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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. STEVEN DAVID ESTELL, Defendant and Appellant.	B237766 (Los Angeles County Super. Ct. No. MA049193)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bernie C. LaForteza, Judge. Affirmed.

Leslie Conrad, 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, Blythe J. Leszkay and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

The jury found defendant Steven David Estell guilty of the second degree murder of Sandra Jones (Pen. Code, § 187, subd. (a))[1] and disobeying a domestic relations order (§ 273.6, subd. (a)), a misdemeanor. The jury also found that defendant personally used a deadly or dangerous weapon in the commission of the murder. (§ 12022, subd. (b)(1).) Defendant was sentenced to 16 years to life in state prison and a consecutive jail term of one year.

In this timely appeal, defendant contends: (1) the trial court abused its discretion in excluding a relevant portion of his interview with the police; and (2) he was denied effective assistance of counsel when his attorney failed to object to the prosecution's improper closing argument. We conclude the court did not abuse its discretion and defendant was not denied effective assistance of counsel. Accordingly, we affirm the judgment.

STATEMENT OF FACTS

Prosecution Case

Defendant was Jones's boyfriend. They frequently drank to excess, argued, and had violent physical fights. On one occasion, Jones threatened to kill defendant with a knife. On December 17, 2009, defendant and Jones had an angry argument. Defendant kicked in the front door and the bedroom door to get to Jones and punched her in the face. On January 4, 2010, the superior court issued a criminal protective order prohibiting defendant from having contact with Jones. Defendant claimed Jones had hit him on the head with a bottle. He told Jones's neighbor that "he was going to kill her for bashing in his head." A restraining order was issued against defendant.

On May 21, 2010, defendant killed Jones. He knocked her to the floor by a blow to the face and then stood over her and bashed in her head with a wooden baseball bat.

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[1] All statutory references will be to the Penal Code, unless otherwise indicated.

He also beat her with the bat on the back and shoulders. There was no struggle, and Jones had no opportunity to try to defend herself. Jones suffered no defensive wounds, and defendant was uninjured. Defendant pushed some of Jones's pills into her open wounds and covered the upper part of her body with a blanket.

Defendant gave two interviews to the police. In the first interview, he denied any involvement in the death. He said Jones was in her bedroom the evening she died watching soap operas on television and drinking, while he watched the big television in the living room. Everything was cool between them; she was not drunk and they did not really argue or hit each other. They argued "a little bit" that night "but nothing . . . physical." He stated she was an argumentative and slightly violent person. "[S]he was kind of dangerous, . . . but not me." He went out for a while and found her dead when he returned. There was blood on his shoes, which he explained was his own blood from the week before when she stabbed him in the chin with a little fork, not leaving a mark.

In the second interview, defendant stated Jones went off on him every day and less than a year earlier hit him on the head causing a laceration. Defendant admitted he killed her, but it was not intentional. He said she picked up a wooden baseball bat and swung it at him first, before he grabbed it and swung back at her. He denied being aware how many times he hit her or where he disposed of the bat. He stated, "I got tired of getting . . . busted up all the time." He stated that the last time she hit him, which was during the prior year, she locked herself in her room and he broke the door in. Defendant displayed what he stated were the scars and marks of where she had hit him in the past: a large scar on his face; ten staples in his head; and marks under his eye and on his nose. Moreover, she bit him on the lip the previous year.

Defendant was aggressive and violent with his female partners, and with others. He threatened to kill Jones's house mate with an eight-inch knife blade. He threatened to kill his ex-wife on numerous occasions. He tracked her down, made threats, and broke windows of her house, injuring her young son. Defendant was the subject of a restraining order to protect the ex-wife, and in 2009, he violated the order. He was also violent with

an ex-girlfriend with whom he had three children. She obtained a permanent restraining order against him in January 2009.

Defense Case

A friend of Jones testified Jones was abusive and violent toward defendant. Jones would strike him on the head, kick him in the testicles, and push him. On two occasions in 2009, without provocation, she put a knife against his throat and threatened to cut him. She did these things for no reason; he did not provoke her. The friend never saw defendant be violent with Jones and or fight back.

A psychologist testified Jones suffered from intimate partner battering syndrome, post-traumatic stress disorder (PTSD), major depressive disorder, and alcohol dependent disorder. Intimate partner battering syndrome and PTSD affected defendant's perception of the need to use self-defense.

DISCUSSION

Evidentiary Ruling

The prosecution asked the trial court to admit into evidence a redacted version of defendant's interviews with the police. Defendant objected that one of the redactions in the first interview was his statement about an injury Jones inflicted on him in the past: "'She hit me with a bottle. See this injury here.'" Defendant requested that the first interview be admitted, if at all, in its entirety, under the rule of completeness. The court denied defendant's request, finding Evidence Code section 356 did not apply. "[T]he first portion where he talks about his injuries . . . [is] a separate conversation, and the rule of completeness would not apply. . . . [¶] . . . I'll allow the People . . . to admit those areas where he's only talking about the incident as statements against his interest." Defendant's statement about prior injuries "doesn't indicate what happened as opposed to

the defendant said he had injuries. It is two separate -- one is an admission, and the other is a self-serving statement in terms of what happened to him in terms of his injuries."

Defendant contends the ruling was an abuse of discretion. We disagree with the contention.

"On appeal, we apply an abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1140.) "A trial court abuses its discretion when its ruling 'fall[s] "outside the bounds of reason."' [Citations.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 714.)

"'"Only relevant evidence is admissible [citations], and all relevant evidence is admissible unless excluded under the federal or California Constitution or by statute. [Citations.] Relevant evidence is defined in Evidence Code section 210 as evidence 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' The test of relevance is whether the evidence tends '"logically, naturally, and by reasonable inference" to establish material facts . . . . [Citations.]' [Citation.] The trial court has broad discretion in determining the relevance of evidence [citations] . . . . [Citations.]" [Citation.]' [Citation.]" (*People v. Carter* (2005) 36 Cal.4th 1114, 1166–1167.)

Evidence Code section 356 provides: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; . . . and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

"The purpose of [Evidence Code section 356] is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed. [Citation.] Thus, if a party's oral admissions have been introduced in evidence, he may show other portions of the same interview or conversation, even if they are self-serving, which 'have some bearing upon, or connection with, the admission . . . in evidence.' [Citations.]" (*People v. Arias* (1996) 13 Cal.4th 92, 156.) "Application of Evidence Code section 356 hinges on the requirement

that the two portions of a statement be 'on the same subject.'" (*People v. Vines* (2011) 51 Cal.4th 830, 861.)

The subject of the first interview is defendant's claim of a lack of knowledge about who killed Jones and his assertion their relationship the night she died was essentially peaceful and harmonious. The subject of the redacted statement is Jones's hitting him with a bottle on a prior occasion, which left a mark. These are different subjects. The redacted statement has no bearing on defendant's story that everything was fine between them that night and he had nothing to do with her death. Accordingly, the trial court did not abuse its discretion in concluding Evidence Code section 356 did not apply.

Exclusion of the statement was harmless in any event, because, under the circumstances of the case, "it is not reasonably probable that admission of the . . . evidence would have resulted in a more favorable verdict. (*People v. Watson* [(1956] 46 Cal.2d 818, 836.)" (*People v. Arias*, *supra*, 13 Cal.4th at p. 157.) The record contains numerous references to injuries Jones inflicted on defendant during the course of their relationship. Moreover, while it did not come in with the first interview, evidence of this specific prior injury came in through other witnesses and exhibits. The outcome of the trial was not affected by the trial court's ruling.

Ineffective Assistance of Counsel

Defendant contends counsel was ineffective in failing to object to the prosecutor's statement to the jury, "In order for you to find that the defendant killed Miss Jones in the heat of passion, you have to accept his statement that Miss Jones swung the bat at him first." We conclude counsel's failure to object was not ineffective assistance.

"To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably

competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-694.) "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' (*Strickland v. Washington, supra,* 466 U.S. at p. 694; *People v. Riel* (2000) 22 Cal.4th 1153, 1175.)" (*People v. Cunningham, supra,* at p. 1003.)

The jury was instructed in the language of Judicial Council of California Criminal Jury Instructions (2010-2011) CALCRIM No. 570: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of a sudden quarrel or in the heat of passion if: [¶] 1. the defendant was provoked; [¶] 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his or her reasoning or judgment; [¶] and [¶] 3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment. [¶] Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection. [¶] In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time. [¶] It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his or her own standard of conduct. . . . In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment. [¶] If enough time passed between the provocation and the killing for an ordinary person of average disposition to 'cool off' and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as a result

of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder."

"'Murder is the unlawful killing of a human being with malice aforethought. (See § 187, subd. (a).) A murder, however, may be reduced to voluntary manslaughter if the victim engaged in provocative conduct that would cause an ordinary person with an average disposition to act rashly or without due deliberation and reflection.' [Citation.] [¶] Heat of passion has both objective and subjective components. Objectively, the victim's conduct must have been sufficiently provocative to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.] . . . [¶] Subjectively, '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.]' [Citation.]" (*People v. Enraca* (2012) 53 Cal.4th 735, 759.)

Defendant's theory of the case was he killed Jones in self-defense: because of her violence toward him in the past, he believed Jones's swinging the bat at him placed him in imminent danger of great bodily injury. Counsel also asked the jury to consider provocation, to reduce defendant's culpability to voluntary manslaughter but did not advance any basis other than Jones's assault with the bat as the factual basis for a finding of provocation.

Concerning voluntary manslaughter, the prosecution argued to the jury: "In order for the defense to show that the defendant acted out of heat of passion, the defendant has to prove that he was provoked and that the provocation was the type that would excite or arouse the passion in an ordinary, reasonable person in the same circumstances and that the defendant acted under the influence of that passion. [¶] In order for you to find that the defendant killed Miss Jones in the heat of passion, you have to accept his statement that Miss Jones swung the bat at him first."

The prosecutor's statement of the application of the law to this case was correct. The only provocation presented by the record that could have been a "direct and immediate influence" acting on defendant when he killed Jones in May 2010 was Jones's assault with the baseball bat. (CALCRIM No. 570.) The record contains no evidence the killing occurred when he was under the influence of any provocative act other than Jones's assault with a baseball bat. Jones's assaults in 2009 were remote and her recent assault on his chin with a "little fork," which left no mark, was both remote and minor. Defendant's expert did not testify that intimate partner battering syndrome or PTSD would lead defendant to attack Jones if she did not attack him first. Neither at trial nor on appeal has defendant identified a factual basis, apart from the evidence Jones swung the bat at him, to support a finding the killing was in the heat of passion.

Because the prosecution's statement of the law as it applied in this case was unobjectionable, counsel was not ineffective in failing to object to it.

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.