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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. CHARLES EDWARD JONES, Defendant and Appellant.	B271239 (Los Angeles County Super. Ct. No. BA427152)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura F. Priver, Judge. Affirmed.

Carlo Andreani, 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, Assistant Attorney General, Paul M. Roadarmel, Jr. and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Charles Edward Jones appeals from the judgment following a court trial in which he was convicted of attempted first-degree murder (count 1) and child abuse (count 2). (Pen. Code, §§ 664, 187, subd. (a), 189, 273a, subd. (a).)[1] He raises issues of improper impeachment, prejudicial legal error, discovery violation, and ineffective assistance of counsel. Finding no error, we affirm.

FACTUAL AND PROCEDURAL SUMMARY

Defendant and S.R., the victim in count 1, were married in 2009. They have a son, C.J., who was 10 months old when the events in this case occurred. S.R. also has a son, C.R., from another relationship. C.R. is the victim in count 2, and was nine years old at the time of trial.

On July 13, 2014, defendant was living with S.R. and both boys in a two-bedroom apartment in the City of Los Angeles. The couple argued. Then, in the presence of both children, defendant shot S.R., gathered his belongings, and left the apartment. On July 23, 2014, he was arrested in Chicago.

Defendant was charged in count 1 with attempted willful, deliberate, and premeditated murder of S.R. (§§ 664, 187, subd. (a), 189). Count 1 included several related firearm allegations. (§ 12022.53, subds. (b), (c), (d)). In count 2, defendant was charged with child abuse of C.R., who had witnessed the shooting. (§ 273a, subd (a).) Both counts included allegations of prior serious and violent felony convictions (§ 245, subd. (a)(1)) and prior prison terms (§ 667.5, subd. (b)).

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

The Prosecution's Case

Defendant waived his right to a jury trial and the case was tried to the court. Because defendant does not dispute that he shot S.R., our discussion focuses on evidence relevant to his state of mind on the night in question.

S.R.'s Testimony

S.R. testified that at about 8 p.m. on July 13, 2014, she had an argument with defendant about her plans to go out that night. When defendant said that he wanted S.R. to stay home, she told him that she was going out anyway. The argument did not last long. Defendant left the apartment for about 25 minutes and came back. When he returned, he seemed "angry." Without speaking, defendant walked up to S.R. and shot her twice, once in the hand and once in the stomach. After she had been shot, S.R. began "cussing him out." S.R.'s older child, C.R., saw what had happened and took the younger child to another room. S.R. called 911. Defendant went to the bedroom, got his things, and left without saying a word. S.R. was taken to the hospital where she underwent surgery. Defendant was arrested ten days later in Chicago.

S.R. described defendant as a "good man" and a "great man," who was good to C.R. even before their child, C.J., was born. S.R. harbored no ill will toward defendant and forgave him for shooting her. She did not want defendant to go to jail; she wanted him to be part of her life and the lives of both children.

Over defense objection, the prosecutor impeached S.R. with her preliminary hearing testimony on three points which she could not recall at trial. When defendant returned to the apartment, he walked directly over to her and said, "'We need to get this shit over with.'" Defendant then pulled out the gun,

removed his hat and glasses, and shot her. After the shooting, defendant said as he left the apartment, "'You're never going to see me again.'"

On cross-examination, S.R. testified they had a good relationship before and after they were married. S.R. had her own car and was free to come and go. But on the night of the shooting, their baby was only 10 months old, and defendant was upset because S.R. would "typically stay out until about 2 or 3 in the morning." They had been arguing about this issue on other occasions prior to the shooting. On the night of the shooting, S.R. was very angry because defendant was telling her what to do. When S.R. told defendant that she was going out regardless of what he thought, he left the apartment for 25 minutes. As he left, she told him not to come back. She said this to him even though it was he who paid the rent. S.R. continued the argument by texting him twice, saying in effect, "'Get out of here. I don't want you here. I'm going to sleep on the couch.'" When defendant returned, she said, "'Why you come back?'" She did not want him in the house and wanted him to leave. Defendant replied that he lived there and had a right to be in his own house. About 30 seconds or a minute later, defendant came up to her while she was sitting on the sofa. She raised her foot defensively because he was "coming towards [her]." He pulled out a gun. She raised her hands in the air and he fired the gun. The bullet hit her left hand. She was cursing him when he fired again. Defendant had a shocked look on his face when the gun went off. As defendant went to get his belongings, he told the older boy, "I'm not going to hurt you." The older boy took the baby into another room.

On re-direct, S.R. testified that the gun was about three feet away from her when she was shot. S.R. recalled telling the responding police officers that when defendant entered the apartment, he walked directly over to her. However, S.R. did not recall saying that defendant had stood in front of her, pointed the gun at her face, and said, "'Let's get this over with now.'" She testified that she "probably" told officers that the gun was possibly a .357 caliber firearm.

In response to further cross-examination, S.R. testified that she had said a lot of "mean nasty" things to defendant on the night of the shooting. They both were very angry.

In her concluding testimony, S.R. said that she loved defendant and forgave him.

Officer Romo's Testimony

The responding officer, Judith Romo, testified that she spoke with S.R. after the shooting, before S.R. was taken to the hospital. Romo related several statements made by S.R.: "[T]here had been an argument[,] that he tried to kill her[,] and he had left." When defendant "walked in he said 'Let's get this over with now.'" "At that point [defendant] removed his glasses. He removed a revolver possibly .357 silver . . . from his waistband and pointed [it] at the victim." Defendant repeated his statement, "'I need to get this over with right now.'" S.R. did not understand defendant's statement until "until she saw the gun pointed at her face." S.R. pushed the gun away from her face just as it fired. One shot hit her left hand and the other hit her abdomen. When the shooting occurred, both children were present in the living room watching television.

Romo testified that upon arriving at the apartment, she found "two small children frightened in a bedroom and the victim

laying in the living room." The older child, who was about seven or eight years old, was crying. The child said that his mother and the person that shot her were fighting, and after the shooting, the child ran and hid in his room.

Detective Cruz's Testimony

Detective Jorge Cruz interviewed S.R. in the hospital. Detective Cruz testified that when he showed S.R. a photograph of defendant, she identified defendant as the person who had shot her. S.R. related the following information: Upon returning to the apartment, defendant twice stated that "[w]e might as well get this over with." Defendant then said, "Let's get this over with." When S.R. asked defendant, "Get what over with?" defendant responded by shooting her. After the shooting, defendant went to gather his belongings. As defendant left the apartment, he said, "'You're not gonna see me again.'"

Defense Evidence

Before defendant took the stand, the prosecution indicated that it intended to impeach him with two prior felony convictions of assault with a deadly weapon, one from 1994 and the other from 1999.[2] Defense counsel objected, arguing that the convictions were too remote to be probative of defendant's credibility. The court overruled the objection.

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[2] Both prior convictions were alleged in the information along with three other convictions: a 1997 violation of Health and Safety Code section 11359 (possession of marijuana for sale); a 2003 violation of section 12021, subdivision (a) (possession of a firearm by a felon); and a 2009 violation of Health and Safety Code section 11351 (possession or purchase of a controlled substance for the purpose of sale).

Defendant testified that on July 13, 2014, he was out drinking with friends when S.R. called to ask him to come home. She called again about 40 minutes later and said that she wanted to go out. He told her that she should stay home with the children. This was typical of the arguments they had been having. S.R. often stayed out until 3 a.m. or even 6 a.m., and would arrive home as defendant was helping her older son to get ready for school. Defendant wanted S.R. to stay home more because their baby was still young. Defendant was caring for the children 65 percent of the time.

When defendant came home on the night of the shooting, he "got cursed out. Called everything, you know. It wasn't nice and you know threatening she would take the kids and leave and go find her another boyfriend and so and so and so so and so then called me blah blah this blah blah this all in all I just went in the room. I just left her sitting in the living room." "As soon as I came in the door she started on me." "She told me you know I need to get off my ass and take care of my kids more. I said, 'What you mean?' So she said. 'Watching the kids more.' '[I said,] Oh so you can go run the streets. No.'"

Defendant testified that they frequently had these arguments. Defendant was doing the best he could, but was not sure how S.R. felt about him.

After defendant went to the bedroom to change his clothes, he went to the kitchen to eat dinner. He then went to the living room and tried to play with the baby. S.R. cursed at him and said, "Don't touch the baby 'cause you don't want to watch him." Defendant went back to the kitchen and ate some more food. He returned to the living room and tried to play with the baby. He

was "cursed out again." Defendant was angry because S.R. was calling him "a bunch of MF's, MB's all this typical stuff."

After defendant retrieved a loaded handgun from their bedroom, he went outside because he did not want to argue with S.R. Defendant was "tired of hearing what she had to say. She kept incessantly cursing out and talking crazy to me. I was getting angry so I went outside to sit down. I was downstairs in front of the house."

While he was outside smoking a cigarette, S.R. texted him three times. "She was telling me 'Are you coming back? I hope you don't come back. I want to stay in the bedroom if you do you sleep on the couch but I hope you leave.'" The text messages made him angrier, and after about 30 or 35 minutes he went back inside.

As defendant entered the apartment, S.R. immediately said, "Why did you bring your bitch ass back?" This upset defendant. He testified that he "walked over to her and she looked up at me. That's when I pulled the gun out." When he did this, he was "mad" because S.R. was "constantly" calling him names, threatening to take the children away, find another man, and put him out of his own house. Defendant was not sure if he "dealt with it in the right way but [he] just couldn't deal with it."

Defendant testified that he was only trying to threaten and scare S.R. with the gun, so that she would leave him alone, stop threatening to take the children away, and stop "talking crazy." When he walked up to S.R. with the gun, S.R. tried to kick him and threw up her hands. As S.R. was "crawling back on the couch" with her hands up, defendant's "intention was to scare her but I just shot the gun."

He testified that he did not intend to discharge the gun. He stated that the gun "went off twice. I discharged. I was just squeezing. I squeezed twice and I didn't know she was hit, you know what I mean? I didn't know 'cause I didn't hear a holler or nothing and I didn't look for blood. [¶] I turned around and started walking toward my bedroom and [C.R.] came out of his room. That's when he sees me with a gun in my hand and he saw her crying. He heard the shots. That's what made him came out and he turned to run back in his room. I heard his mom call to him to come get the baby. While I was – while I was putting some things in the backpack."

Defendant testified that he loved S.R. both then and now, that he did not intend to kill her. He did not want to hurt her.

On cross-examination, defendant testified that he "just kind of lost it" when he came back inside and S.R. said, "'Why you bring your bitch ass back.' It set me off. That's when I approached her when she was on the couch." He went straight to her. He pulled out the gun, which he knew was loaded, and stood close to her.

As defendant gestured with his hands, the prosecutor described his movements: "For the record, the defendant . . . has taken his right hand, held it in position as if he's holding a gun with his left hand cupped underneath and pointed straight from his body."

Defendant testified that the gun was "pointed down. I don't know exactly on her but it was pointed down and I still closer. That's when she raised her foot to kick everything. She raised her hand you know and raised her hand she scooted back and I stepped back and that's when it went off. It went off. I just shot." "My hand on the trigger and I squeezed it." When asked

whether he knew that he had fired at least one shot, defendant replied: "Yep. I squeeze. I squeeze." He testified that he did not stop to check whether S.R. was hit because she "didn't holler. I figured she wasn't hit so I turned and walked away." He said that he had taken the gun with him because he wanted to "get rid of it." When he got on the bus, he "started riding," with no particular destination in mind. He did not recall saying, "'Let's get this shit over with.'" He did not say anything when he left after the shooting.

Defendant testified the shooting was "accidental." "[I]t just happened. I wouldn't say rage. I was mad. It just happened." The gun was pointed in her "general direction" but "it wasn't like I was standing over her putting it to her head." "My intention was to go in. I was going to the room, grab some clothes and leave. As soon as I came through the door she started at me again. 'Why you bring your bitch ass back.' I locked the door. I went right to her." "[M]y intention was to scare her, to threaten her so she would quit talking crazy to me . . . ."

Defendant testified that he had been convicted of assault with a deadly weapon in 1994 and 1999.

Closing Arguments

Before closing argument, defendant sought permission to argue the crime of assault with a deadly weapon (§ 245), a lesser related offense of attempted murder. The trial court granted the motion.

Prosecution's Argument.

The prosecution argued the facts were "virtually undisputed." "We know the defendant got upset, went outside. He was gone for a period of time. Immediately upon entering the house again he had the gun. It was loaded. We know virtually

without dispute that [S.R.] was sitting on the couch with the two children[.] We know that she didn't have any type of weapon. We know she didn't make any threat of any physical force or violence towards the defendant, that without provocation the defendant pulled the gun, pointed it at her causing her to assume a defensive position where she raised her hand to block her face and that notwithstanding her efforts to defend herself the defendant not once – not away from her but struck her twice with the bullets, one in the hand and one in the side. We know after he shot her at close range, we know he didn't attend to her, did not check on her well-being. Didn't display any concern or shock as to what he had done but merely fled, not just the city, not just the state, but the entire jurisdiction taking the gun with him. This is not a case of an imperfect self-defense. The defendant's own words as I've indicated."

As to defendant's provocation theory, the prosecution argued "[t]here was nothing that [S.R.] did to provoke him. As a provocation argument there is nothing about the facts that a reasonably prudent person would act rashly and not use judgment in th[ese] circumstances." Even though there was "this ongoing dispute about her going out," we "know the defendant had a cooling off period of time and it demonstrates the willful premeditated deliberate attempted murder." Defendant was free to leave, but instead he went inside and "reinitiated the dispute."

The prosecution argued that nothing indicated S.R. had a grudge or bias against defendant. Rather than attempt to make defendant appear "more guilty," S.R. tried to minimize his culpability. However, the shooting was not accidental. Before he fired the gun, defendant removed his hat and glasses and said, "Let's get this over with." There was no struggle for the gun.

Defendant deliberately pulled the trigger from a distance of three feet. Defendant denied that C.R. was present during the shooting, but S.R. testified that C.R. was on the couch. Even though "defendant cares for his family" and S.R. "still cares for him," the "bottom line" is that the evidence shows he is guilty of attempted willful, premeditated and deliberate murder, and that he committed this crime in front of a young child who will live with what he witnessed for the rest of his life.

Defense Argument

Defense counsel argued the shooting was accidental. Defendant did not intend to shoot the gun, but only to scare S.R. Even S.R. testified that defendant had a shocked look on his face when the gun went off. Because defendant did not intend to kill, he was guilty of the lesser related offense of assault with a deadly weapon.

Alternatively, even if there were an intent to kill, defendant did not harbor malice, and, therefore, he should be acquitted of attempted murder and convicted of attempted voluntary manslaughter. Malice was negated by heat of passion, which in this case was triggered "by a provocation sufficient to cause a person of ordinary and average disposition to act rashly or without due deliberation and reflection."

The couple had been repeatedly arguing about S.R.'s habit of staying out until early morning, leaving their small baby at home. Defendant was upset by being told to leave, and threatened with calls to the police. He was constantly "walking on eggshells," fearful of being falsely accused of a crime. S.R. routinely taunted him about finding another man. While he was sitting outside that night, S.R. texted him and called him names. When he went back inside, "she called him a bitch ass and that

just sent him over the edge. A fight ensued." "He testified that it was such pressure that he just wanted her to stop. That's why he came at her with a gun just to scare her." "I want to make it clear it's not just the name calling. It's not [S.R.] telling him to get out. I believe it's the accumulation of all the fights and threats that caused him to act under the heat of passion. The issue is Mr. Jones's state of mind leading him to this intense emotion such that he pulled a gun and shot her."

As to count 2, defense counsel cited defendant's testimony that C.R. was not in the room during the shooting. Counsel argued that because C.R. was not present, defendant was not guilty of child abuse.

Trial Court's Decision

The trial court found defendant guilty of attempted first degree murder. The court stated that the evidence failed to support defendant's theory of an accidental shooting. The fact that defendant armed himself with a loaded handgun before he went outside indicated that he had the weapon with him during the cooling off period.

When defendant went back inside, he walked directly over to S.R., pointed the gun at her, "and shot relatively quickly is the way they both described it. [¶] I understand Mr. Jones testified he didn't mean to shoot her but he also testified he was angry and shot her two times. [¶] So I have to digest all of that testimony and the victim said it was a fairly quick thing. He walked up to her. She put her hands up and tried to kick at him but then was shot. She was actually shot. I mean first it hit her wrist of her left hand, which she had up in a defensive manner and the second bullet hit her side in the abdomen. So it wasn't like he was not pointing the gun at her when he shot. It's clear

from the circumstantial evidence he was. [¶] So based upon all the testimony as to count 1 the court does find [appellant] guilty. I do find that [appellant] willfully, deliberately, and with premeditation acted and so I find that the premeditation element was there and that to be true . . . ."

As to count 2, the court found defendant guilty based on his "extremely dangerous and abusive" behavior. Because child abuse is a general intent crime, the fact that defendant's animosity was not directed at his children would not exonerate him because the act was so dangerous that it constitutes a violation of the statute.

At a separate proceeding, the prosecution produced testimony and documentary evidence of defendant's prior convictions. The court found that in 1999, defendant was convicted of assault with a deadly weapon, a knife, which constituted a strike felony. As to the 1994 conviction, the court found that the evidence was insufficient to show that it was a strike felony.

After denying defendant's motion to strike the 1999 felony under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*), the court imposed sentence. On count 1, defendant received 7 years to life, which was doubled to 14 years to life because of the prior strike. He received a consecutive term of 25 years to life under section 12022.53, subdivision (d), plus an additional five-year consecutive term under section 667, subdivision (a). All other sentences were stayed under section 654. Defendant filed a timely appeal from the judgment.

DISCUSSION

I

Before he took the stand, defendant sought to bar impeachment with his 1994 and 1999 convictions of assault with a deadly weapon. (§ 245, subd. (a)(1).) In denying the motion, the court pointed out that in a bench trial, the risk of confusing the jury (one of the factors in Evidence Code section 352, subdivision (b)) does not apply, and the court, which already was aware of the prior convictions because they were alleged in the information, would not be confused or misled by impeachment evidence. We find no error. The law is well-settled that any felony involving moral turpitude is relevant for impeachment purposes (*People v. Clark* (2011) 52 Cal.4th 856, 932), and "that assault with a deadly weapon is a crime of moral turpitude. [Citations.]" (*People v. Elwell* (1988) 206 Cal.App.3d 171, 175.)

Defendant relies on the court's hypothetical comment—"if this were a jury trial [then] I may well agree with you that [the prior convictions are] highly prejudicial and they are very remote in time." He argues that this remark constituted a judicial finding that the prior convictions are "very remote and highly prejudicial." As discussed, the hypothetical statement was merely a reference to the fact that there was no danger of misleading a jury. Because there was no such finding, defendant has failed to show that the admission of the impeachment evidence was erroneous. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [all "intendments and presumptions are indulged to support [the judgment] on matters as to which the record is silent"].)

Defendant cites *People v. Rollo* (1977) 20 Cal.3d 109, 118, for the proposition that ""[a]cts of violence . . . generally have

little or no direct bearing on honesty and veracity.'" [Citations.]"[3] However, crimes of moral turpitude are not limited to those offenses in which dishonesty is an element of the crime. Moral turpitude also exists in crimes that involve a general readiness to do evil. (*People v. Chavez* (2000) 84 Cal.App.4th 25, 28.) Assault with a deadly weapon falls within that category. (*People v. Elwell*, *supra*, 206 Cal.App.3d at p. 175.)

Defendant contends his prior convictions are too remote to be probative of his credibility. We do not agree. Crimes that are remote in time are not "automatically inadmissible for impeachment purposes. Even a fairly remote prior conviction is admissible if the defendant has not led a legally blameless life since the time of the remote prior. [Citations.]" (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925–926.)

Following his 1999 conviction of assault with a deadly weapon, defendant sustained numerous convictions: In 2003, he was convicted of two drug related charges and a firearm possession offense, resulting in a 10-year prison sentence. Six years later, in 2009, defendant received a four-year prison term for another drug related conviction. In 2012, he earned another

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[3] *Rollo* was superseded by Proposition 8, which amended the California Constitution to provide in relevant part that "[a]ny prior felony conviction . . . shall subsequently be used without limitation for purposes of impeachment . . . in any criminal proceeding." (Cal. Const., art. I, § 28, subd. (f); see *People v. Castro (*1985*)* 38 Cal.3d 301, 305–306.) Subject to the trial court's discretion under Evidence Code section 352, Proposition 8 ""'authorizes the use of any felony conviction which necessarily involves moral turpitude, even if the immoral trait is one other than dishonesty.'" [Citations.]" (*People v. Edwards* (2013) 57 Cal.4th 658, 723–724.)

felony drug conviction which resulted in a formal probation sentence. Two years later, defendant committed the present offenses. In light of defendant's extensive history of crime, the prior convictions are not too remote in time to be probative of his credibility. (See *People v. Green* (1995) 34 Cal.App.4th 165, 183 [20-year-old prior conviction, followed by additional convictions in 1978, 1985, 1987, 1988, and 1989, created a pattern relevant to defendant's credibility].)

Defendant argues that the similarity of the prior convictions to the charged offenses renders them unduly prejudicial. However, similarity is but one factor to be considered by the trial court in its exercise of discretion. (See *People v. Clark*, *supra*, 52 Cal.4th at p. 932.) ""'Where multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurors to believe 'if he did it before he probably did so this time.' As a general guide, those convictions which are for the same crime should be admitted sparingly. . . ." [¶] . . . No witness including a defendant who elects to testify in his own behalf is entitled to a false aura of veracity.' [Citation.]" (*People v. Muldrow* (1988) 202 Cal.App.3d 636, 646.) The decision whether to admit identical or similar priors rests within the discretion of the trial court. (See *People v. Price* (1991) 1 Cal.4th 324, 412, superseded by statute on other grounds as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161-1165.)

Notably, when the trial court listed the critical facts in this case, it did not mention defendant's criminal record. The court weighed defendant's testimony that he did not intend to harm or to shoot S.R., against his testimony that he was angry and shot

S.R. two times. The court found that defendant intended to shoot S.R. based on the latter testimony.

The record contains substantial evidence to support defendant's conviction of willful, deliberate, and premeditated attempted murder. There was undisputed evidence that after he argued with S.R., defendant armed himself with a loaded pistol, went outside, thought things over, went back inside, and quickly fired the gun at S.R. Given these facts, it is not reasonably probable that exclusion of the prior convictions would have led to a more favorable result. (Evid. Code, § 353, *People v. Watson* (1956) 46 Cal.2d 818, 836.)[4]

II

Defendant contends the trial court applied the wrong legal standard in rejecting his theory of heat of passion. We do not agree.

A. General Legal Principles

First degree murder is the unlawful, premeditated, and deliberate killing of a human being with malice. (*People v. Chun* (2009) 45 Cal.4th 1172, 1181.) Attempted murder "requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citation.] Attempted murder requires express malice, that is, the assailant either desires the victim's death, or knows to a substantial certainty that the victim's death will occur." (*People v. Booker* (2011) 51 Cal.4th 141, 177–178.)

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[4] In light of our determination that the prior convictions were properly admitted, we need not discuss the due process violation claim. (See *People v. Partida* (2005) 37 Cal.4th 428, 439 (*Partida*).)

Attempted voluntary manslaughter is a lesser included offense of attempted murder. (*People v. Thomas* (2012) 53 Cal.4th 771, 813.) Voluntary manslaughter is an unlawful killing "upon a sudden quarrel or heat of passion." (§ 192, subd. (a).) In order to negate malice and reduce a murder to manslaughter, "there must be substantial evidence in the trial record to support a finding that, at the time of the killing, defendant's reason was (1) actually obscured as a result of a strong passion; (2) the passion was provoked by the victim's conduct; and (3) the provocation was sufficient to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection, and from this passion rather than from due deliberation or reflection. [Citations.]" (*People v. Wright* (2015) 242 Cal.App.4th 1461, 1481 (*Wright*).)

"[T]he California test for sufficient provocation, properly understood, has never been whether the victim's provocation would cause an ordinary person of average disposition to kill. (*People v. Beltran* [(2013) 56 Cal.4th 935,] 942.) 'Adopting a standard requiring such provocation that the ordinary person of average disposition would be moved to *kill* focuses on the wrong thing. The proper focus is placed on the defendant's state of mind, not on his particular act. To be adequate, the provocation must be one that would cause an emotion so intense that an ordinary person would simply *react*, without reflection. . . . [T]he anger or other passion must be so strong that the defendant's reaction bypassed his thought process to such an extent that judgment could not and did not intervene. Framed another way, provocation is not evaluated by whether the average person would *act* in a certain way: to kill. Instead, the question is whether the average person would *react* in a certain way: with

his reason and judgment obscured.' (*Id.*, at p. 949.) '[P]rovocation is sufficient [when] . . . it eclipses reflection. A person in this state simply reacts from emotion due to the provocation, without due deliberation or judgment. *If an ordinary person of average disposition, under the same circumstances, would also react in this manner, the provocation is adequate . . . .*' (*Id.* at p. 950; italics added.)" (*Wright*, *supra*, 242 Cal.App.4th at p. 1482.) "The provocation must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment." (*People v. Lee* (1999) 20 Cal.4th 47, 60.)

B. Trial Court's Findings

In rejecting defendant's heat of passion theory, the trial court stated that it had relied on defendant's testimony that "he was angry and I think understandably so, given the argument that had been [an] ongoing problem in the relationship. However, it was not appropriate behavior of the defendant as a result of that argument. I think those are critical facts, the fact that he got the gun out of the bedroom before he went outside for the cooling off period then he went back inside and when he went back inside he walked directly—this wasn't—he walked directly into the door and pointed the gun at the victim and shot relatively quickly is the way they both described it."

Whether defendant's ongoing arguments with S.R. concerning her desire to stay out late and her disparaging and threatening remarks to find a new boyfriend and report him to police would have caused an ordinary person to simply react without reflection presented an issue of fact. However, defendant is not claiming the evidence was insufficient to support the verdict. Instead, he argues the trial court applied the wrong legal

standard by focusing on whether the average person, faced with the same circumstances, would have tried to kill S.R. (See *People v. Beltran*, *supra*, 56 Cal.4th at p. 949 ["Adopting a standard requiring such provocation that the ordinary person of average disposition would be moved to *kill* focuses on the wrong thing. The proper focus is placed on the defendant's state of mind, not on his particular act."].)

Defendant contends that a violation of this legal standard was demonstrated by the trial court's statement that the shooting "was not appropriate *behavior* of the defendant as a result of that argument." (Italics added.) He argues the trial court violated the law by using the words "not appropriate behavior" rather than "reaction without reflection." However, the law permits a trier of fact to consider whether "the provocation was sufficient to cause an ordinary person of average disposition to *act* rashly or without due deliberation and reflection, and from this passion rather than from due deliberation or reflection. [Citations.]" (*Wright*, *supra*, 242 Cal.App.4th at p. 1481 (italics added).)

Defense counsel argued the correct legal standard at trial—that defendant's mental state was obscured by heat of passion, and that he acted under the heat of passion—and the trial court was simply responding to that argument. Because all persons are presumed to know the law (see *People ex rel. Mosk v. Lynam* (1967) 253 Cal.App.2d 959, 967–968), and because a lower court judgment is presumed correct (*Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 564), we find no error.[5]

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[5] In light of our determination that the trial court did not err, we need not discuss the due process violation claim. (See *Partida*, *supra*, 37 Cal.4th at p. 439.)

III

Defendant contends the prosecution committed a *Brady*[6] discovery violation by withholding favorable evidence material to punishment. Respondent contends the *Brady* claim was forfeited because it was not raised at trial. (*People v. Morrison* (2004) 34 Cal.4th 698, 714.) We agree the claim was forfeited, but we address the merits in light of defendant's claim that his trial counsel was ineffective.

After defendant's *Romero* motion was denied, the prosecution stated that S.R., who was not present, wanted to inform the court that defendant had "provided for her and for her child, that she had wanted to try to get him to come home. She forgives him for this incident and she still wants to have contact with Mr. Jones. In addition, they have a child in common and she's interested that Mr. Jones be home to be a father to the young child. She also wanted the court to know Mr. Jones made it a point of not maybe drawing the process out causing trauma to [C.R. by] forcing him to testify. He was concerned about her interests that he always wanted to take an early admission as to guilt but the offer wasn't what he wanted." Following this statement—which defendant refers to as *Brady* material—the trial court imposed sentence under the Three Strikes law.

In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecuton." (*Brady*, *supra*, 373 U.S. at 87.) In *United States v. Agurs* (1976) 427 U.S. 97, 107, the

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[6] *Brady v. Maryland* (1963) 373 U.S. 83.

Supreme Court extended the duty to disclose such evidence even where the accused makes no such request. A true *Brady* violation consists of three elements: (1) evidence "'favorable to the accused,'" (2) must have been "'suppressed' . . . either willfully or inadvertently" by the prosecution, and (3) the evidence must be "material" as to guilt or punishment. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1043, quoting *Strickler v. Greene* (1999) 527 U.S. 263, 281–282.)

Defendant argues that as a result of the suppression of the *Brady* material, the court was unable to consider his entire background before it ruled on his *Romero* motion. Defendant overlooks the fact that S.R. had testified at trial to the alleged *Brady* material. In her testimony, she stated that she still cared for defendant, forgave him, did not want him to go to jail, and wanted him to be a part of her children's lives. In addition, S.R. testified that defendant cared for the family, paid the rent for their apartment, treated her son C.R. as his own son, and was a great man.

"[E]vidence that is presented at trial is not considered suppressed, regardless of whether or not it had previously been disclosed during discovery. [Citations.]" (*People v. Morrison* (2004) 34 Cal.4th 698, 715.) Because the trial court already was aware of S.R.'s positive attitude toward defendant, nothing suggests the trial court would have exercised its discretion differently if the prosecutor had brought her statement to the court's attention before the *Romero* motion was decided. Accordingly, appellant has failed to show that he was prejudiced by the purported *Brady* violation. Because we find no *Brady* violation, we do not reach defendant's related claims of violation of due process and ineffective assistance of trial counsel.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.