Filed 3/28/12 P. v. Kim CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. SOO DUK KIM, Defendant and Appellant.	B227932 (Los Angeles County Super. Ct. No. GA071852)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael D. Carter, Judge. Reversed.

Wallin & Klarich and Stephen D. Klarich 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 Herbert S. Tetef, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Soo Duk Kim (also known as Brandon Kim) guilty of second degree murder of his girlfriend, Susan Kim, with a knife, and found that he was sane at the time of the offense. His appeal challenges a number of trial court rulings, in which we find no error. However we conclude that the trial court erred prejudicially in failing to instruct the jury on the lesser included offense of voluntary manslaughter. On that ground, we reverse the judgment.

BACKGROUND

Soo Kim and his niece Christina lived with his girlfriend Susan Kim, in Susan Kim's house in Glendale.[1] Soo was unemployed. Susan's daughter, Jane Moon, attended college in San Diego, but periodically stayed at her mother's house during weekends and school breaks.

At about 8:00 or 9:00 in the morning on Sunday, December 16, 2007, Jane was awakened in her upstairs bedroom by a loud argument downstairs between Susan and Soo. After a few minutes of fighting, Susan came upstairs and apologized to Jane for waking her up.[2]

When Jane reawoke a few hours later, she went downstairs to take a shower in a bathroom adjoining her mother's bedroom. She again heard her mother and Soo fighting in their downstairs bedroom, as they had been earlier. But when they became aware of her presence nearby, she believed, she heard Soo whisper something that she did not hear, to which Susan responded, "'Oh, so you're going to kill me?'"

The fighting between Susan and Soo continued after Jane's shower. It ended when Soo left the house, after he had "thrown around" "shoes and stuff" (such as Susan's outdoor sandals) in the driveway. Soo appeared to Jane at that time still to be upset about his fight with Susan. Two neighbors saw Soo back his white Lexus out of Susan's

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[1] In order to minimize confusion with the parties' similar names, this opinion will refer to Susan Kim as Susan, and to appellant Soo Duk Kim as Soo, the name he told the police they should use.

[2] Jane Moon had been out the night before at the wedding of her long-time boyfriend's brother. By the time of the trial, Jane and her boyfriend were married.

driveway that afternoon, driving uncharacteristically fast, with screeching of tires, almost clipping the house on his way out.

After Soo left the house, Susan and Jane cleaned up the mess and Susan left a few minutes later. She returned that afternoon at about 3:00, just as Jane and her boyfriend, Chris, were leaving for some errands.

When Jane and Chris returned to the house early that evening, Jane went inside while Chris waited in the car for her to open the electric gate. In the kitchen she found her mother lying on the floor in a pool of blood, with a white towel over her face. She screamed for Chris, who came and pulled her from the house. They called the police at 6:40 p.m.

The police found Susan's body in the blood-spattered kitchen, and a bloody knife. They found no blood or evidence of struggle in other parts of the house. She was later determined to have died from multiple stab wounds, some of them fatal, which could not have been self-inflicted.

In the early morning hours the next day, at about 4:15 a.m., the police were watching an address on Occidental Boulevard when they saw a white Lexus enter the building's underground parking lot, and leave about five minutes later, driving beyond the speed limit. They followed the car, which stopped for about five minutes at a motel a few miles away, while the driver went into the motel office.

After the Lexus left the motel, straddling lanes, the driver pulled into a gas station when the police turned on their red lights. The driver identified himself as Soo Kim. He had a large horizontal cut on his left wrist, which was beginning to scab, and bloodstains on his sweatpants. He was calm and cooperative when the police handcuffed him, and he responded to their questions in English. Soo's pockets contained a razor blade from a disposable razor wrapped inside a rolled up tissue with a small amount of blood on it, and about 12 feet of speaker wire.

Later that day the police went to a Los Angeles motel, where in a fourth-floor trash receptacle they found (among other things) bloody clothes, a cell phone without a battery, and a plastic card room key. The room key opened a nearby room in the motel,

which had blood smears on the edge of the bed sheet, and blood driplets on the bathroom floor.[3] Blood samples were taken, but no DNA or other testing was done to determine whose blood was on any of the clothes or other items found in the house, on Soo, or at the motel.

At the Glendale police station, Detective Frank got the impression that Soo's fluency in English was very limited, so he called for Detective Prokosch, a Korean police officer who was fluent in the Korean language, before he interviewed Soo Kim. Before Prokosch arrived about a half-hour later, however, Soo asked him—in English, and not in response to any question—"'Is she dead? Is the girl dead?'" (Frank stalled in response, giving an answer that deferred the discussion until later.) Frank saw cuts on both of Soo's wrists, consistent with having been made by razor blades. Frank applied dressings to the cuts.

When Detective Prokosch arrived at the station, Frank interviewed Soo. At the outset of the interview, Detective Frank told Soo he could speak in English if he wanted, but Soo chose to be interviewed in Korean. Prokosch translated Frank's questions and Soo's answers. The interview was recorded, from which a 21-page transcript was made. Prokosch later reviewed and corrected the transcript in some particulars. The transcript, and Prokosch's corrections to it, were stipulated to be an accurate transcription of the recording. The recorded interview was played for the jury (with a minor redaction to which the parties agreed), and copies of the transcript were provided to the jury.

At Detective Frank's direction, Detective Prokosch began by translating for Soo the *Miranda* warnings from a card used by the Glendale Police Department, which Soo said he understood. Soo then told Frank that at about 3:00 in the afternoon the day before (Sunday, December 16, 2007), he and Susan, his girlfriend that he had been dating for about a year, were arguing in the kitchen of her house, where he lived with her. The argument was because he had been caught using marijuana a few days earlier. He said

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[3] The police apparently were acting on information they had received from Soo in searching the motel trash receptacle and identifying the room that would be opened by the plastic key they found. And a cell phone battery had been found near Susan's body.

that Susan had taken his key, and told him to go to live with his mother in Korea for a while. Soo said that the way Susan had talked to him was abusive and rude, which upset him.

Soo said that he had grabbed her head and hit it against the wall. Susan screamed and fell down, and Soo, acting unintentionally or unknowingly, grabbed a knife and stabbed her in the stomach. Soo affirmed that he remembered what had occurred during the stabbing, though he was momentarily crazy when it happened. He told Frank where he had obtained the knife, and said that he had hit Susan's head against the kitchen wall, where an indentation was found in the drywall. Without a request by Frank, Soo voluntarily made a drawing of the kitchen, showing where the knives were kept, where Susan's head was pushed into the wall, and where Susan's body lay, next to a fallen chair. Soo said that he then drove off in a hurry, to go somewhere to commit suicide.

In a one-count information, Soo was charged with the crime of willful, deliberate, premeditated murder of Susan, with malice aforethought, in violation of Penal Code section 187, subdivision (a). The information alleged also that he personally used a knife in committing the murder. Soo pleaded not guilty, and not guilty by reason of insanity.

After an evidentiary hearing, the trial court denied Soo's motion under Penal Code section 1538.5, seeking suppression of the statements he made to the police and all observations of him at the time of his arrest on the ground that the arrest had been without probable cause. After hearing testimony from Detectives Frank and Prokosch and receiving evidence of the admonition Prokosch had given Soo before he was interviewed, the court also denied Soo's motion to exclude evidence of his statements to police. And during his trial, the court denied Soo's request to preclude the prosecution from having witnesses identify Susan using a photograph of Susan and Jane together while Susan was alive.

After hearing the prosecution's evidence described above, Soo presented the testimony of a forensic psychologist and psychiatric nurse practitioner, Dr. Jungyeol Oh, in his defense. Dr. Oh testified that she interviewed Soo many times, administered a number of neuropsychological tests, and reviewed his and his family's medical and

psychiatric history and records from the United States and Korea (including information that his mother was diagnosed with schizophrenia, that his sister was diagnosed with bipolar affective disorder, that as a teenager Soo had made at least one attempt at suicide and had twice attempted suicide when his psychotropic medications were changed while he was imprisoned after this incident). Dr. Oh had also reviewed evidence regarding Soo's behavior during and after Susan's killing, and his statements to the police.

Based on her evaluation of these results, Dr. Oh concluded that Soo suffered from a mood disorder, which she identified as schizoaffective disorder bipolar type—a combination of schizoprenia and affective disorder. Dr. Oh testified that a person suffering from such a psychosis might have delusions, auditory hallucinations, and command hallucinations. And someone like Soo, with the bipolar type of this psychosis, would experience changes in mood in which these symptoms would come and go in response to stress and other environmental factors. In her opinion, during a manic phase a person suffering from a schizoaffective disorder bipolar type is irrational, not in control, out of touch with reality, cannot think in a rational manner, and cannot plan his actions. In Dr. Oh's opinion, the stress of humiliation after having his key taken away and being kicked out of his girlfriend's house could be a stressor sufficient to induce such a manic frenzy in someone suffering from this condition. And though unusual, it is possible for such a psychotic state to last for as short a period of time as 30 seconds to a few minutes.

Dr. Sanjay Sahgal, a psychiatrist called by the prosecution, testified in rebuttal that indications that Soo was not suffering a schizoprenic episode when he killed Susan were shown by the fact that it was during an argument that he became angry with Susan, and that he was cooperative with the police afterward. He testified that because even the shortest psychotic episodes last more than a few minutes, under the circumstances shown by the evidence it was unlikely, though not impossible, that Soo had a psychotic episode when he killed Susan.

The jury returned a verdict finding Soo not guilty of first degree murder, guilty of second degree murder, and finding true the allegation that he had personally used a deadly and dangerous weapon, a knife.

After hearing further testimony in the sanity phase of Soo's trial, concerning Soo's mental condition (including Dr. Oh's testimony that Soo reported hearing voices telling him to "kill the devil and kill yourself"), the jury found that Soo was legally sane at the time of his crime. The court sentenced Soo to 16 years to life in prison. Soo filed a timely appeal.

DISCUSSION

Soo challenges his conviction on four grounds. He argues that the admission into evidence of a photograph of the victim was a prejudicial abuse of discretion; that the trial court prejudicially erred by permitting Jane Moon to testify that she overheard her mother say, "Oh, so you're going to kill me?" during her argument with Soo; that his statements to the police should have been excluded, because he was not given proper advice about his *Miranda* rights; and that the trial court improperly refused to instruct the jury on the lesser included offense of voluntary manslaughter. We find merit only in the last of these contentions.

1. The Admission of Susan Kim's Photograph Was Not Prejudicial Error.

The defense objected to the admission of a photograph of Susan and Jane Moon together while Susan was alive, which the defense described as a "very nice picture of the decedent and her daughter in happier times." The objection at trial (argued out of the jury's presence) was that the picture was irrelevant and its use was unnecessary for the victim's identification. The trial court overruled the objection, ruling that it was admissible as an element of the prosecution's proof. On appeal, Soo argues that the photograph was irrelevant, and unduly prejudicial.

Soo asserts on appeal that the photograph deprived him of his rights under the state and federal constitutions to a fair trial, to due process of law, and to confront and cross-examine the witnesses against him. Not only did he not mention those grounds in the trial court, in this court his brief does no more that state them as a one-sentence conclusion.

Soo's central contention in the trial court, and in this court, is that exposing the jury to the victim's photograph while she was alive was an unnecessary appeal to the

jury's sympathy, that "could have resulted in a different verdict by the jury had the photograph and related testimony been excluded." We are mindful that courts have been cautioned to use care in admitting photographs of murder victims while they were alive, due to the "risk that the photograph will merely generate sympathy for the victims." (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1230, and cases cited therein.) However, we find no error, and no prejudice, in the trial court's ruling.

The photograph was not irrelevant, even though it plainly was not indispensible to the prosecution. (*People v. Martinez* (2003) 31 Cal.4th 673, 692 [no error to admit photograph of murder victim while alive for identification purposes during examination of witnesses]; *People v. DeSantis*, *supra*, 2 Cal.4th at p. 1230 [photograph of victim while alive was relevant for identification]; *People v. Smithey* (1999) 20 Cal.4th 936, 975 [photograph of victim while alive was relevant even if victim's status as live person was not in issue, and could not have been unduly prejudicial].)

Soo's defense in this case was not that he did not kill Susan, or that Susan's behavior was such as to reasonably provoke her murder. Soo's defense admitted that he had killed Susan during a "classic domestic argument"; he diagrammed for the police the kitchen and the position of Susan's body after he stabbed her; and he told them that he had hit Susan's head against the kitchen wall and had stabbed her because she had spoken disrespectfully to him, she had taken away his key to her house, and she had told him to go back to Korea. This plainly showed that Soo had intentionally killed Susan (with or without malice) without having reasonable or legal justification for his acts. The jury undoubtedly had sympathy for Susan, the innocent victim of a bloody murder, committed—even according to the defendant—during a senseless psychotic rage. However, nothing in the record provides any basis on which to conclude that the jury's exposure to this single photograph exacerbated that unavoidable sympathy, that it led the jury to reject Soo's defense that his psychosis precluded him from forming the requisite mental intent, or affected the trial's outcome in any way. (*People v. Thomas* (1992) 2 Cal.4th 489, 523; see *People v. Rich* (1988) 45 Cal.3d 1036, 1089-1090 [jury is presumed to have heeded instruction not to be swayed by passion or prejudice].)

2. The Trial Court Did Not Err By Permitting Jane Moon to Testify About Susan's Statement to Soo.

In the trial court, Soo unsuccessfully sought to exclude, as inadmissible hearsay, Jane Moon's testimony that during her mother's argument with Soo she had overheard Soo whisper something to her mother (apparently out of awareness that Jane might be nearby), and her mother's response to Soo, "Oh, so you're going to kill me?" Hearsay is evidence of a statement made other than by the witness at the hearing, offered to prove the truth of the matter stated. (Evid. Code § 1200, subd. (a).) The trial court held that Jane Moon's testimony about Susan's overheard statement was admissible under Evidence Code section 1240, which provides that a statement is not made inadmissible by the hearsay rule if it purports to describe a condition perceived by the declarant, and was made spontaneously under the stress of excitement caused by that perception.

Whether the requirements of the spontaneous statement exception to the hearsay rule are satisfied is ordinarily a question for the trial court. The court's decision to admit evidence under the spontaneous statement exception to the hearsay rule is reviewed for abuse of discretion. (*People v. Stanphill* (2009) 170 Cal.App.4th 61, 73.)

Soo argued in the trial court, and argues in this appeal, that the statement did not come within Evidence Code section 1240's spontaneous statement exception to the hearsay rule, because there was no sufficient showing that when Susan made the statement she was suffering sufficient stress and excitement. The prosecution countered in the trial court that the requisite stress and excitement was shown by the fact that the statement was made in the course of a heated argument. On appeal, however, Respondent argues that Susan's statement was not hearsay at all, but was merely a question, which was not offered to prove the truth of any matter stated.

It is true that Jane Moon had not heard Soo say that he planned to kill Susan, or that Susan had said she actually heard him make such a statement. But if Susan's overheard inquiry had any relevance at all, it was because it carried the implication that Susan had stated her inquiry—"Oh, so you're going to kill me?"—in response to

something Soo had said or done. Unless it implied some statement or conduct by Soo, Susan's overheard question would not be relevant to any issue being tried.

Jane Moon's testimony about the overheard statement raised an implication that Susan had understood Soo to have in some manner threatened her. Jane Moon reported Susan's out-of-court statement, and her testimony therefore also reported the implied statement that had prompted Susan's inquiring response, "Oh, so you're going to kill me?" It left for the jury to decide the meaning that should be attributed to the exchange between Soo and Susan—whether Susan's question should be taken to mean that Soo had said or done something to threaten Susan, and what Soo's statement or conduct might have been.

The jury might well have understood Jane Moon's testimony to convey not the literal truth of Susan's statement—that Soo intended to kill her—but rather merely the fact that Soo had made a threat of that nature, without regard to whether it was or was not true. Without regard to the truth of the implication that Soo actually intended to kill Susan, the statement, implying such a threat, might (even if not taken literally) constitute strong evidence of the nature and depth of the parties' argument, and might be understood to evidence also Soo's deliberation and premeditation, elements of the prosecution's proof of the charge of first degree murder.[4]

To the extent Jane Moon's testimony about Susan's out-of-court statement was offered to prove that Soo intended to kill Susan, it was being offered for its truth, and was for that purpose hearsay. But to the extent it was offered to prove that Susan and Soo were having a heated argument, in which threats about killing—whether or not true—were being expressed, the statement was plainly relevant, and was not hearsay. However, the purpose for which the testimony was offered, and whether it was or was not hearsay, is in this case of little importance. The testimony was, in either case, admissible.

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[4] That the jury acquitted Soo of first degree murder indicates that it did not accept Jane Moon's testimony as evidence that Soo premeditated Susan's murder.

The evidence about the statement Jane Moon overheard Susan to make was admissible as non-hearsay evidence of the nature and depth of the parties' argument in the hours before Susan was killed, and perhaps of Soo's state of mind at the time. And if taken as evidence that Soo had in some manner expressed his intention to kill Susan, it was hearsay, admissible under the spontaneous statement exception to the hearsay rule. Susan's inquiry, "Oh, so you're going to kill me?" purports to describe a condition perceived by Susan—Soo's intention to kill her—and it was made spontaneously under the stress of excitement during the heated argument in which the threat was made. (Evid. Code § 1240.)

Soo contends, to the contrary, the fact that Soo and Susan were then whispering in order to avoid being heard by Jane Moon shows that their argument was not then so heated, and the overheard statement was not the product of spontaneous excitement. But the evidence is also sufficient to show otherwise, that—as Soo's defense contended—the argument was so stressful, over a period of hours, as to induce his psychotic episode. The trial court was well within its discretion in finding the statement admissible.

3. Soo Received Proper Instruction As To His Rights Under *Miranda.*

Soo contends that because the *Miranda* warnings he was given by the police after his arrest did not properly advise him of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), his consent to talk to the police was not voluntary and his resulting confession should have been suppressed. We find that Soo was properly advised of his rights under *Miranda*, including that he could remain silent and refrain from talking with the police; that what he would say to the police might later be used in court; that before talking to the police he could have his lawyer present; and that if he wanted a lawyer but could not afford to pay for one, the court would arrange for a lawyer without cost to him. Because he knowingly, intelligently, and voluntarily waived those rights after being properly advised of them, we find no error.

The trial court conducted a hearing under Evidence Code section 402 before the trial began, in order to resolve the defense motion to suppress the recording and transcript of Soo's statements to the police after his arrest on the ground that the *Miranda* warnings

he was given were improper. At the hearing Detective Frank testified that he interviewed Soo at the Glendale police station shortly after his arrest, using Detective Prokosch to translate his questions and Soo's answers.[5]

At Detective Frank's direction, Prokosch translated the *Miranda* warnings from a card used by the Glendale Police Department. In Korean, he told Soo:

> [Prokosch]: Before we start, before the policemen start investigation, I have several things to mention.
>
> [Soo]: Yes.
>
> [Prokosch]: Before that . . . . just to let you know that . . . you may remain silent. . . you may select not to comment anything.
>
> [Soo]: Yes.
>
> [Prokosch]: And, what you are going to talk to us may be used in the court later. OK? During this conversation, or before you start the conversation, you may have your lawyer. OK? If you want a lawyer but you can't afford one financially, the court may arrange one for free. Do you understand?
>
> [Soo]: Yes.[6]

Detective Prokosch testified, under questioning by the defense, that in this context, the words used for "may" and "can" are interchangeable in Korean. When he told Soo that "you may remain silent," it means also "you can remain silent"; when he said "you may select not to comment anything," it means also "you can select not to comment anything"; and when he said "you may have your lawyer," it means also "you can have your lawyer." He testified that his advice that Soo "may remain silent" and that he "may select not to comment anything" constituted advice that Soo had a right to remain silent,

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[5] Detective Frank saw that Korean was Soo's first language, and had earlier testified that "[e]ven though I was able to converse with the defendant on a limited basis, it was clear to me that without an interpreter I didn't feel he would understand his Miranda rights."

[6] The transcript was stipulated to be an accurate transcription of the audio recording of the interview.

and that if he chose, he did not have to speak with the police—despite the fact that he did not use the words "the right."

Based on this testimony, the defense argued that telling Soo he may remain silent, and he may have a lawyer, is not the same as telling him that he has a *right* to remain silent and to have a lawyer. A right is mandatory, he argued, but "may" or "can" is permissive.

In *Miranda*, *supra*, 384 U.S. 436, the United States Supreme Court established procedural safeguards requiring that before custodial interrogations police advise criminal suspects of their rights under the Fifth and Fourteenth Amendments. A suspect must be told "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." (*Id.* at p. 479; *Duckworth v. Eagan* (1989) 492 U.S. 195, 201, 202.)

However, as Soo's appeal recognizes, as long as the substance of these warnings is conveyed, the words used are immaterial. (*Duckworth v. Eagan*, *supra*, 492 U.S. at pp. 202-203; *California v. Prysock* (1981) 453 U.S. 355, 359 ["the 'rigidity' of *Miranda* [does not] extend to the precise formulation of the warnings given a criminal defendant," and "no talismanic incantation [is] required to satisfy its strictures."].)

The trial court correctly framed the issue under these authorities. The inquiry is simply whether the warnings reasonably "convey [ ] to [a suspect] his rights as required by *Miranda*." (*California v. Prysock*, *supra*, 453 U.S. at p. 361.) In other words, did Soo understand that these were things he could do? On that question the prosecution had the burden of proof. (*People v. Hill* (1992) 3 Cal.4th 959, 979)

The trial court concluded that the evidence showed the warnings given by Prokosch accurately advised Soo that if he talked to the police, anything he talked about may come back and be used in court, and that he could have a lawyer if he wanted, even if he could not afford one. Not only did Soo make no indication that he did not understand these rights, the trial court noted, he affirmatively responded that he did, and he indicated that he wished to speak with the police about Susan's stabbing. On that

basis the trial court denied the motion to suppress Soo's statements. The record amply supports its ruling.

4. The Trial Court Erred In Refusing To Instruct The Jury On The Lesser Included Offense Of Voluntary Manslaughter.

Second degree murder, of which Soo was convicted, is the unlawful killing of another with malice aforethought (Pen. Code, § 187, subd. (a)), but without the features, such as deliberation and premeditation, that classify the murder as first degree (Pen. Code, § 189). Voluntary manslaughter, a lesser included offense of murder, is the unlawful killing of another without malice. (Pen. Code, § 192.) The defendant's mental state is the crux of the distinction between murder and manslaughter. (*People v. Bolin* (1998) 18 Cal.4th 297, 329.) "[A] defendant who intentionally and unlawfully kills [nonetheless] lacks malice . . . when [he] acts in a 'sudden quarrel or heat of passion' [or in an] unreasonable but good faith belief in having to act in self-defense." (*People v. Barton* (1995) 12 Cal.4th 186, 199; *People v. Rios* (2000) 23 Cal.4th 450, 460.)

Malice ordinarily is presumed from proof that the defendant intentionally committed the act of killing. (*People v. Roy* (1971) 18 Cal.App.3d 537, 551; *People v. Love* (1980) 111 Cal.App.3d 98, 105.) However, when a defendant acts in a "'sudden quarrel or heat of passion" [citation],'" he reduces an intentional unlawful killing from murder to voluntary manslaughter, "by *negating the element of malice* that otherwise inheres in such a homicide." (*People v. Breverman* (1998) 19 Cal.4th 142, 154; *People v. Rios*, *supra*, 23 Cal.4th at p. 461.)

If the evidence is sufficient to support a determination that the defendant acted from the provocation of a sudden quarrel or heat of passion, the jury must be instructed that it would be entitled to find that he committed the lesser crime of voluntary manslaughter. (*People v. Barton*, *supra*, 12 Cal.4th at pp. 196, 199-203 [trial court must instruct on heat-of-passion and unreasonable self-defense theories of manslaughter, if supported by evidence].) But if the evidence does not show provocation and sudden quarrel or heat of passion sufficient to "negate[ ] the element of malice that otherwise

inheres in such a homicide," no voluntary manslaughter instruction should be given. (*People v. Breverman, supra,* 19 Cal.4th at p. 154, italics omitted.)

In this case the trial court found that the evidence could not justify instructing the jury on the crime of voluntary manslaughter based on sudden quarrel or heat of passion. Soo's appeal challenges that refusal as error requiring reversal of his conviction. We conclude that his challenge has merit.

The showing required to justify an instruction on voluntary manslaughter based on sudden quarrel or heat of passion has both subjective and objective elements. The subjective element requires evidence that the heat of passion under which the defendant was acting must have been induced by the victim's provocation, before a "'"sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return."'" (*People v. Moye* (2009) 47 Cal.4th 537, 550.) The objective element requires evidence that the heat of passion must also be such as would cause an "'ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.'" (*People v. Barton, supra*, 12 Cal.4th at p. 201.) In determining whether these elements are satisfied—and thus wither the instruction was required—we examine whether the evidence is sufficient to deserve jury consideration. (*People v. Marshall* (1997) 15 Cal.4th 1, 39 ["A trial court must give a requested instruction only if it is supported by substantial evidence, that is, evidence sufficient to deserve jury consideration"].) We examine only the bare legal sufficiency of the evidence, not its weight. (*People v. Moye, supra,* 47 Cal.4th at p. 556.)

We conclude that the evidence in this case satisfied both the subjective and objective tests for the crime of voluntary manslaughter based on sudden quarrel or heat of passion. While the evidence about the specifics of the parties' argument is sparse, the jury was entitled to infer—from Soo's statements to the police, from Jane Moon's testimony about what she overheard, and from Dr. Oh's evaluation of Soo's mental history and condition—that the disputes about which Susan and Soo were arguing were of a depth and seriousness that would be objectively sufficient to provoke a reasonable

person to rash reaction, based on passion rather than judgment, and acting without deliberation and reflection. (*People v. Barton*, *supra*, 12 Cal.4th at p. 201.) There was evidence that Soo and Susan had been involved in a long and heated argument after Susan found Soo using marijuana; that she had taken his key, and had told him to return to his mother in Korea, ending their romantic relationship and displacing Soo from what had for months been his home; and that Soo had felt belittled and stressed. There was evidence from which the jury could conclude that during the course of their argument Soo had made a threat to harm or kill Susan. And although Dr. Oh testified that in stabbing Susan, Soo had acted from the compulsion of a psychotic episode, the jury could conclude, to the contrary, that Soo had instead acted in response to stress and heat of passion provoked by their argument.

The trial court ruled, however, that these provocations did not meet the objective test for "heat of passion" sufficient to support a finding of voluntary manslaughter. It held that even if Susan's conduct was *subjectively* sufficient to provoke Soo's homicidal response, it was not *objectively* sufficient to have caused an "'ordinarily reasonable person of average disposition'" to abandon deliberation and reflection, and to act "'from such passion rather than from judgment.'" (*People v. Barton*, *supra*, 12 Cal.4th at p. 201; see also *People v. Avila* (2009) 46 Cal.4th 680, 706 [events shown by the evidence were not sufficient to "'to arouse feelings of homicidal rage or passion in an ordinarily reasonable person'"].)

Notwithstanding the ample sufficiency of the evidence to support the jury's second degree murder conviction, the evidence also entitled the jury to conclude that Soo had acted out of sudden heat of passion resulting from provocation. Had it reached that conclusion upon proper instructions, it might have concluded that Soo had acted without malice in killing Susan, and was guilty of voluntary manslaughter rather than murder. The error in failing to instruct the jury on the lesser included offense of voluntary manslaughter therefore cannot be found to have been harmless. (*People v. Breverman, supra,* 19 Cal.4th at p. 164 [trial court error in failing to instruct the jury on all lesser included offenses supported by the evidence is prejudicial if "it is reasonably probable

that a result more favorable to the appealing party would have been reached in the absence of the error"]; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

DISPOSITION

The judgment is reversed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.