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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO NILA ROJAS, Defendant and Appellant.	B281169 (Los Angeles County Super. Ct. No. KA094021)

APPEAL from a judgment of the Superior Court of Los Angeles County, Juan Carlos Dominguez, Judge. Affirmed.

Kevin D. Sheehy, 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, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Francisco Nila Rojas appeals from the judgment following his conviction for first degree murder. Defendant

contends that the trial court erred in not instructing the jury on voluntary manslaughter based on a theory of sudden quarrel or heat of passion. We affirm.

FACTUAL BACKGROUND[1]

In February 2011 defendant and the victim, Claudia Tecuautzin, were living together in an apartment with defendant's brother and sister. Defendant and Tecuautzin were a "couple."

Tecuautzin's cousin Bonifacio Sanchez lived a few blocks away. Sanchez said Tecuautzin was like a sister to him. They usually spoke on the phone at least once a day and saw each other three or four times a week.

On February 18, 2011, Tecuautzin called Sanchez around 7:00 p.m. She was crying. She told Sanchez someone had been withdrawing money from her bank account without her permission.[2] She and Sanchez arranged to go to the bank together the next morning.

Sanchez called Tecuautzin later that same night at 9:00 p.m., but she did not answer. He tried several more times throughout the night without success. Sanchez thought this was unusual. When he got off work at midnight, he went to Tecuautzin's apartment and observed from the outside that the

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[1] The recitation of facts is limited to those relevant to the issue on appeal. The defense presented no witnesses, so the facts are taken from the prosecution's case.

[2] Sanchez initially testified that Tecuautzin told him it was defendant who was withdrawing the money. The court struck this testimony as hearsay and instructed the jury to disregard it. This testimony does not factor into our analysis.

lights were off and the car shared by Tecuautzin and defendant was in the carport. Sanchez went home.

The next morning Sanchez called Tecuautzin around 7:00 a.m., and she again did not answer. He went to her apartment, where defendant's sister told him Tecuautzin had left at 6:00 a.m. Sanchez immediately went to the sheriff's station and reported Tecuautzin missing.

Deputy Sheriff Jose Vasquez took the initial missing persons report from Sanchez. Vasquez contacted defendant and met with him at a gas station later that same day. Defendant said he and Tecuautzin had argued the night before, and she had accused him of taking money from her bank account. He left the apartment to go eat, then went to a bar. He returned home around 2:00 a.m. He said Tecuautzin was upset that he had returned so late, but they went to sleep without any further incident. The last time he saw Tecuautzin was that morning at 6:00 a.m.

Tecuautzin's body was found in a canyon in early March 2011. She had been killed by a gunshot to the head.

PROCEDURE

A jury convicted defendant of one count of first degree murder (Pen. Code, § 187, subd. (a)) and found the allegations regarding a firearm enhancement to be true (§ 12022.53, subd. (d)). The court sentenced defendant to 25 years to life for the murder conviction, with an additional 25 years to life for the enhancement. The court also awarded credits and assessed fines and fees.

Defendant timely appealed.

DISCUSSION

Defendant argues that the trial court erred by not giving "sua sponte jury instructions for voluntary manslaughter as a lesser included offense . . . based on the theory of sudden quarrel/heat of passion." (Italics omitted.) Defendant asserts that this theory was "supported by substantial trial evidence." We disagree.

A court is required to instruct the jury sua sponte on any and all lesser included offenses supported by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 160 (*Breverman*).) "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is ' "evidence from which a jury composed of reasonable [persons] could . . . conclude[]" ' that the lesser offense, but not the greater, was committed." (*Id.* at p. 162, italics added.) "[O]n appeal we employ a de novo standard of review and independently determine whether an instruction on the lesser included offense of voluntary manslaughter should have been given." (*People v. Manriquez* (2005) 37 Cal.4th 547, 584 (*Manriquez*).)

Voluntary manslaughter on a theory of sudden quarrel or heat of passion is a lesser included offense of intentional murder. (*Breverman, supra*, 19 Cal.4th at pp. 153-154.) " '[T]he factor which distinguishes the "heat of passion" form of voluntary manslaughter from murder is provocation. The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct

reasonably believed by the defendant to have been engaged in by the victim. [Citations.] The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*Manriquez, supra*, 37 Cal.4th at pp. 583-584.) Put another way, "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." (*People v. Beltran* (2013) 56 Cal.4th 935, 949, italics added (*Beltran*).) The evidence must show not only that the provocation was sufficient as to an "ordinary person" (an objective test), but also that " '[t]he defendant . . . actually, subjectively, kill[ed] under the heat of passion.' " (*Manriquez, supra*, at pp. 583-584.)

Defendant argues that the evidence indicated "an emotionally explosive argument between [defendant] and Tecuautzin" regarding his taking her money without permission, followed by "her sudden disappearance by 6 a.m. the following morning." Defendant claims that Tecuautzin's "heated accusation . . . supplied the necessary provocation. Their resulting heated argument was a 'sudden quarrel,' plain and simple." Defendant asserts that Tecuautzin's "immediate need to call [her cousin] Sanchez" and the fact that she was crying "underscored the emotional intensity" of the argument. Defendant claims that "Sanchez's demonstrated, continuous and heightened concern and vigilance about Tecuautzin's well-being" that night and the following morning raises an inference that "Sanchez perceived" the argument "to be so heated and so intense

emotionally that Sanchez immediately feared for Tecuautzin's physical well being at [defendant's] hands." That defendant was actually provoked is shown, defendant argues, by the fact that defendant apparently killed Tecuautzin within a few hours after her call with Sanchez, before there was time for defendant's passions to cool.[3]

Defendant also argues the evidence suggested that "Sanchez played a very important personal role in Tecuautzin's personal and business affairs and might even have been romantically involved with her during the convenient morning hours that he would visit her when she was alone at home. A reasonable trier of fact could also readily conclude that a reasonable person in the shoes of Tecuautzin's boyfriend [(i.e., defendant)] would view Sanchez as an intermeddler in the relationship between Tecuautzin and [defendant], and as a possible (or actual) rival for Tecuautzin's affections under [defendant's] own roof. The intensity and ongoing nature of the Tecuautzin/Sanchez relationship could only aggravate the tensions between Tecuautzin and [defendant] during their nighttime altercation on February 18 about her money."

These arguments are unpersuasive. Defendant's speculation that Tecuautzin was romantically involved or otherwise inappropriately close with her cousin is totally unsupported by the evidence and does not merit further discussion. The only possible provocative conduct of which there was evidence was Tecuautzin accusing defendant of taking money from her bank account without permission. This is not

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[3] " ' "[I]f sufficient time has elapsed for the passions of an ordinarily reasonable person to cool, the killing is murder, not manslaughter." ' " (*People v. Avila* (2009) 46 Cal.4th 680, 705.)

the sort of conduct "that would cause an emotion so intense that an ordinary person would simply react, without reflection." (*Beltran, supra*, 56 Cal.4th at p. 949, italics omitted.) While in some cases that determination is better left to a jury, a court may properly decline to instruct on voluntary manslaughter when verbal declarations from the victim "plainly were insufficient to cause an average person to become so inflamed as to lose reason and judgment." (*Manriquez, supra*, 37 Cal.4th at p. 586 [trial court properly denied voluntary manslaughter instruction based on evidence that victim called defendant a " 'mother fucker' " and taunted defendant to use his weapon].) Such is the case here.

There also was no evidence from which the court could conclude that defendant " 'actually, subjectively, kill[ed] under the heat of passion.' " (*Manriquez, supra*, 37 Cal.4th at p. 584.) Contrary to defendant's assertions, there was no evidence of "an emotionally explosive argument" or a "heated accusation." The evidence showed that Tecuautzin was upset to the point of crying, and she shared this with her cousin with whom she spoke frequently. But the record is silent as to the nature of the accusation and defendant's reaction to it because defendant did not testify and there were no living witnesses to the argument. There was no evidence that defendant "exhibited anger, fury, . . . rage," or some other passionate emotion suggesting actual provocation. (*Id.* at p. 585.) Nor can that inference be drawn from Sanchez's concern about Tecuautzin's safety; the more reasonable inference is that Sanchez was concerned because Tecuautzin uncharacteristically did not answer his telephone calls, not because he thought she had provoked defendant into a homicidal rage. And given the lack of evidence of provocation,

defendant's argument that there was insufficient time for him to calm down is irrelevant.

In the absence of substantial evidence of provocation, the trial court did not err in declining to instruct the jury on voluntary manslaughter based on heat of passion or sudden quarrel.

DISPOSITION

The judgment is affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.