury

determination of whether the crime was [voluntary] manslaughter rather than murder and gave an unfair advantage to the prosecution . . . ."

A juror could not have understood the instruction "so as to interfere in any significant way with his consideration of the evidence." (*People v. Mickey* (1991) 54 Cal.3d 612, 673.) Nothing in the instruction suggested that the jury believed it "must return a verdict on the greater offense before it could consider or discuss the lesser included offenses." (*People v. Hunter* (1989) 49 Cal.3d 957, 976.) Moreover, as explained above, jurors could not find appellant committed murder unless they determined that he harbored malice aforethought. CALCRIM No. 640 comports with the procedure announced in *People v. Kurtzman* (1988) 46 Cal.3d 322, 330, 334, and subsequently reaffirmed multiple times. (*People v. Nakahara* (2003) 30 Cal.4th 705, 715; *People v. Riel* (2000) 22 Cal.4th 1153, 1200-1201; *People v. Fields* (1996) 13 Cal.4th 289, 308-311; *People v. Mickey*, *supra*, at p. 673.) Following *Kurtzman* and its progeny, we reject appellant's argument.

Because we find no error, we need not consider appellant's argument that he suffered cumulative prejudice.

DISPOSITION

The judgment is affirmed.

FLIER, J.

We concur:

BIGELOW, P. J.

GRIMES, J.