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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL LUBAHN CLARK, Defendant and Appellant.	B246263 (Los Angeles County Super. Ct. No. YA080813)

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

Verna Wefald, 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, Margaret E. Maxwell and Eric E. Reynolds, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

A jury convicted appellant Michael Clark[1] of second degree murder. The victim in this case was Carol Lubahn, appellant's ex-wife.[2] Carol disappeared in March 1981 and has never been found. Appellant challenges the sufficiency of the evidence. He also contends the court erred in failing to instruct on voluntary manslaughter. We affirm.

FACTS

1. Testimony of Family and Friends

Melba Meyer was Carol's mother. She first met appellant in 1969 or 1970, when Carol was 15 years old. Appellant went to high school with Carol and was a year or so older than her. The two dated and Carol became pregnant with appellant's child in 1971. Carol took her responsibilities as a mother seriously, even though she was a teenager when she became pregnant. After she gave birth to her son (Michael Lubahn, Jr.), Carol graduated from high school, and Carol and appellant married. They also had a daughter, Brandi Lubahn, three and a half years after Michael, Jr., was born. Appellant had a good relationship with Carol's family. Carol's father, Milton Meyer, treated him like a son. Milton had a house painting business, and appellant went to work for him after appellant graduated from high school around 1973. When Milton retired, appellant took over the business.

Appellant was the primary breadwinner in the household, and Carol was the primary caregiver. But Carol was very ambitious. She was going to school at the time of her disappearance and was studying architecture. She was a very good student and was on the dean's list at El Camino College. She was approximately two months from finishing there when she disappeared. Carol was also working at a tax preparation office because their finances were strained and they needed extra money.

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[1] Appellant's legal name was Michael Lubahn until 1987, when he changed it to Michael Lubahn Clark.

[2] We will refer to Carol and other witnesses who share surnames by their first names, not out of disrespect but for the reader's convenience.

Appellant and Carol never lived more than three miles from her parents, and for a time, they lived with her parents. Carol was very close with Melba, Milton, and her two sisters. Melba and Carol talked almost every day. If Carol was planning on leaving her family, Melba would have expected her to have said something to Melba about it. Melba considered Carol to be a very good, responsible, involved mother. She was certain Carol would never abandon her children, even if she was unhappy with appellant. Carol and appellant had separated twice before her disappearance, and each time, appellant left the house and Carol stayed with the children.

Melba knew Carol and appellant had been having some trouble in their marriage around the time of her disappearance. Carol wanted to sell their house, but appellant did not. Melba did not notice any change in Carol's behavior or strange behavior in the months leading up to her disappearance. She had lunch with Carol three days before Carol's disappearance. The family was planning the wedding of Carol's sister, Terri Meyer Samuelson. Samuelson's wedding shower was planned for the same week Carol disappeared. Carol was excited about the wedding and helping to plan it.

On March 29, 1981, the Meyers had a family dinner at their house, which Carol and appellant attended. Carol and appellant did not appear to be getting along well that night. When they left, Carol told appellant to ride in the back seat of the car. She was terse with him. That was the last time Melba saw Carol, though she talked to her on the phone the next day. Carol did not mention she was planning on leaving that night. Carol's second sister, Gale Rutt, also talked to her that day, and Carol said nothing about leaving her family.

On the morning of March 31, 1981, Milton told Melba that Carol had disappeared. He had learned this from appellant, with whom he was working that day. Melba talked to appellant later that afternoon. He said he and Carol had an argument, after which she went to take a bath and he went to bed. He told Melba that was the last time he saw Carol. When he woke in the morning, she was gone.

Michael, Jr., was 10 years old when Carol disappeared. He described Carol as a good, doting, affectionate mother. She definitely would not have left him and Brandi

voluntarily, especially without saying goodbye. He did not notice any strange behavior from Carol around the time she disappeared. He described his father's temper as having "a very long fuse," but when it did go off, his temper was explosive, like a powder keg. Michael, Jr., was listening to his headphones on his bed between 9:00 and 10:30 p.m. the night Carol disappeared. The way his bed was positioned, he could see Carol briskly walk out of her bedroom, shut the door behind her, and walk down the hall. She seemed upset. He thought he heard a thud like a door slamming. After Carol disappeared, appellant never discussed her disappearance or reminisced about her with Michael, Jr. Michael, Jr., observed that whenever Carol's name came up, appellant would appear uncomfortable and immediately change the subject.

Brandi was seven years old when Carol disappeared. Carol was a great mother to her. She never observed anything that would lead her to believe Carol would abandon her and Michael, Jr. She had never observed her parents arguing. On the night Carol disappeared, Brandi went to bed between 8:00 and 9:00 p.m. From her bedroom (which she shared with Michael, Jr.), she heard her parents discussing selling the house. At some point she heard the car start. Throughout the years, when Brandi asked appellant about Carol, whether the question related to Carol's disappearance or other issues, appellant would answer her questions.

After Carol disappeared, Melba began taking care of Michael, Jr., and Brandi within a day or two. Appellant seemed sad about Carol's disappearance but also a "little nonchalant" about it, from what Melba observed. Appellant did not act "too disturbed" by it, and Melba thought that was odd. Melba and Milton tried to find Carol; they called her friends, contacted her college professors, drove around looking for her, and bought an advertisement in the newspaper for approximately a month. Melba found Carol's car at a restaurant Carol frequently visited. It was dusty, as though it had been sitting there for awhile. The car did not provide any clues as to where Carol might be. Melba and Milton also hired a private investigator to look for Carol. The investigator worked on the case for six months and did not find anything. Melba asked appellant to help pay for the investigator, but he did not want to help, and he did not explain why.

Jerry and Johnnette Hurst were neighbors of Carol and appellant for approximately two and a half years when Carol disappeared. They would see Carol and appellant nearly every day and would socialize nearly every weekend. They often heard Carol discuss her dissatisfaction with their house, particularly the size of it. It was only 600 or 700 square feet. Carol wanted to move. Appellant thought the house was fine.

Jerry found out Carol had disappeared from appellant. Appellant told Jerry they had argued the night before because she wanted him to sign papers for selling the house. Afterward, she took a bath and went to bed. When he woke up the next morning, Carol was gone. Appellant did not seem sad or emotional. Appellant told Johnnette that Carol had gotten upset and "took off." He said it was normal behavior for her and she would be back in a few days, but Johnnette had never known Carol to leave.

Between Carol's disappearance and when the Hursts moved (three to four months later), appellant never talked about missing Carol. Several weeks after her disappearance, appellant asked Jerry if he had seen Carol at the house. He said they had secret hiding places for money around the house, and he had put tape on these places. The tape had been removed and some of the money had been taken. Jerry told appellant he had been outside all day working in the front yard and had not seen Carol.

Johnnette had heard Carol refer to appellant as her "third child." Carol also told her sister, Rutt, that she felt like she was raising three kids. Johnnette had the feeling from watching Carol and appellant's interactions that Carol had outgrown the marriage. But Johnnette described Carol as the best mother she had ever known. Both Jerry and Johnnette believed Carol would never leave her children.

Mark Turpin was Carol's college classmate. He met Carol approximately a year before she disappeared. They began a romantic relationship approximately six months after they met. Carol told him she was separated from her husband but still lived in the same house with him. She talked about her children and seemed to love them very much. He did not think she would ever abandon her children.

Appellant's second wife, Kerry Dunki-Jacobs, met him around February 1982. They began living together around December 1982, and they married in 1988. He was very

private about Carol, but he did tell Dunki-Jacobs that Carol got upset and left a few times, and it was not uncommon for her to be gone for days at a time. He told her his marriage with Carol was good, other than they argued about her wanting to sell the house and move. He told Dunki-Jacobs that the night Carol disappeared, he heard the door, got up, and saw the taillights of her car outside.

2. Press and Police Investigations

On April 7, 1981, approximately a week after Carol's disappearance, appellant went to the Torrance Police Department and filed a missing persons report on Carol. He said he had last seen Carol on March 30, 1981, at 10:00 p.m. When he awoke at 4:45 a.m. the following morning, she was gone. Her car had been found at a restaurant in Redondo Beach on April 5.

On April 15, 1981, Detective Ronald Peterson interviewed appellant. Since Carol's disappearance, appellant had received approximately 15 telephone calls at home in which the caller hung up after he answered. He took the children to an amusement park on April 10, and when they returned home, he saw some mail had been moved. Also, a piece of tape he placed over the dresser drawer had been broken. Carol had been pushing him to sell the house. The evening of her disappearance, she presented him with paperwork for selling the house. They argued about it, and she finally told him, "You can just have the house. I don't want any part of it." She also told him "she didn't want anything to do with him," took a shower, and then went to bed. He awoke at 4:30 a.m. to find her gone.

Detective Peterson interviewed appellant again on April 29, 1981. Appellant believed Carol had been in their house because someone had removed money from a hiding place about which only he and Carol knew. The detective placed the case on inactive status in June 1981. His final report concluded no foul play was involved, and Carol had likely left because of "divorce problems."

In 1987, Sergeant Jack McDonald reopened the case when he received a request from an out-of-state agency for Carol's dental records. This prompted him to review the records of the case, and he found Carol was still missing. He then conducted a full re-investigation. He checked with the Social Security Administration and found it had no record of activity

relating to Carol since 1981. He was not able to find any evidence Carol was still alive. The sergeant interviewed appellant on February 26, 1987. Appellant said Carol "was not acting herself" at the time of her disappearance. Since going to college, she wanted to socialize with younger people. Also, two days before she disappeared, she struck their son, which was very unusual for her. She gave Michael, Jr., a small scratch.[3] When appellant asked about it, she said "she just didn't care." She seemed to be easily agitated and angry the last few days her disappearance. The night before, they fought about selling the house when he refused to sign the paperwork necessary to list the house. He thought if he agreed to sell the house, she would have asked him for a divorce. At 5:30 a.m. the morning after the fight, Carol got out of bed and said she was going to the bathroom. He continued to sleep until he heard a car start; it was Carol driving off. Two weeks later, $60, two pictures of the children, and six or seven changes of Carol's clothes disappeared from the house. At a second interview on May 6, 1987, appellant reported he and Carol separated for a short time when she had "a fling" with a high school classmate.

Detective Allen Tucker looked into this case in December 1996 when his superior assigned it to him. He read the reports of the officers previously involved and spoke to appellant briefly on the phone. Detective Tucker asked appellant if he killed Carol. Appellant said no. The detective conducted a search of appellant's former backyard, where he and Carol had lived, and did not find anything.

In 1997, Larry Altman, a reporter for The Daily Breeze, interviewed appellant and wrote an article about the case as part of a series on unsolved cases. Appellant told Altman he and Carol argued the night before her disappearance because she wanted to sell the house. She went to bed after the fight. When he awoke at 4:00 or 5:00 a.m., Carol was not in bed. He heard the garage door open. She did not take anything with her then.

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[3] Michael, Jr., was certain Carol never hit him or caused a scratch on him. He never told appellant that Carol hit him.

"Sometime" after that, some of her clothes went missing and someone had leafed through the mail.

In late 2002 or early 2003, Detective Walter Delsigne started looking at this case as part of his work on "cold cases," though he was working multiple other cases at the same time. In 2003, he interviewed Melba, Milton, Carol's sisters, and Michael, Jr. Beginning in October 2010, he recorded several lengthy interviews with appellant totaling approximately 10 hours, portions of which were played for the jury. Among other things, appellant told Detective Delsigne that he and Carol started discussing the real estate papers she wanted him to sign at approximately 8:00 p.m. He refused to sign, and they had a heated discussion about it until 11:30 p.m. or 12:00 a.m. When he refused to sign the real estate papers, Carol told him, "[Y]ou make my skin crawl." Though he and Carol argued, appellant explained they had bigger arguments before, like when he discovered she had an affair with their high school classmate. The detective commented to appellant that he had worked some cases in which a husband kills his wife when he finds out she is cheating on him. Appellant responded, "It had nothing to do with that."

During another interview, Detective Delsigne told appellant he believed appellant killed Carol and asked appellant to turn himself in and cooperate with officers. He told appellant he had enough to arrest him. Appellant said, "I can't admit to that," and asked for a few days to get his affairs in order, after which he would come to the detective and cooperate. A few days later, on November 2, appellant again spoke with the detective. He had wrapped up his affairs and thought he would be arrested, but he did not intend to "say anything."

Detective James Wallace created an Internet presence for Carol so that if she ever did an online search for her name or appellant's name, she would see he was arrested and charged with her murder. He also wanted to increase her online presence to collect information from others. He established a missing persons website called "Carol Jeanne Meyer Lubahn Is Still Missing." He also created a Facebook page in Carol's name with information about the case and created a profile for her on any other social networks he could find. He used a photograph from her high school graduation, one from the Sunday

night before she disappeared, an age-progression photograph, and two sketches. All the Web sites directed readers to the Torrance Police Department if they had information about Carol. No one ever contacted the department to say they had seen Carol after she disappeared.

3. Defense's Character Witnesses

Several of appellant's old friends testified in his case. They described him alternately as funny, patient, kind, giving, friendly, honest, trustworthy, nice, easygoing, nonconfrontational, mellow, and even-tempered.

4. Appellant's Testimony

Appellant testified in his own defense. Early in his and Carol's marriage, he discovered Carol was having an affair with their high school classmate when she left a note for him to find. Carol was not at home. He was mad and hit the bathroom mirror with his hand, injuring it. He wanted to crack the mirror to show Carol how the news had affected him. Appellant stayed elsewhere for a few weeks, but they eventually resumed living together.

The night Carol disappeared, President Reagan had been shot earlier in the day. When appellant arrived home at approximately 7:00 p.m., Carol was on the phone and seemed upset. She got off the phone and told appellant she was upset because she did not like how some people reacted at school to the shooting. Later that night, Carol presented him with paperwork for selling the house that she wanted him to sign. He asked whether she had a plan for what would happen after they sold the house. She had no plan and said they could figure it out later. He refused to sign anything unless they had a plan. They went back and forth on the issue for hours, though not continuously. He would be watching television or go into the children's room or otherwise be moving around the house, and they would argue for 10 to 15 minutes at a time. They were using "elevated voices," but they were not yelling or screaming at each other.

Appellant took a shower and went to bed at some point. Carol came into the bedroom and tried again to get him to sign. She shoved the papers in his face as he was lying in bed. He again refused to sign and she went to take a bath. While she was in the

bathtub, appellant went in there to use the restroom. She brought up the paperwork again and he again refused to sign. As he was walking out the door, she told him, "You make my skin crawl." At approximately 4:30 a.m., appellant woke up for some reason. Carol was not next to him in bed. He looked for her in the house and then went outside. The garage door was up and the car was gone.

In the days that followed, appellant was not looking for Carol because he thought she would be coming home soon. He thought she was just disappointed she did not get what she wanted. After Melba found Carol's car, he went to the police to file a missing persons report.

Ten or 11 days after Carol disappeared, appellant took the children to an amusement park for the day. Appellant set "traps" in the house. He stuck a piece of paper between the front door and the threshold so that it would fall out if someone opened the door. He also sprinkled baby powder on the floor and put a piece of tape on one of Carol's dresser drawers. When they returned home that night, the piece of paper had fallen out of the door, the baby powder had been disturbed, and the tape on the dresser drawer had come off. Additionally, some money had been taken from their emergency hidden stash, some of Carol's clothes were missing, a picture of the children was missing, and some mail had been moved around.

After Carol disappeared, appellant remained close with her family. He continued to work with Milton after Carol's disappearance for 13 years, after which time Milton retired and appellant took over the business. He would see the Meyers at family events and would take his second wife, Dunki-Jacobs, to these events. The Meyers accepted Dunki-Jacobs. When they got married, all the Meyers -- Carol's parents and sisters -- attended the wedding.

Appellant said he did not kill Carol and did not have anything to do with her disappearance. But he did not think Carol would ever voluntarily leave her family.

PROCEDURAL HISTORY

The jury found appellant guilty of second degree murder. At the beginning of the sentencing hearing, the prosecutor informed the court appellant had confessed to killing

Carol at an interview with the prosecutor and defense counsel that morning. The prosecutor relayed the following in open court. Appellant explained he and Carol argued the night she disappeared, and she did leave the house, but she came home around 1:30 a.m. When she returned, she told him she was taking another man to her sister's upcoming wedding. She did not expressly say she was having an affair, but that is what he thought she meant. He was very upset and she tried to comfort him, telling him not to worry and he would find someone else. He pushed her away from him and she fell and hit her head on a heavy coffee table. He knew instantly she was dead and he panicked. He hid her body in the garage and took her car to the restaurant parking lot in the morning, where it was found days later. Later, he tied a cinder block to her body, put the body in the trunk of his car, and drove to the beach. He used a raft and paddled out several hundred feet, then dumped the body in the ocean. He agreed to go out with sheriff's department divers to try to find her remains. Appellant took a polygraph exam after he explained these events, and the results were inconclusive. The examiner told him he did not pass the polygraph. Appellant then said he punched Carol hard in the head.

After the prosecutor explained all that had occurred that morning and defense counsel argued, the court denied probation and sentenced appellant to 15 years to life in state prison. Appellant timely appealed.

STANDARD OF REVIEW

We review the verdict for substantial evidence -- that is, evidence that is reasonable, credible, and of solid value. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence." (*Ibid.*) We do not resolve credibility issues or evidentiary conflicts, as they are the sole province of the jury. (*Ibid.*) "The same standard governs in cases where the prosecution relies primarily on circumstantial evidence. [Citation.] We 'must accept logical inferences that the jury might have drawn from the circumstantial evidence.'" (*Ibid.*)

Asserted instructional errors are questions of law we review de novo. (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1424, superseded on other grounds as stated in *People v. Lawson* (2013) 215 Cal.App.4th 108, 118.)

DISCUSSION

1. Sufficiency of the Evidence

Appellant contends the evidence was insufficient to sustain a conviction for second degree murder. He argues the evidence of malice was insufficient. He asserts the evidence shows his crime was manslaughter at most. We do not agree the evidence was insufficient.

Homicide is defined broadly as the killing of one human being by another. (*People v. Antick* (1975) 15 Cal.3d 79, 87, superseded by constitutional amendment on another ground in *People v. Castro* (1985) 38 Cal.3d 301, 312.) Murder, a type of homicide, "is the unlawful killing of a human being . . . with malice aforethought." (Pen. Code, § 187, subd. (a).)[4] A murder that does not involve the additional elements necessary to support first degree murder -- willfulness, premeditation, and deliberation -- is second degree murder. (§ 189; *People v. Knoller* (2007) 41 Cal.4th 139, 151.)

"[M]alice aforethought" may be express or implied. (§ 188.) Malice "is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (§ 188.) Implied malice murder does not require an intent to kill or a showing that the defendant intended his or her acts to result in the death of a human being. (*People v. Swain* (1996) 12 Cal.4th 593, 602.) It "requires instead an intent to do some act, the natural consequences of which are dangerous to human life. 'When the killing is the direct result of such an act,' the requisite mental state for murder -- malice aforethought -- is implied." (*Id.* at pp. 602-603, italics omitted.) Ill will toward the victim is not necessary. (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 103.) But the defendant must have known his conduct endangered the life of

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[4] Further undesignated statutory references are to the Penal Code.

the victim and must have acted with conscious disregard for the victim's life. (*People v. Patterson* (1989) 49 Cal.3d 615, 626.)

Appellant suggests that because Carol's body was never recovered and we do not know exactly how Carol died, his conviction was based on mere speculation and conjecture. But a murder conviction need not be reversed merely because the victim's body is missing and the suspect does not confess. Our courts have rejected this argument. "If this contention is valid it would mean that a man could commit a secret murder and escape punishment if he was able to completely destroy the body of his victim, however complete and convincing the circumstantial evidence of guilt. No one would say that the law should be powerless to uncover such a crime and inflict punishment unless the accused had made a confession." (*People v. Scott* (1959) 176 Cal.App.2d 458, 489; see *People v. Manson* (1977) 71 Cal.App.3d 1, 42 ["The fact that a murderer may successfully dispose of the body of the victim does not entitle him to an acquittal. That is one form of success for which society has no reward. Production of the body is not a condition precedent to the prosecution for murder."].) Rather, in such a case, the prosecution may prove both the corpus delicti[5] of the crime and malice through circumstantial evidence and inferences. (*People v. Scott, supra*, at p. 489; *People v. Lewis* (1969) 1 Cal.App.3d 698, 701; *People v. Frye, supra*, 7 Cal.App.4th at p. 1154.)

Thus, in *People v. Ruiz* (1988) 44 Cal.3d 589, 599, our Supreme Court affirmed the defendant's conviction for second degree murder, even though the victim's body was never found, the defendant did not confess to the killing, and there was no direct evidence explaining how the victim died or a possible motive for the killing. The court nevertheless found sufficient circumstantial evidence supported the conviction. (*Id.* at p. 611.) The victim was the defendant's third wife, who disappeared suddenly one day and was never

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[5] "The corpus delicti of the crime of murder 'consists of two elements, the death of the alleged victim[ ] and the existence of some criminal agency as the cause . . . .'" (*People v. Frye* (1992) 7 Cal.App.4th 1148, 1154.)

seen or heard from again. (*Id.* at pp. 600, 601.) The defendant was charged with her murder approximately four years later, when the bodies of his fifth wife and her son were found under circumstances implicating him in their murder. (*Id.* at pp. 600, 601.) The evidence of the corpus delicti, or the victim's "death by foul play," consisted of her mysterious and abrupt disappearance, her failure to contact friends and relatives, her abandonment of personal effects, and her failure to seek Medi-Cal and Social Security payments to which she was entitled. (*Id.* at pp. 610-611.) The substantial evidence supporting the murder conviction consisted of this same evidence, plus the defendant's fourth marriage before formally divorcing the victim and the evidence tending to show the defendant also killed his fifth wife and her son. (*Id.* at p. 611.)

Here, the circumstantial evidence was also sufficient to show malice and second degree murder. The evidence demonstrated Carol was a devoted, capable, and loving mother who would never have abandoned her children. When she and appellant had previously separated, he left the family home, and she stayed with the children. She was their primary caretaker. Carol was an equally devoted daughter and sister who loved and was very close to her siblings and parents. She was excited about the upcoming wedding of her sister and was participating in the planning. She was ambitious and had plans for a future career; she was studying architecture and was a good student. She had only two months remaining to complete her degree from El Camino College when she disappeared. And when she disappeared, she did not appear to take any clothes or other personal effects with her. Her car was found abandoned days after she disappeared. The evidence demonstrated she was not a person who would voluntarily and abruptly disappear.

After her disappearance, friends and family never heard from her again. There was no record of activity relating to her Social Security number. The extensive Internet presence Detective Wallace created for Carol yielded no news of her. Appellant said he set traps in the house to detect her presence, and a week or so after she disappeared, he believed she came into the house and took some clothes, a small amount of money (only $60), and some pictures. But their neighbor, Jerry, had been in the front yard working all day when this purportedly occurred and had not seen Carol.

The evidence further showed the night of her disappearance, Carol and appellant argued over selling the house. Carol apparently was having an affair with a classmate at the time, and she was outgrowing the marriage. Appellant feared, perhaps rightly so, that if he agreed to sell the house, she would ask for a divorce. When appellant found out about a previous affair, Carol was not around, but he punched the bathroom mirror, breaking it and injuring his hand. He had a temper with a long fuse, though when it did go off, it was explosive.

The last person to have any known contact with Carol was appellant. His story about how she disappeared that night was ever changing and thus lacked credibility. He told some witnesses he and Carol had an argument, after which she went to take a bath and he went to bed. When he awoke in the morning she was gone. He told others he heard the door the night she disappeared, and when he got out of bed, he saw the taillights of her car driving off. In another version of the events, Carol had taken a shower and gotten into bed with him, and when he awoke in the morning, she was gone. In still another, he told an officer Carol had gotten out of bed and said she was going to the bathroom; he then heard the car start and saw her drive off. He told a reporter they argued the night before, and when he awoke at 4:00 or 5:00 a.m., he heard the garage door open, and Carol was gone. And when he testified at trial, he said after they argued, Carol took a bath and he went to bed. When he awoke at 4:30 a.m., Carol was not there, the garage door was open, and Carol's car was gone.

The jury could have logically inferred from all this evidence that appellant killed Carol because he thought she would leave him. His temper exploded and he acted out violently, as he had when he found out about her previous affair, and he injured her seriously enough to kill her.[6] In other words, during the argument he deliberately performed an act that would endanger her life with conscious disregard for her life. His conduct

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[6] Indeed, appellant does not truly argue otherwise. His briefing states he is *not* arguing the evidence was insufficient to prove her death or that he was responsible for killing her.

afterward was also relevant in establishing implied malice, that is, that he acted with an "abandoned and malignant heart." (*People v. Ogg* (1958) 159 Cal.App.2d 38, 51 [defendant's failure to seek assistance or obtain medical aid when he knew his wife was seriously injured indicated "a heartless attitude and callous indifference toward her"].) Rather than seek assistance or call 911, the evidence was that he disposed of her body so thoroughly it was never found and further tried to cover up his deed by dumping her car in the parking lot of the restaurant she frequented. He seemed nonchalant and unemotional about her disappearance. He refused to contribute toward a private investigator who would search for her.

Appellant argues that, at most, the evidence established he committed voluntary manslaughter, that is, a killing that occurred upon a sudden quarrel or heat of passion. The evidence does not support this contention. It is true murder is reduced to voluntary manslaughter when malice is presumptively absent because the defendant killed upon a sudden quarrel or heat of passion. (§ 192, subd. (a); *People v. Lee* (1999) 20 Cal.4th 47, 59.) However, the deadly heat of passion must be based on sufficient provocation. (*People v. Lee, supra*, at p. 59.) The test for adequate provocation is objective. (*Id.* at p. 60.) "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." (*Id.* at p. 59.) In *People v. Hyde* (1985) 166 Cal.App.3d 463, 473, the fact that a homicide victim was dating the defendant's former girlfriend was not sufficient provocation to support manslaughter. In *People v. Lee*, *supra*, at pages 53 and 59, an argument involving pushing and shoving between the defendant and his wife was not sufficient provocation. And in *People v. Lujan* (2001) 92 Cal.App.4th 1389, 1414, it was not sufficient provocative conduct for a woman who had been separated from her estranged husband for several months and had filed a petition for dissolution of the marriage to develop a romantic relationship with another.

Here, there was also no evidence of sufficient provocation negating malice. An argument about the desire of one spouse to sell a house was not provocative conduct that would cause "an average, sober person [to] be so inflamed that he or she would lose reason

and judgment" and act under a deadly heat of passion. (*People v. Lee, supra,* 20 Cal.4th at p. 60.) Even if appellant believed Carol wanted to leave him, there was no evidence she said something so provocative that an ordinary, reasonable man would lose all reason and judgment. "'[N]o defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused'" unless the passions of the average reasonable man would also be aroused. (*People v. Steele* (2002) 27 Cal.4th 1230, 1252-1253.)

In sum, substantial evidence showed appellant killed Carol, "no considerable provocation appear[ed]," and "the circumstances attending the killing show[ed] an abandoned and malignant heart." (§ 188.) His conviction for second degree murder should be affirmed.

2. Failure to Instruct on Voluntary Manslaughter

Appellant also contends the court prejudicially erred in failing to sua sponte instruct on voluntary manslaughter. We disagree.

A trial court must sua sponte instruct on a lesser included offense if there is substantial evidence the defendant is guilty only of the lesser offense. (*People v. Birks* (1998) 19 Cal.4th 108, 118.) But as we discussed above, there was no substantial evidence of sufficient provocation to support voluntary manslaughter. Assuming for the sake of argument that substantial evidence existed, the court nevertheless was not required to instruct on voluntary manslaughter.

"Whatever a trial court's duty to give *sua sponte* instructions may be, it need not instruct on a lesser included offense barred by the statute of limitations." (*People v. Diedrich* (1982) 31 Cal.3d 263, 283, italics omitted.) Because a defendant cannot be convicted of a time-barred offense, an instruction on the offense would serve no purpose. (*Id.* at pp. 283-284.) A defendant may, however, waive the statute of limitations for a time-barred offense and obtain an instruction on it. (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 372-373, 376.)

The statute of limitations for voluntary manslaughter in 1981, when the offense would have been committed, was three years. (Former § 193, subd. (a), Stats. 1978, ch.

579, § 3; former § 800, Stats. 1980, ch. 1307, § 2.) Appellant was not prosecuted until his arrest in 2011, long after the statute of limitations had run. Appellant did not waive the statute of limitations. Accordingly, the court did not err in failing to instruct on this time-barred offense.

Appellant concedes this analysis is correct so far as it goes. Still, he argues the court should have advised appellant on the consequences of not requesting a voluntary manslaughter instruction and should have asked at the close of evidence whether appellant wanted to waive the statute of limitations. He cites no authorities for these requirements. In any event, the record indicates defense counsel was well aware of the time-bar issue, had discussed it with the prosecutor, and appellant did not want to waive the statute of limitations. We may presume that appellant consulted with his counsel and was aware of the consequences. (*Cowan v. Superior Court, supra*, 14 Cal.4th at p. 373.)

DISPOSITION

The judgment is affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.