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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. DAVID LEE FERNANDEZ, Defendant and Appellant.	B232123 (Los Angeles County Super. Ct. No. MA037601)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hayden Zacky, Judge. Affirmed.

Landra E. Rosenthal, 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, Assistant Attorney General, Steven D. Matthews and Shawn McGahey Webb, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant David Lee Fernandez challenges his conviction for murder. He contends that evidence of a dog scent identification lineup was improperly admitted at trial, that his counsel rendered ineffective assistance in failing to object to the evidence, and that the jury should have been instructed on "heat of passion" voluntary manslaughter. We conclude that appellant has shown no prejudicial error, and affirm.

RELEVANT PROCEDURAL BACKGROUND

On September 27, 2007, an information was filed, charging appellant with the murder of James Beikman (Pen. Code, § 187, subd. (a)).[1] The information also alleged that appellant had suffered two convictions within the scope of the "Three Strikes" law (§§ 677, subds. (b) – (i), 1170.12, subds. (a) – (d)), and served two prior prison terms (§ 667.5, subd. (b)). After appellant initially pleaded nolo contendere, he rejected the prosecution's offer and pleaded not guilty.

Trial was bifurcated on the prior conviction allegations. On March 18, 2011, a jury found appellant guilty of second degree murder. Appellant admitted that he had suffered a prior "strike," and the prosecution elected not to seek trial on the remaining special allegations. On April 4, 2011, the trial court sentenced appellant to a total term of imprisonment of 30 years to life.

FACTS

A. *Prosecution Evidence*

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[1] All further statutory citations are to the Penal Code.

Anthonette Vidal was determined by the trial court to be unavailable as a witness, and portions of her preliminary hearing testimony were presented to the jury.[2] According to Vidal, prior to November 2006, she had known appellant for approximately a year. They lived on the streets of Lancaster and, for a period, were "together." She also knew James Beikman, who lived on the streets at a makeshift campsite that Vidal shared with appellant. Sometime before Beikman's death, appellant showed Vidal a distinctive knife he had acquired.

On November 17, 2006, while Vidal was in appellant's tent, appellant told her that she had "15 minutes to get everybody out of the desert . . . . " Appellant also said that she "didn't want to be a witness to what was gonna happen and pay for it later." As Vidal knew that appellant could act violently, she urged other people in the camp to "get out of the desert," and sounded an alert while riding a bicycle. As she did so, she saw appellant running after Beikman. According to Vidal, appellant was then wearing a T-shirt.

A short time later, in the late afternoon, Vidal was riding her bicycle close to a Valero gas station near Avenue J and Division Street when appellant ran up to her from behind a dairy in the area. Appellant was shirtless, had blood stains on his chest, and carried his knife. He asked Vidal whether she could see the knife and blood, to which she answered affirmatively. Appellant then said, "I had to kill an innocent man." He explained that he had performed the killing to gain the trust of a man called "Loco," whom appellant viewed as controlling a local street gang. Appellant also said that he intended to kill Loco "if [he] went to sleep." Afterward,

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[2] In this testimony, Vidal acknowledged that she had a conviction for a felony.

Vidal found a place of safety away from appellant, and learned that Beikman had been stabbed.

Los Angeles County Sheriff's Department Deputy Sheriff Paul Fernandez testified that on November 17, 2006, he patrolled an area encompassing a Valero gas station and Young's Bar. At approximately 5:30 p.m., he saw a shirtless man talking to a woman seated on a bicycle. Later, Fernandez identified the pair as appellant and Vidal in photographic lineups; in addition, at trial he identified appellant as the shirtless man.

On the date Beikman was killed, Charleen Heasley was working as a bartender in Young's Bar, located on the corner of Trevor Avenue near Avenue J. According to Heasley, her shift ran from 10:00 a.m. until 6:00 p.m. Late in her shift, she heard a commotion outside the bar. She left the bar through its front door and saw an argument between two men, one of whom was shirtless. She recognized neither man and noticed no weapon. As she re-entered the bar, someone said that there had been a fatal stabbing near the bar. At trial, Heasley denied having identified the two men as appellant and Beau Vitagliano to investigating officers. Heasley also denied that she recognized appellant in the courtroom.

At approximately 5:00 p.m., Los Angeles County deputy sheriffs discovered Beikman in the area of Young's Bar, in a planter behind a wall along Trevor Avenue. He had died from a fatal stab wound to the chest. The deputy sheriffs found a knife approximately 75 to 100 yards away in an alley adjoining Trevor Avenue. Later, Vidal identified it as appellant's knife.

Around 10:00 p.m., Ted Hamm, a dog scent consultant, arrived at the crime scene with Joe D'Allura, a dog handler, and a "trailing" dog trained to follow

scents. Using a vacuum device, Hamm created two "scent pads" from the knife; in addition, he created "scent strips" to preserve the scent evidence. After exposure to the crime scene and a scent pad, the dog followed a course that went past the dairy and Valero gas station near Division and J, and ended inconclusively near an apartment building.

On November 26, 2006, appellant was arrested on an unrelated matter at his campsite. Upon arresting appellant, deputy sheriffs obtained two bags containing his personal belongings. From these belongings, Los Angeles County Sheriff's Department Detective Alexander MacArthur created a scent pad. MacArthur and D'Allura then conducted a dog scent identification lineup. After MacArthur arranged the scent pad and three unrelated scent pads in a diamond pattern, D'Allura exposed his trailing dog to a scent pad taken from the knife, and then permitted the dog to sniff each of the scent pads in the pattern. The dog responded to the scent pad taken from appellant's belongings.

On December 28, 2006, when Los Angeles County Sheriff's detectives interviewed Heasley, she said that she had seen two men arguing outside the bar; from photographic lineups she identified the men as appellant and Beau Vitagliano. According to Detective MacArthur, Heasley also said that appellant was shirtless and was holding a knife while arguing with Vitagliano.

The knife found near Beikman disclosed DNA from a major contributor and at least two minor contributors. Detective MacArthur testified that the major contributor was identified as an individual residing in the Antelope Valley who had no connection with Beikman's death. Cheryl Andersen, the criminalist who conducted the DNA analysis, testified that she had included appellant as a potential minority contributor, but that his inclusion was statistically weak.

B. *Defense Evidence*

Appellant presented no evidence.

DISCUSSION

Appellant contends (1) that the evidence of the dog scent identification lineup was improperly admitted, (2) that his counsel rendered ineffective assistance in failing to object to the evidence, and (3) that the trial court erred in failing to instruct the jury, sua sponte, on "heat of passion" voluntary manslaughter as a lesser included offense of murder. For the reasons discussed below, appellant has established no prejudicial error.

A. *Dog Scent Identification Lineup Evidence*

Appellant contends that the evidence regarding the dog scent identification lineup was inadmissible under the "*Kelly* rule" applicable to novel scientific techniques (see *People v. Kelly* (1976) 17 Cal.3d 24). In addition, he argues that the evidence was inadmissible under Evidence Code section 352 because its potential to mislead the jury exceeded its probative value, and that its admission contravened his right to confront witnesses under the Sixth Amendment of the United States Constitution. As explained below, appellant has forfeited these contentions.

Under the *Kelly* rule, "evidence obtained through a new scientific technique may be admitted only after its reliability has been established under a three-pronged test. The first prong requires proof that the technique is generally accepted as reliable in the relevant scientific community. [Citation.] The second prong requires proof that the witness testifying about the technique and its

application is a properly qualified expert on the subject. [Citation.] The third prong requires proof that the person performing the test in the particular case used correct scientific procedures. [Citation.]" (*People v. Bolden* (2002) 29 Cal.4th 515, 544-545.) Ordinarily, proof regarding the first prong is unnecessary once a published appellate decision has affirmed a trial court ruling admitting evidence obtained by the scientific technique. (*Id*. at p. 545.)

In *People v. Mitchell* (2003) 110 Cal.App.4th 772, 784-790, the appellate court held that scent transfer devices were subject to the *Kelly* rule, insofar as they were used to prepare scent pads for use in dog scent identification lineups. In addition, the court concluded that even if the *Kelly* rule were inapplicable to other foundational elements of the lineups, an adequate showing was required regarding them, including that each human has a unique scent, that the scent samples had suffered neither contamination nor degradation, and that the dog could reliably match scents from the samples. (*Id*. at pp. 790-794.) No published decision has affirmed that the scientific community has generally accepted the device used to prepare the scent pads from the knife in the instant case; nor was any foundation offered below regarding the other elements of the lineup.

Because no objections to the evidence regarding the dog scent identification lineup were asserted at trial, appellant has forfeited his contentions. As our Supreme Court has explained "'[Q]uestions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal [citations].' [Citations.]" (*People v. Belmontes* (1988) 45 Cal.3d 744, 766, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Furthermore, the objection before the trial court must be "on the exact ground

being raised on appeal. [Citations.]" (*People v. Bury* (1996) 41 Cal.App.4th 1194, 1201.) This principle is applicable to challenges based on the *Kelly* rule (*People v. Ochoa* (1998) 19 Cal.4th 353, 414), section 352 (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 199), and the Confrontation Clause of the Sixth Amendment (*People v. Burgener* (2003) 29 Cal.4th 833, 869). Accordingly, appellant failed to preserve his contentions for appeal.

B. *Ineffective Assistance of Counsel*

Appellant contends that his defense counsel rendered ineffective assistance by failing to object to the evidence regarding the dog scent identification lineup. "In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.]" (*People v. Jennings* (1991) 53 Cal.3d 334, 357.) Regarding tactical decisions such as objecting to evidence, no such showing is made "when the record does not establish why counsel . . . failed to act in the manner challenged, unless counsel was asked at trial for an explanation and failed to provide one, or unless there could be no satisfactory explanation." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1037.) Moreover, to show ineffective assistance, the defendant "must . . . show prejudice flowing from counsel's performance or lack thereof. [Citations]" (*People v. Jennings, supra*, 53 Cal.3d at p. 357.)

It is unnecessary for us to examine whether defense counsel contravened professional norms in failing to object to the evidence, as appellant suffered no prejudice from its admission. "Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Jennings*, *supra*, 53 Cal.3d at p. 357.) Under this standard, appellant must show that absent the deficient performance, there would have been at least "a significant but something-less-than-50 percent likelihood of a more favorable verdict." (*People v. Howard* (1987) 190 Cal.App.3d 41, 48.)

Under this standard, we discern no prejudice from the admission of the evidence regarding the lineup. The record discloses considerable evidence that supports appellant's conviction independently of the lineup evidence. According to Vidal, before Beikman's death, appellant displayed the knife used to kill Beikman, and announced his intention to take violent action against people at the campsite. Vidal then witnessed appellant chasing Beikman. Shortly afterward, when she saw appellant covered with blood and holding the knife, he said, "I had to kill an innocent man." This evidence was uncontradicted at trial, and was corroborated by Deputy Sheriff Paul Fernandez, who saw two people resembling Vidal and appellant engaged in a conversation. There was also evidence that after first speaking to Vidal, appellant engaged in an angry encounter in front of Young's Bar, near where Beikman's body and the knife were found.

The prosecution placed little emphasis on the evidence regarding the dog scent identification lineup. In testifying regarding the lineup, Detective MacArthur acknowledged that it was not "a 100 percent fail-safe system," that it carried "no guarantee[]," and that it was "an investigative tool." Moreover, although the prosecutor briefly discussed the dog tracking evidence during closing arguments, he made no reference to the lineup. On this record, there is no reasonable likelihood that there would have been a more favorable outcome for appellant if

defense counsel had objected successfully to the evidence regarding the dog scent identification lineup.[3]

C. *"Heat of Passion" Voluntary Manslaughter Instruction*

Appellant contends the trial court erred in failing to instruct the jury sua sponte on voluntary manslaughter based on a sudden quarrel or heat of passion. Generally, voluntary manslaughter based on a sudden quarrel or heat of passion is a lesser included offence of intentional murder. (*People v. Breverman* (1998) 19 Cal.4th 142, 153-154, 160.) The trial court is obligated to instruct on lesser included offenses which the evidence tends to prove (*People v. St. Martin* (1970) 1 Cal.3d 524, 532-533), but not if there is no such evidence (*People v. Breverman*, *supra*, 19 Cal.4th at p. 154) or the pertinent evidence is "minimal and insubstantial" (*People v. Springfield* (1993) 13 Cal.App.4th 1674, 1680). As we explain below, there is no evidence of provocation sufficient to support an instruction regarding voluntary manslaughter.

The factor that distinguishes murder from voluntary manslaughter based on a sudden quarrel or heat of passion is provocation. (*People v. Manriquez* (2005) 37 Cal.4th 547, 583 (*Manriquez*).) As our Supreme Court has explained: "[A]n

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[3] On a related matter, we observe that appellant has raised no contention of error on appeal regarding the evidence that a trailing dog was used to track scent paths from the crime scene. Evidence of this type is ordinarily admissible upon a sufficient showing of the handler's and trailing dog's reliability. (*People v. Craig* (1978) 86 Cal.App.3d 905, 915-916.) Although Hamm exposed his trailing dog to the crime scene and a scent pad created by the vacuum device in order to prepare the dog for tracking, appellant has challenged neither the foundational showing at trial regarding the admission of the dog tracking evidence or his counsel's failure to object to the evidence. Accordingly, he has forfeited any such contention. However, for reasons essentially similar to those discussed

(Fn. continued on next page.)

intent to unlawfully kill reflects malice. [Citations.] An unlawful killing with malice is murder. [Citation.] Nonetheless, an intentional killing is reduced to voluntary manslaughter if other evidence negates malice. Malice is presumptively absent when the defendant acts upon a sudden quarrel or heat of passion on sufficient provocation [citation]." (*Ibid*.)

The requisite provocation is subject to several requirements. (*Manriquez, supra*, 37 Cal.4th at p. 583.) The provocation must be caused by the victim, or reasonably attributed to the victim by the defendant. (*Ibid*.) Furthermore, although the provocative conduct may be physical or verbal, it "must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*Id*. at pp. 583-584.) The provocation is thus assessed under subjective and objective standards: it must actually motivate the defendant's conduct, and also be capable of arousing the passions of a "'"reasonable person."'" (*Id*. at p. 584.)

An instructive application of these principles is found in *Manriquez*, *supra*, 37 Cal.4th 547. There, the defendant was charged with murder following a shooting in a bar. (*Manriquez, supra*, 37 Cal.4th at p. 552.) At trial, there was evidence that the victim approached the defendant in the bar, taunted him, and called him a "motherfucker"; in addition, the victim repeatedly asked the defendant whether he had a gun, and dared him to use it. (*Id*. at pp. 585-586.) On appeal, the defendant contended that the trial court erred in failing to instruct the jury on voluntary manslaughter. (*Id*. at p. 583.) In rejecting the contention, our Supreme Court concluded that the victim's behavior satisfied neither the subjective nor

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above, we would not discern reversible error if we were to examine the contentions.

objective requirements for provocative conduct, as there was no evidence the behavior actually motivated the shooting, and the behavior itself was "insufficient to cause an average person to become so inflamed as to lose reason and judgment." (*Id.* at pp. 585-586.)

Here, there was no evidence that Beikman provoked appellant in any manner. The sole evidence regarding appellant's motivation for killing Beikman came from Vidal, who testified that appellant told her he had killed "an innocent man" in order to curry favor with Loco, whom he also intended to kill. In view of *Manriquez*, this evidence was incapable of establishing the requisite provocation.

Pointing to Heasley's testimony regarding the angry confrontation in front of Young's Bar, appellant contends that the testimony supports the reasonable inference that the participants were Beikman and appellant. We disagree. The jury heard two versions of Heasley's account of the confrontation, neither of which supported an instruction on "heat of passion" voluntary manslaughter.

At trial, Heasley testified that she saw two men whom she did not recognize arguing in front of the bar. Although one of the men was shirtless, Heasley noticed no weapon. Because the confrontation did not involve regular customers of the bar, she returned to the bar. As she re-entered it, someone said there had been a stabbing in the area. This testimony supports no reasonable inference that the confrontation involved Beikman, as Beikman's stabbing had already occurred. In contrast with Heasley's trial testimony, the Los Angeles County Sheriff's Department detectives testified that Heasley identified the two men in front of Young's Bar as appellant and Vitagliano. This version of the confrontation also supports no reasonable inference that Beikman was a participant. Finally, even if Beikman had been involved in the confrontation, neither account suggests that he

provoked it. Accordingly, as the record contained no evidence of the requisite provocation, the trial court was not obliged to instruct the jury on "heat of passion" voluntary manslaughter.

DISPOSITION

The judgment is affirmed.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.