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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DONTAE BOND. Defendant and Appellant.	B279802 (Los Angeles County Super. Ct. No. TA139406)

APPEAL from a judgment of the Superior Court of Los Angeles County, John J. Lonergan, Judge. Affirmed in part and remanded for resentencing.

Peter Gold, 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, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Robert C. Schneider, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Dontae Bond was charged with one count of murder (Penal Code, § 187, subd. (a)) and one count of possession of a firearm by a felon. (Penal Code, former § 12021, subd. (a)(1), now § 29800, subd. (a)(1).) At trial, Bond's former girlfriend, Tina Jones, testified that she witnessed Bond get into a verbal altercation with the victim, and then shoot him. The jury convicted Bond on both counts.

On appeal, Bond argues the trial court erroneously excluded two out-of-court statements Jones made that cast doubt on her credibility. Bond also contends the court had a duty to instruct the jury sua sponte on the heat of passion theory of voluntary manslaughter. We affirm in part and remand for resentencing.

FACTUAL BACKGROUND

A. Summary of the Information

On January 12, 2015, Charles Hicks, a detective with the Los Angeles Police Department, was dispatched to 230 East 120th Street to investigate a homicide. When Hicks arrived at the scene, he observed the body of the deceased, Ronnie Graham, lying in a driveway with multiple gunshot wounds. The driveway was located across the street from a building where Constance Webb resided.

Several months after the shooting, Demetrius Bates, then an inmate in state prison, informed law enforcement that he had information regarding Graham's shooting. On April 7, 2015, Detective Hicks interviewed Bates, who asserted that Dontae Bond had told him he shot Graham. One week later, Hicks interviewed a second witness, Orrin Weathington, who stated that he had seen Bond outside Webb's apartment holding a firearm and arguing with Graham. Shortly thereafter,

Weathington heard several gun shots. A third witness, Bond's former girlfriend, Tina Jones, informed Hicks she had witnessed Bond shoot Graham.

On August 5, 2016, the District Attorney for the County of Los Angeles filed an information charging Bond with one count of murder (Pen. Code, § 187, subd. (a)[1]) and one count of being a felon in possession of a firearm (former § 12021, subd. (a)(1), now § 29800, subd. (a)(1)). The information also included a special allegation asserting that Bond had personally and intentionally discharged a firearm, resulting in death. (§ 12022.53, subd. (d).)

B. Evidence at Trial

1. Witness testimony

a. Testimony of Tina Jones

Tina Jones testified that she had been in a relationship with Bond for five years, and had three children with him. Jones stated that on January 12, 2015, she and Bond, whose gang moniker was "Babyshort", drove to Constance Webb's apartment. Several people were present when they arrived, including Ronnie Graham, Raylorce Gordon and Orrin Weathington.[2] Jones stated that Bond and Graham had been "arguing" earlier in the day, but she had not heard what they were arguing about. While at the apartment, Jones observed Bond and Graham "screaming" and

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1 Unless otherwise noted, all further statutory citations are to the Penal Code.

2 During her testimony, Jones referred to Graham as "Maniac," Weathington as "O-dub" and Gordon as "X-ray." For purposes of clarity, we refer to these individuals by their legal names.

"cussing" at each other. The two men eventually left the apartment, and Jones followed them outside.

After exiting the apartment, Jones entered the passenger seat of Bond's car, which was parked in a driveway across from Webb's building. Jones put on her headphones and began listening to music. She saw Graham and Bond yelling at each other, but could not hear what they were saying. After three or four minutes of arguing, Jones saw Bond pull a silver gun out of his pocket and shoot Graham in the head. Bond then got into the driver seat of the car, and drove away. Minutes later, Bond stopped the vehicle, and began talking to Weathington, who was on a bicycle. After the conversation ended, Bond drove to his uncle's house, where he and Jones stayed for the next week.

On cross-examination, Jones testified that Bond and Graham appeared "angry" during their altercation, and had been yelling at each other very loudly. Jones further asserted, however, that she was not able to hear what they were "screaming" about.

Jones admitted she had consumed alcohol at Webb's apartment, estimating that she drank one cup of hard liquor. Jones also admitted she had been convicted of several crimes during the preceding three years, including prostitution in 2014, residential burglary in 2015 and impersonation by fraud in 2016. Jones explained that she and Bond were arrested together in connection with the burglary charge, and that she had stopped talking to him after the arrest. Jones denied telling Bond that she blamed him for her burglary conviction, and claimed that she still loved him.

Jones also acknowledged she and Bond were engaged in a custody dispute involving their three children, and that she

hoped to regain custody. Jones denied that she blamed Bond for losing custody of the children, which had occurred as a result of the burglary conviction.

b. Testimony of Orrin Weathington

Orrin Weathington testified that on the night of January 12, 2015, he rode his bicycle to Constance Webb's apartment. Weathington saw Bond and Graham talking inside the apartment, but was uncertain whether they were arguing. Weathington stated that he brought a silver revolver to Webb's apartment, which he had wrapped in a sock and placed in his waistband.

Approximately 20 minutes after arriving at Webb's apartment, Weathington decided to leave. As he was moving toward the door, Gordon asked him for his gun. Weathington testified that although he had handed Gordon the revolver, he was uncertain what Gordon had done with the weapon. Weathington further testified that he could not recall whether he had previously told Detective Hicks that he saw Gordon give the gun to Bond. Shortly after exiting the apartment, Weathington heard multiple gunshots. Shortly thereafter, Bond and Jones drove up to Weathington, who was on his bicycle. Jones handed Weathington a gun, which was the same revolver he had previously given to Gordon, and directed him to "get rid" of the weapon.

The prosecution played a recording of an interview Detective Hicks had conducted of Weathington several months after the shooting. Weathington told Hicks that Gordon had asked Weathington for his gun because Bond had been arguing with Graham. Weathington explained that when he handed the gun to Gordon, he believed some "bullshit [was] about to happen."

Weathington then saw Gordon give the gun to Bond. Weathington stated that he exited Webb's apartment, and saw Bond holding the gun while arguing with Graham. Weathington further stated that after Bond had done "what he had to do," Bond and Jones drove up to Weathington, and Jones gave him back the gun he had given to Gordon.

When Detective Hicks asked whether "Babyface" had shot Graham, Weathington responded "yes," but clarified that he had not actually witnessed the shooting. Weathington confirmed, however, that he had seen Gordon give the gun to Bond, and saw Bond holding the gun while arguing with Graham immediately prior to the shooting.

On cross-examination, Weathington testified that while he was at Webb's apartment, he had observed Gordon and Graham engaged in a "bitter," loud argument. Weathington also testified that when he told Detective Hicks that Gordon handed the gun to Bond, he was merely restating information that Hicks had already told him about the incident, explaining: "[Hicks] already knew the story . . . so I just went with what they said." Weathington also asserted he had told Hicks that Gordon gave the gun to Bond to minimize his own liability for the shooting.

c. Testimony of Constance Webb

Constance Webb testified that the court had ordered her to attend the trial. She stated that she could not remember anything that had occurred on the night of the shooting because she was taking a medication that caused her to forget things.

The prosecution played a recording of a telephone conversation between Webb and Rosse Leve, then an inmate in state prison. During the conversation, which occurred the day after the shooting, Webb told Leve she was upset about what had

happened. In response, Leve stated that "he shouldn't have been outside at 3 in the morning." Leve then asked Webb, "so let me get this right, he been arguing with Babyshort? Why they keep getting into it?" In response, Webb stated: "I don't know just over frivolous bullshit and he didn't want him up in the car . . ." Ross then said "Who, Babyshort didn't want him in the car?" Webb stated "yes," and then admonished Leve to "stop saying names over the phone."

Webb testified that she was uncertain whether she was the woman speaking on the recorded call, and denied that "Babyshort" was a reference to Bond.

d. Testimony of Demetrius Bates

Demetrius Bates testified that he told Detective Hicks that Bond had "admitted . . . he murdered [Graham]." Bates further testified, however, that he had fabricated this information in an attempt to avoid prosecution on several burglaries he had been charged with.

The prosecution played a recording of Hicks's interview of Bates. Bates informed Hicks that Bond had said he was at Webb's apartment, and then got into an argument with Graham because Graham had "sucked somebody's dick." Bond told Bates the fight escalated, and that he and Graham went outside the apartment. According to Bates, Bond stated that he then took a gun from another man, and shot Graham six times. Bond then gave the gun to a person on a bicycle, and drove to Bates's house with his girlfriend.

When Hicks asked Bates to clarify the nature of the dispute between Bond and Graham, Bates asserted that the argument began because of "something over [Graham] sucking dick." Bates explained to Hicks that there was a "rumor" on "the street" that

Graham had engaged in homosexual activity while he was in prison. Bates stated that Bond had not told him any additional information about why he shot Graham, but noted that Bond was a "hothead" and "will kill you."

On cross-examination, Bates testified that he had decided to speak with the police about Graham's murder after learning that he was going to be charged "on a string of burglaries." Bates asserted that an officer had assured him his burglary charges would "go away" if he provided information about Graham's shooting. Bates further asserted that he had learned many of the details about the shooting from Facebook postings. He also claimed that Gordon was the person who had told him Bond was the shooter.

e. Testimony of Dontae Bond

Bond, testifying in his own defense, stated that he had traveled to Webb's apartment with Jones on the night of the shooting, and that Weathington, Gordon and Graham were all present when he arrived. Bond stated that he and Graham were members of the same clique of the "East Coast" gang, and that Gordon and Weathington were members of a different "East Coast" clique. Bond claimed he had grown up with Graham, and described him as his "big home."

Bond testified that he saw Gordon and Graham arguing at Webb's apartment. Bond, Jones and Weathington decided to leave. As they were walking toward the door, Bond heard Gordon ask Weathington for a gun. Weathington pulled a revolver that was wrapped in a sock from his waist, and handed it to Gordon. As Bond and Jones were crossing the street outside Webb's apartment, Gordon unwrapped the gun and placed it in his

pocket. Bond testified that after pulling out the gun, Gordon started arguing with Graham about drugs and an unpaid debt.

Bond got into his car with Jones, and then heard several gun shots. Bond looked up and saw Gordon standing over Graham's body. Gordon walked over to Bond's car, handed Bond the gun and told him to give it to Weathington. Bond asserted that he gave the gun to Jones, and that they drove off to find Weathington. After locating Weathington, who was on his bicycle, Jones handed Weathington the weapon. Bond and Jones then drove to a hotel.

Bond testified that approximately two months after the shooting, he and Jones were arrested together for committing a burglary. Defense counsel asked Bond whether Jones had ever told him that she blamed him for her burglary arrest. The prosecution objected on hearsay grounds. In response, defense counsel asserted that Jones's statement to Bond was admissible as a prior inconsistent statement. The court sustained the objection. Defense counsel then asked Bond whether he thought Jones had a "bias against [him] concerning [their] children." The prosecution objected on the ground of "speculation"; the court sustained the objection.

Bond went on to testify that he and Jones were currently involved in a custody dispute over their three children. Bond asserted that he was supposed to get custody of the children, but Jones "told the people [he had committed the burglary so he got sent] to jail." Bond also testified that Jones had stopped talking to him because of the custody dispute and her burglary arrest. Bond claimed Jones had recently told him she wanted him to be dead. Bond believed Jones had fabricated her testimony against

him because she did not like him, and because she was upset about the custody dispute.

2. Closing argument, jury deliberations and verdict

At closing argument, defense counsel argued that the evidence demonstrated Jones's testimony was not credible because she was biased against Bond. Specifically, counsel argued that the evidence showed Jones was angry at Bond "because of that burglary conviction," and because of their custody dispute. According to the defense, Jones's statements and demeanor at trial showed she had an "axe to grind," and that she "hate[d]" Bond because she believed he had "ruined her life." Defense counsel also argued Bates and Weathington were not credible witnesses because they had provided conflicting information about the shooting, and admitted that their statements to the police were intended to minimize their own criminal liability. Defense counsel argued that Bond's testimony that Gordon had committed the shooting was the most likely scenario.

The jury found Bond guilty of first degree murder and possession of a firearm by a felon. The jury also found Bond had personally and intentionally discharged a firearm, resulting in death. (See § 12022.53, subd. (d).)

The court sentenced Bond to an aggregate term of 50 years to life in prison on count one, which consisted of 25 years to life for first degree murder (see § 190, subd. (a)), and an additional consecutive term of 25 years for the true finding on the firearm allegation. (See § 12022.53, subd. (d).) The court sentenced Bond to the upper term of three years in prison for possession of a firearm by a felon, but stayed the sentence.

DISCUSSION

*A. **Bond Has Failed to Establish Any Prejudicial Evidentiary Error***

Bond argues the trial court erred in excluding two out-of-court statements that Tina Jones allegedly made to him and to law enforcement. First, he contends the court erroneously excluded a statement in which Jones admitted she provided false information to the police regarding the burglary in 2015. Second, Bond asserts the court should have allowed him to testify that Jones told him she blamed him for her burglary conviction. Bond argues the first statement was admissible to impeach Jones's credibility, and the second was admissible under the hearsay exception for inconsistent prior statements of a witness.

1. Standard of review

"We review a trial court's decision to exclude evidence for abuse of discretion. [Citation.] The decision to exclude evidence 'will not be disturbed except on a showing [that] the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation].'" (*People v. Peoples* (2016) 62 Cal.4th 718, 745; see also *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10 [trial court's decision to "admit or exclude evidence offered for impeachment" reviewed under abuse of discretion standard]; *People v. Jones* (2013) 57 Cal.4th 899, 956 ["trial court's decision to admit or exclude a hearsay statement under . . . exception [for prior inconsistent statement of a witness] will not be disturbed on appeal absent a showing of abuse of discretion"].)

"[T]he erroneous admission or exclusion of evidence does not require reversal except where the error or errors caused a

miscarriage of justice. [Citation.] '[A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citations.]" (*People v. Richardson* (2008) 43 Cal.4th 959, 1001.)

2. Bond has failed to provide an adequate record to permit review of whether Jones's statements to police were properly excluded

a. Factual summary

Prior to trial, Bond's counsel requested that the court admit a statement Jones made during the murder investigation in which she acknowledged having previously provided false information to police about the burglary she and Bond committed in March of 2015. According to Bond's counsel, Jones's statement showed she had "lied to police about information concerning defendant and the facts of that case." Counsel further asserted that Jones's admission that she had previously lied to law enforcement was "relevant under [Penal Code] section 148.9.[3] It would be false information to a police officer. Therefore, I'm asking for the court to consider it as impeachment for dishonesty not relevant to the case on whether the murder was committed or not, but rather is she a believable witness."

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3 Penal Code section 148.9 provides, in relevant part, that any person who "falsely represents or identifies himself or herself as another person or as a fictitious person to any peace officer. . ., upon a lawful detention or arrest of the person, either to evade the process of the court, or to evade the proper identification of the person by the investigating officer is guilty of a misdemeanor."

The court denied the request, explaining that the defense could introduce evidence that Jones was convicted of residential burglary in 2015, but it would not allow the defense to "go deeper" into the circumstances of the conviction, or the investigation that had preceded it. In response, defense counsel stated that he was "submit[ting]" on the issue.

b. Bond has failed to provide an adequate record

Bond argues that Jones's "lies relating to the prior burglary . . . were relevant to show . . . that her statements to the police could not be believed," and that "she likely lied again when she incriminated Bond in this case."

Bond, however, fails to cite any portion of the record that establishes the content of the statement he now contends was erroneously excluded. Although Bond's counsel informed the trial court that Jones's statement demonstrated she had provided false information to law enforcement about the burglary investigation, nothing in the record shows what she actually said. "It is appellant's burden to affirmatively demonstrate error by an adequate record; error is never presumed." (*People v. Blackwood* (1983) 138 Cal.App.3d 939, 949; see also *People v. Wiley* (1995) 9 Cal.4th 580, 592, fn. 7 [""A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. . . ."""].) "'Failure to provide an adequate record on an issue requires that the issue be resolved against [appellant].' [Citation.]" (*People v. Seneca Ins. Co.* (2004) 116 Cal.App.4th 75, 80.)

Without knowing the content of Jones's statement, we cannot assess whether the trial court abused its discretion in excluding the evidence. Although the court did not specify the

specific basis for its ruling, we presume it excluded Jones's statement under Evidence Code section 352, which provides discretion to exclude relevant evidence if its probative value is substantially outweighed by the probability that its admission would create undue prejudice, confuse the jury or necessitate the undue consumption of time. (See generally *People v. Lavergne* (1971) 4 Cal.3d 735, 741-743 [section 352 provides discretion to exclude relevant impeachment evidence].) As explained by our Supreme Court, "'[T]he latitude section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.' [Citation.]" (*People v. Ayala* (2000) 23 Cal.4th 225, 301.) Without knowing the nature of Jones's purported misstatements to police, we cannot assess whether the court acted within its discretion in excluding the evidence pursuant to section 352 or any other provision in the Evidence Code.

Bond's failure to disclose the specific content of Jones's alleged statement also precludes us from conducting a proper harmless error analysis. As noted above, the erroneous exclusion of evidence requires reversal "'only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citation.]" (*People v. Richardson* (2008) 43 Cal.4th 959, 1001.) Such an analysis is not possible without knowing the nature of the evidence that was excluded.

3. Any error regarding the exclusion of Jones's statement to Bond regarding her burglary conviction was harmless

Bond also argues the court erred when it prohibited him from testifying that Jones told him she blamed him for her burglary conviction. Bond contends Jones's statement was admissible as a prior inconsistent statement of a witness because she had previously testified that she did not tell Bond she blamed him for her conviction. Bond further argues that Jones's statement was relevant to show her "dislike of, and bias against [Bond], giving her a strong motive to lie about his involvement in the charged crimes." The Attorney General does not address whether the court erred in excluding the statement, but contends any error was harmless. We agree.

As the Attorney General notes, although the court did not allow Bond to testify that Jones told him she blamed him for her burglary conviction, the jury did hear a substantial amount of other evidence suggesting that that she might be biased against him. Jones and Bond both testified that they were currently involved in a custody dispute over their three children. Bond stated that he was denied custody of his children because Jones had "blame[d]" him for the burglary, which caused him to "go to jail." Bond also asserted that Jones stopped talking to him as a result of the custody battle, and had told him that "she wanted him to be dead." Bond further contended that he believed Jones fabricated her testimony against him because she did not like him, and because of their ongoing custody dispute. Although Jones denied that she blamed Bond for her burglary arrest, she admitted that she had stopped speaking to him immediately after the arrest. At closing argument, defense counsel emphasized this

evidence to the jury, contending that it showed Jones felt animus toward Bond and was therefore not a credible witness.

Moreover, Jones's testimony was not the only evidence that directly implicated Bond in Graham's shooting. During a recorded interview, Weathington told Detective Hicks he had observed Bond holding a gun and arguing with Graham shortly before the shooting occurred. Weathington also confirmed to Hicks that Bond was the shooter. In a second recorded interview, Demetrius Bates told Hicks that Bond had admitted he was the shooter.

Given the evidence summarized above, we find no reasonable probability that the jury would have reached a different conclusion regarding Bond's guilt had he been permitted to testify that Jones told him she blamed him for the burglary conviction. The jury's verdict shows it did not believe Bond was a credible witness, rejecting his claim that Gordon was the shooter. It is therefore unlikely that the jury would have accorded much weight to Bond's claim that Jones told him she blamed him for the burglary arrest. Moreover, Bond was permitted to testify that Jones had told him she wished he was dead, and then stopped speaking to him. Permitting Bond to further testify that Jones had said she blamed him for the burglary conviction would have added little to the defense's theory that she fabricated her testimony because of animus.[4]

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[4] Bond also appears to argue that the trial court erred when it prohibited him from testifying whether he believed Jones "had a bias against [him] concerning [their] children." The prosecutor objected to this question on the basis of "speculation." The court sustained the objection, presumably concluding that Bond lacked personal knowledge to testify whether Jones harbored bias

*B. **The Trial Court Was Not Required to Instruct the Jury On Voluntary Manslaughter***

Bond next contends that the court had a duty to instruct the jury sua sponte on the heat of passion theory of voluntary manslaughter (see § 192, subd. (a)) as a lesser included offense to the charge of murder.

1. Summary of applicable law

"'The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request.' [Citations.] 'That obligation encompasses instructions on lesser included offenses if there is evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser.' [Citation.]" (*People v. Rogers* (2006) 39 Cal.4th 826, 866; see also *People v. Sedeno* (1974) 10 Cal.3d 703, 715 (*Sedeno*) [overruled on other grounds by *People v. Flannel* (1979) 25 Cal.3d 668 and *People v. Breverman* (1998) 19 Cal.4th 142]; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1215 ["'has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction'"].)

Murder is an unlawful killing with malice. (§ 187; *People v. Lee* (1999) 20 Cal.4th 47, 59.) "Voluntary manslaughter is a lesser included offense of murder when the requisite mental element of malice is negated by a sudden quarrel or heat of

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against him as a result of their custody dispute. Bond's appellate brief argues the court erroneously excluded this evidence on hearsay grounds. As noted, however, that was not the basis for the court's ruling. By failing to address the actual basis for the trial court's evidentiary ruling, Bond has failed to demonstrate error.

passion, or by an unreasonable but good faith belief in the necessity of self-defense." (*People v. Gutierrez* (2003) 112 Cal.App.4th 704, 708.) Voluntary manslaughter under the heat of passion theory (the only theory at issue here) "has both an objective and a subjective component. [Citations.] [¶] '"To satisfy the objective or 'reasonable person' element of this form of voluntary manslaughter, the accused's heat of passion must be due to 'sufficient provocation.'" [Citation.]' [Citation.]. . . . The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citations], 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. [Citations.]" (*People v. Moye* (2009) 47 Cal.4th 537, 549-550 (*Moye*).)

"To satisfy the subjective element of this form of voluntary manslaughter, the accused must be shown to have killed while under 'the actual influence of a strong passion" induced by such provocation. [Citation.] 'Heat of passion arises when "at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment." [Citations.]' [Citation.] '"However, if sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter. . . ." [Citation.]' [Citation.]" (*Moye, supra,* 47 Cal.4th at p. 550.)

"The trial court need not instruct sua sponte on voluntary manslaughter due to heat of passion unless there is evidence sufficient to 'deserve consideration by the jury, i.e., "evidence from which a jury composed of reasonable men could have concluded"' that the accused acted intentionally but without malice. [Citation.] Once there is sufficient evidence to warrant this conclusion, the trial court is obligated to instruct on the theory." (*People v. Wickersham* (1982) 32 Cal.3d 307, 325 [disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 200-201].)

2. There was insufficient evidence to instruct on voluntary manslaughter

Bond argues that "[i]n this case, substantial evidence justified instruction on voluntary manslaughter." The sole evidence Bond cites in support of this argument is testimony from Jones and other witnesses indicating that Bond and Graham got into a "heated argument" at Webb's apartment, and then continued to argue outside the apartment until the moment Bond "pulled out a gun and shot [Graham]." According to Bond, this evidence is sufficient to "support[] a finding that [Bond] only killed [Graham] due to a sudden quarrel or in a heat of passion."

The evidence Bond cites is insufficient to establish either component of the heat of passion theory of manslaughter. As explained above, the objective component requires a showing that the victim committed a provocative act, and that the conduct was sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. Although multiple witnesses did testify that Bond was engaged in a verbal dispute with Graham prior to the shooting, Bond cites no evidence indicating the subject matter of that

dispute. Indeed, the only evidence regarding the nature of the dispute consists of Bates's statement to Hicks that Bond said he had confronted Graham about Graham's alleged homosexual activity. Such evidence is clearly insufficient to support a finding that Graham provoked Bond, or that the nature of his provocation would cause an objective person to act rashly.

Bond, however, appears to contend that a jury could reasonably reject Bates's testimony, and conclude that Bond and Graham were arguing about some other issue; that Graham had provoked the argument; and that the subject matter of the argument, whatever it may have been, was such that it would cause a reasonable person to act rashly. Given the absence of any evidence indicating that Graham did in fact provoke Bond, or that the argument involved an issue that might cause a reasonable person to act rashly, such inferences would be purely speculative. "Speculation is an insufficient basis upon which to require the giving of an instruction on a lesser offense." (*People v. Wilson* (1992) 3 Cal.4th 926, 941.)

There is also no evidence that would have supported a finding on the subjective component of the heat of passion theory of manslaughter. Bond never asserted that he shot Graham out of heat of passion. To the contrary, he maintained that he was not the shooter. Nor has Bond cited any other evidence that would permit the trier of fact to "infer[] that his reason was in fact obscured by passion at the time of the act." (*Sedeno*, *supra*, 10 Cal.3d at p. 719 ["It is not enough that provocation alone be demonstrated. There must also be evidence from which it can be inferred that the defendant's reason was in fact obscured by passion at the time of the act"].) Again, Bond appears to argue the jury could reasonably infer that he subjectively acted under

the heat of passion based on testimony that he was engaged in a verbal argument with Graham immediately prior to the shooting. As explained above, however, without any additional evidence regarding the nature of the dispute or the circumstances of the shooting, it would be purely speculative to conclude that Bond killed while under the influence of a strong passion.

*C. **Bond Is Entitled to a Hearing Regarding his Firearm Enhancement***

Bond argues we should vacate his sentence, and remand for resentencing, pursuant to a recent amendment to section 12022.53 that now provides the trial court discretion to strike a firearm enhancement otherwise applicable under that provision. At the time of Bond's sentencing, former section 12022.53, subdivision (h) prohibited the trial court from striking any firearm enhancement applicable under section 12022.53. In October 2017, however, the Legislature passed S.B. 620, which took effect on January 1, 2018. The statute provides, in relevant part: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section." (§ 12022.53, subd. (h), as amended by Stats. 2017, ch. 682, § 2.) The Attorney General concedes that the amendment applies retroactively to Bond, whose sentence was not final when the provision went into effect. (See *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1080 (*Billingsley*); *People v. Watts* (2018) 22 Cal.App.5th 102, 119.)

This Court has previously held that when, as here, the defendant was subjected to a firearm enhancement prior to the passage of S.B. 620, remand for resentencing is necessary unless

"the record . . . 'clearly indicate[s]' the court would not have exercised discretion to strike the firearm allegation[] had the court known it had that discretion." (*Billingsley, supra,* 22 Cal.App.5th at p. 1081; see also *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 ["a remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement"].) The Attorney General has not identified any evidence in the record that clearly shows the trial court would not have exercised its discretion to strike Bond's firearm enforcement had such discretion existed at the time of the sentencing.[5] Accordingly, we remand the matter to permit the trial court to exercise the discretion it is afforded under the new law.

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[5] The Attorney General does not appear to dispute that Bond is entitled to a sentencing hearing to address his firearm enhancement. The only argument the Attorney General presented on this issue in his appellate brief was that Bond's request for a sentencing hearing was not ripe because, at the time the parties submitted their briefs, the amendment had not yet gone into effect. The Attorney General agreed, however, that the amendment would apply retroactively to Bond once it went into effect. Because the amendment has now taken effect, it does not appear the Attorney General opposes Bond's request to vacate his sentence, and remand for a hearing regarding his firearm enhancement.

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated. The matter is remanded for the limited purpose of allowing the trial court to exercise its discretion under section 12022.53, subdivision (h).

ZELON, J.

We concur:

PERLUSS, P. J.

FEUER, J.