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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. ZACKARIAH LEHNEN, Defendant and Appellant.	B269497 (Los Angeles County Super. Ct. No. SA077546)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathryn Solorzano, Judge. Affirmed as modified.

Richard A. Levy, 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, and Margaret E. Maxwell and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Zackariah Lehnen appeals from his judgment of conviction of two counts of first degree murder (Pen. Code,[1] § 187, subd. (a)), with findings that he committed multiple murders (§ 190.2, subd. (a)(3)) and personally used a deadly weapon in his commission of the crimes (§ 12022, subd. (b)(1).) On appeal, Lehnen argues the trial court erred when it: admitted evidence of his jailhouse confession to a police informant; failed to instruct the jury on voluntary manslaughter as a lesser offense of murder; and calculated his presentence custody credits. We modify the judgment to correct the sentencing error, but otherwise affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The People's Evidence

A. Lehnen's Contacts with the Victims

The victims in this case were Lucien George Bergez and Erica Escobar. In 2011, 89-year-old Bergez lived alone in a house in Culver City. Because Bergez was elderly and had been a victim of fraud in the past, his adult daughter managed his finances, which included monitoring the debit card he used to pay for his personal expenses. Bergez also had a part-time caretaker, Sadie Vasquez. About a year before Bergez's death, Vasquez saw Lehnen at the house three times, and learned that Bergez had paid Lehnen to clean his garage and yard. On one occasion, while Lehnen was waiting to take Bergez to the bank, Vasquez hid Bergez's debit card from him because she did not trust Lehnen.

In 2011, Escobar lived in a residential facility for adults with mental illnesses and developmental disabilities. On May 1,

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[1] Unless otherwise stated, all further statutory references are to the Penal Code.

2011, Jason McCullough, an administrator at the facility, saw Escobar wearing a new floral dress. Later that day, McCullough observed Escobar smoking on the front steps of the facility and talking to Lehnen and another man. Escobar then left with both men and was not seen at the facility again.

Video and audio surveillance from a 7-Eleven store near Bergez's home showed that Lehnen, Escobar, and Bergez were together at the store on the evening of May 1, 2011. At Lehnen's request, Bergez bought a pack of cigarettes with his debit card. After the purchase, they unsuccessfully attempted to withdraw money from an ATM inside the store. They then returned to the cashier, and Lehnen asked if they could obtain $80 cash back on a purchase. When the cashier said they could only receive $10 cash back, they left the store.

B. Discovery of the Victims' Bodies

On the morning of May 3, 2011, the bodies of Bergez and Escobar were discovered in Bergez's home. Escobar was found in the living room. She was naked and lying face down in a pool of blood. There were shoeprints on Escobar's face and body and throughout the living room floor. Bergez was found in the kitchen. He was fully dressed and lying on his back with a tablecloth draped over his upper body. A screwdriver was on top of his chest and a blood-stained knife with a broken tip was on the kitchen counter above his body. There was blood spatter on the lower kitchen cabinets, the refrigerator, and a wall leading to the laundry room. A floral dress was recovered from the dryer in the laundry room, and several towels covered in blood or feces were found inside the bathroom. Blood and feces also were found throughout the living room and kitchen.

A deputy medical examiner from the Los Angeles County Coroner's Department determined that the cause of Bergez's death was multiple blunt and sharp force injuries. Bergez had deep stab wounds to his left back and leg, which were consistent with him lying on the ground and being stabbed with a knife by someone standing above him. There were also puncture wounds to his face, which were caused by a round tool such as a screwdriver. Bergez's entire face was bruised due to multiple direct blunt force injuries. He also sustained multiple facial fractures that would have required significant force, and were consistent with being stomped on or punched repeatedly. The medical examiner opined that none of the injuries would have been immediately fatal, and that Bergez likely was alive for as long as 20 minutes after the injuries were inflicted.

Escobar's cause of death also was determined to be multiple blunt and sharp force injuries. She had a stab wound to her right cheek that fractured her skull and was consistent with someone kneeling over her with a knife and plunging it in with deliberate force. She also had a stab wound to her chest that penetrated her diaphragm and lung. These sharp force injuries were inflicted while Escobar was still alive. Escobar sustained numerous blunt force injuries to her face, which were consistent with being hit or stomped on repeatedly. She also had multiple skull fractures, which would have required hard intentional blows by slamming her head against the ground or kicking it. In addition, Escobar had numerous contusions on her hands, arms, legs, and back, which were consistent with defensive wounds as she was being beaten or kicked. The medical examiner opined that Escobar could have lived for 10 to 20 minutes during the attack, but the stab wounds she sustained were ultimately fatal.

C. Evidence Linking Lehnen to the Crime Scene

Lehnen was arrested on May 5, 2011. He had swelling, bruises and scratches on his face. He also had bruises and scratches on his hands, wrists, calves, and feet, and a fracture of his left hand. The clothing and shoes that Lehnen was wearing at the time of his arrest were collected. The prints from Lehnen's shoes were similar to those found on the floor of Bergez's house and on the bodies of Bergez and Escobar.

There were blood stains on Lehnen's shoes, pants, and belt. Bergez was a major contributor to the DNA found in the blood on Lehnen's shoes and belt, and Escobar was a minor contributor to the DNA found in the blood on Lehnen's shoes. The blood on Lehnen's pants included DNA from Lehnen, Bergez, and Escobar. Blood also was detected on the blade of the knife that was recovered from Bergez's kitchen counter. Bergez and Escobar were contributors to the DNA found in the blood on the blade, and the handle of the knife contained a mixture of DNA from Bergez, Escobar, and Lehnen.

D. Lehnen's Custodial Interview with the Police

Culver City Police Detective Andrew Bass conducted a videotaped interview with Lehnen shortly after his arrest. Lehnen told the detective he was on parole for a drug-related offense, but had been "off of meth" for about a year. He also said he was homeless and living on the streets in Hollywood. Lehnen denied spending time in Culver City or having any friends in that area. He further denied knowing Bergez or Escobar, or going to the 7-Eleven store near Bergez's home. Detective Bass did not observe any signs that Lehnen was under the influence of, or withdrawing from, methamphetamine during the interview.

E. Lehnen's Jailhouse Confession to His Friend

Following Lehnen's arrest, Culver City Police Detective Ryan Thompson placed an undercover officer posing as an inmate in Lehnen's jail cell to see if Lehnen made any statements about the murders. When Lehnen did not disclose any information of value to the undercover officer, Detective Thompson contacted Christopher Hamilton, who knew Lehnen and previously had provided a tip to the police about Lehnen's possible involvement in the crimes. On May 8, 2011, a few days after Lehnen's arrest, Hamilton agreed to assist the police by being placed in Lehnen's jail cell while wearing a hidden audio recording device. Detective Thompson brought Hamilton to the jail and pretended to book him as an accessory to murder. He then placed Hamilton in Lehnen's cell. At the detective's direction, Hamilton pretended that he had been arrested in North Hollywood for beating up his girlfriend, and that his girlfriend had implicated both Hamilton and Lehnen as being involved in the murders.

During their recorded conversation, Lehnen admitted to Hamilton that he had killed Escobar and Bergez. As described by Lehnen, he met Escobar in Santa Monica and brought her to Bergez's house. Lehnen knew Bergez because he worked as a handyman for him, and Bergez "never had a problem" giving him money. On the day of the murders, Lehnen became upset when Bergez could not remember his password to withdraw money from his debit card. Later on, while they were at Bergez's house, Escobar allowed Bergez to touch her breasts while she was sitting naked on the couch. When Lehnen began to have sexual intercourse with Escobar, however, she pulled away, "making [him] feel like [he was] raping her." Lehnen started "smacking" Escobar and "going off about her fucking taunting" him. While

Lehnen was hitting Escobar, Bergez got in the way "a little bit" and said he was going to kill Lehnen. In response, Lehnen began "whaling on" Bergez.

In describing the killings, Lehnen told Hamilton that he was "coming down from meth and drunk off wine" when he "lost it" and "stomped [them] to death." Lehnen added that he "wanted them to stay down and they wouldn't," so he continued stomping on them "until they were dead." Lehnen said that he also stabbed Escobar. When Hamilton asked Lehnen why he had killed Bergez and Escobar, Lehnen answered, "I don't know why bro, I'm fucking . . . I'm psycho." Lehnen later said: "I keep playing it back in my head dude, going . . . [w]here did I lose it at? Anyways, because he wasn't gonna give me any money and she wasn't gonna give me no pussy dog. That's all I know bro."

II. The Defense Evidence

A. Lehnen's Psychiatric History

Between 2007 and 2010, Lehnen underwent a number of psychiatric hospitalizations. The hospitalizations generally occurred when Lehnen called 911 claiming to be suicidal. Lehnen also reported to the psychiatrists who treated him that he was bipolar and a regular user of methamphetamine. During that period, Lehnen was diagnosed with a variety of conditions, including schizoaffective disorder, mood disorder, and polysubstance dependence. A global functioning assessment performed in 2009 showed that Lehnen had a moderate degree of impairment. Lehnen typically was prescribed psychotropic medication and released from the hospital after a few days of treatment. On various occasions, Lehnen was offered drug rehabilitation services, but he declined the services and indicated that he was unwilling to stop using methamphetamine.

On April 25, 2011, about a week before the murders, Lehnen was hospitalized after he threatened to kill himself. He was diagnosed with bipolar disorder and polysubstance abuse, and was prescribed psychotropic medication. Lehnen reported he had a history of abusing drugs, including methamphetamine, but was not interested in a drug rehabilitation program. On April 28, 2011, Lehnen told the hospital staff that he was getting bored and thought it was time for him to leave. He was discharged from the hospital that same day.[2]

B. Medical Expert Testimony

Dr. Michael Gold, a neurologist, testified as an expert for the defense. On March 20, 2013, Dr. Gold performed a magnetic residence imaging (MRI) scan and a positron emission tomography (PET) scan on Lehnen's brain. Dr. Gold opined that Lehnen's MRI scan was normal, but his PET scan was abnormal. The PET scan showed lesions on the frontal lobes of Lehnen's brain, particularly on the right frontal lobe, which could result in impaired judgment, impulsivity, and sudden mood swings. Such abnormalities could not, however, predict Lehnen's behavior. Dr. Gold thus could not conclude from the PET scan that Lehnen had violent tendencies.

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[2] The prosecution presented rebuttal evidence that, on other occasions in 2010 and 2011, Lehnen was placed on psychiatric holds after he reported being suicidal. Lehnen told the medical professionals who evaluated him during those holds that he had lied about being suicidal because he was homeless and needed a place to stay.

III. Verdict and Sentencing

The jury found Lehnen guilty of the first degree murders of Bergez and Escobar. As to each count, the jury found true the enhancement allegation that Lehnen personally used a knife during the commission of the crime. The jury also found true the special circumstance allegation that Lehnen committed multiple murders, at least one of which was a murder of the first degree. Lehnen was thereafter sentenced to two consecutive terms of life in prison without the possibility of parole, plus two years.[3]

DISCUSSION

I. Admission of Lehnen's Jailhouse Confession

On appeal, Lehnen first asserts the trial court violated his Fifth Amendment right against self-incrimination and his Fourteenth Amendment right to due process by admitting into evidence his jailhouse confession to Hamilton. Lehnen argues his statement to Hamilton should have been excluded because it was involuntary and the result of coercive police conduct.

A. Relevant Law

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." (U.S. Const., 5th

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[3] Based on the single multiple-murder special circumstance finding made by the jury, the trial court imposed a separate term of life without the possibility of parole for each murder count. (*People v. Garnica* (1994) 29 Cal.App.4th 1558, 1563-1564 [while only one multiple-murder special circumstance can be found true in a given case, it may be used to impose separate sentences of life without parole for each first degree murder conviction].)

Amend.) In *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), the United States Supreme Court "'adopted a set of prophylactic measures to protect a suspect's Fifth Amendment right from the "inherently compelling pressures" of custodial interrogation.'" (*People v. Linton* (2013) 56 Cal.4th 1146, 1171.) Under *Miranda* and its progeny, "'a suspect [may] not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and, if indigent, to appointed counsel.'" (*People v. Dykes* (2009) 46 Cal.4th 731, 751.) To be valid, the "waiver must be 'voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception' [citation], and knowing in the sense that it was 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.' [Citation.]" (*People v. Sauceda-Contreras* (2012) 55 Cal.4th 203, 219.)

In addition, "'[t]he due process clause of the Fourteenth Amendment precludes the admission of any involuntary statement obtained from a criminal suspect through state compulsion.' [Citation.]" (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1086.) "'"A statement is involuntary if it is not the product of "'a rational intellect and free will.'" [Citation.] The test for determining whether a confession is voluntary is whether the defendant's 'will was overborne at the time he confessed."'" [Citations.] [¶] "'A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence. [Citation.] Although coercive police activity is a necessary predicate to establish an involuntary confession, it 'does not itself compel a finding that a resulting confession is involuntary.'

[Citation.] The statement and the inducement must be causally linked. [Citation.]" [Citation].' [Citation.] A confession is not rendered involuntary by coercive police activity that is not the 'motivating cause' of the defendant's confession." (*People v. Linton*, *supra*, 56 Cal.4th at p. 1176.)

"The prosecution has the burden of establishing by a preponderance of the evidence that a defendant's confession was voluntarily made. [Citation.]" (*People v. Carrington* (2009) 47 Cal.4th 145, 169.) ""'On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review.'" [Citation.]' [Citation.] "'[W]hen a reviewing court considers a claim that a confession has been improperly coerced, if the evidence conflicts, the version most favorable to the People must be relied upon if supported by the record. [Citations.]'" [Citation.]" (*People v. Tully* (2012) 54 Cal.4th 952, 993.)

B. The Trial Court Did Not Err in Admitting Evidence of Lehnen's Confession

At trial, Lehnen brought a motion to suppress his jailhouse confession to Hamilton. He argued the confession was obtained in violation of his due process rights because, after he was taken into custody and invoked his *Miranda* rights, he was placed in a cell with Hamilton, a police informant, and was asked questions that were designed to elicit incriminating responses. The trial court denied the motion, concluding that "the fact that [Lehnen] did not know that Mr. Hamilton was wired is not tantamount to coercion or involuntariness." The recording of Lehnen's jailhouse conversation with Hamilton was played for the jury at trial.

On appeal, Lehnen contends his incriminating statements to Hamilton were involuntary because they were the product of police coercion. Lehnen notes that, after he first told Hamilton about his involvement in the murders and Hamilton reported this information to the police, the investigating officers devised a ruse to procure a confession from Lehnen. The officers pretended to book Hamilton for beating his girlfriend and for being an accessory to the murders, and then placed him alone with Lehnen in a jail cell. When Hamilton entered the cell, he immediately exclaimed: "I'm fucked. I'm fucked." He then falsely told Lehnen that, after he beat up his girlfriend, she went to the police and claimed that he and Lehnen "did a double murder." Hamilton complained that he was now in jail as an accessory to murder and questioned why Lehnen had talked about the crimes in front of his girlfriend. Lehnen then began to cry and confessed the details of the murders to Hamilton.

Lehnen asserts the totality of circumstances surrounding this conversation shows that the police improperly induced his confession by exploiting his friendship with Hamilton to elicit incriminating statements. As the United States Supreme Court has explained, however, "*Miranda* forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner." (*Illinois v. Perkins* (1990) 496 U.S. 292, 297.) "Coercion is determined from the perspective of the suspect. [Citations.] When a suspect considers himself in the company of cellmates and not officers, the coercive atmosphere is lacking." (*Id*. at p. 296 [holding that an undercover officer posing as a fellow inmate need not give *Miranda* warnings to a suspect before asking questions that may elicit an incriminating response]; see also *People v. Gonzales*

(2011) 52 Cal.4th 254, 284 [although defendant "misplaced his trust" in confiding in a fellow inmate and gang member who surreptitiously recorded their conversation, "his tape-recorded statements were voluntary and free of compulsion"]; *People v. Tate* (2010) 49 Cal.4th 635, 686 [defendant's statements to his girlfriend while in police custody were properly admitted because "voluntary statements to someone the suspect does not believe is a police officer or agent, in a conversation the suspect assumes is private, simply does not involve [the] critical concerns" underlying *Miranda*]; *People v. Webb* (1993) 6 Cal.4th 494, 526 [defendant's jailhouse calls to his girlfriend "were not the product of 'custodial interrogation'" even though she secretly recorded them in cooperation with the police because "[f]rom defendant's perspective, he was talking with a friend and lover," and thus, his "statements were completely voluntary and compulsion-free"].)

In this case, Lehnen made the incriminating statements to his friend who was posing as a fellow inmate and surreptitiously recording their conversation. Lehnen nevertheless contends that his statements were the product of coercion because, as part of an intricate ploy designed by the police, Hamilton falsely blamed Lehnen for his predicament of being incarcerated as an accessory to murder and repeatedly pressed Lehnen for details about his commission the crimes. The record, however, does not support Lehnen's claim that Hamilton coerced him into making the incriminating statements. Rather, the record shows that, at the time of his arrest, Lehnen already had implicated himself in the murders in a prior conversation with Hamilton. When Hamilton was later placed in the jail cell with Lehnen, he told Lehnen that he should not have "run your mouth in front of" his girlfriend, but he did not immediately inquire about the murders. After Lehnen

asked Hamilton if his girlfriend was drunk when he beat her and Hamilton answered that she was, Lehnen volunteered: "[S]ee that was my problem I was coming down from meth and drunk off wine bro. I don't know what happened Chris I lost it." When Lehnen began to cry, Hamilton asked, "What did you do bro?" Lehnen answered, "I killed em. I stomped em to death dog." Lehnen then revealed details about the murders and his reasons for killing Bergez and Escobar. Given that Lehnen was confiding in someone whom he believed to be a friend when he confessed to the killings, his statements were voluntarily and free from compulsion.

Moreover, contrary to Lehnen's claim, the fact that the police used deceptive tactics to place Hamilton in Lehnen's jail cell did not render Lehnen's subsequent confession to Hamilton involuntary. "Deception does not undermine the voluntariness of a defendant's statements . . . unless the deception is ""of a type reasonably likely to procure an untrue statement."" [Citations.] "'The courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable.'" [Citation.]" (*People v. Williams* (2010) 49 Cal.4th 405, 443; see also *People v. Farnam* (2002) 28 Cal.4th 107, 182 ["'[l]ies told by the police to a suspect . . . can affect the voluntariness of an ensuing confession, but they are not per se sufficient to make it involuntary'"].) Here, neither the police nor Hamilton made any threats against Lehnen or offered him any promises of leniency. At most, the police engaged in "strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner." (*Illinois v. Perkins*, *supra*, 496 U.S. at p. 297.) Such deception, however, does not amount to undue coercion.

(*Ibid*.) Hamilton likewise did not engage in any conduct that was likely to elicit a false confession from Lehnen. Although Hamilton deceived Lehnen about his reason for being in jail, he never made any statements to induce Lehnen to lie about his role in the murders or to confess to a crime that he did not commit.

Accordingly, when Lehnen misplaced his trust in Hamilton and confided in him about the murders, he did so freely. Because the record does not support a finding that Lehnen's confession to Hamilton was the result of coercive police conduct that overcame his will and rendered his statement involuntary, the trial court did not err in admitting the statement at trial.

II. Failure to Instruct on Voluntary Manslaughter

Lehnen next asserts the trial court erred in failing to instruct the jury sua sponte on voluntary manslaughter as a lesser included offense of murder. He argues that a voluntary manslaughter instruction was warranted because there was substantial evidence from which the jury could have concluded that he killed Escobar in the heat of passion.

A. Relevant Law

"[I]t is the [trial] 'court's duty to instruct the jury not only on the crime with which the defendant is charged, but also on any lesser offense that is both included in the offense charged and shown by the evidence to have been committed.' [Citation.]" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 826.) "Conversely, even on request, the court 'has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction.' [Citation.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1215.) Substantial evidence "is not merely '*any* evidence … no matter how weak' [citation], but rather '"evidence from which a

jury composed of reasonable [persons] could … conclude[]'" that the lesser offense, but not the greater, was committed." (*People v. Cruz* (2008) 44 Cal.4th 636, 664; see also *People v. Burney* (2009) 47 Cal.4th 203, 250 ["'[t]o justify a lesser included offense instruction, the evidence supporting the instruction must be substantial — that is, it must be evidence from which a jury . . . could conclude that the facts underlying the particular instruction exist'"].) "[W]e review independently whether the trial court erred in failing to instruct on a lesser included offense. [Citation.]" (*People v. Booker* (2011) 51 Cal.4th 141, 181.)

Voluntary manslaughter is "the unlawful killing of a human being without malice . . . upon a sudden quarrel or heat of passion." (§ 192, subd. (a).) "Heat of passion arises if, '"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."' [Citation.]" (*People v. Beltran* (2013) 56 Cal.4th 935, 942.) '"The heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion,'" and the '"heat of passion must be due to "sufficient provocation."'" (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1143-1144.) "[T]he factor which distinguishes the 'heat of passion' form of voluntary manslaughter from murder is provocation. The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], 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. Lee* (1999) 20 Cal.4th 47, 59.) "Adequate provocation and heat of passion must be affirmatively demonstrated. [Citations.]" (*Id.* at p. 60.)

B. The Trial Court Did Not Err in Failing to Give a Voluntary Manslaughter Instruction

Lehnen contends a voluntary manslaughter instruction was warranted in this case because there was evidence that he killed Escobar in the heat of passion after she engaged in "taunts and sexual maneuvering." In particular, Lehnen points to his statement to Hamilton about the event that purportedly triggered his attack on Escobar: "[W]ell the thing is, when she's sitting there naked on the fucking couch [Bergez] was feeling on her titties and fucking this and that. You know what I mean, he is kind of an old pervert bro. . . . And then, we're in the bathroom . . . and I start fucking her a little bit and then she starts pulling away dog, making me feel like I'm raping her homie. . . . So I fucking, my shit goes 'bbrrmmm' . . . cause I can't rape a bitch bro. Wham, I start fucking smacking her bro. And I hit, I'm going off about her fucking taunting me, this and that, this and that, and shit." Lehnen claims that such evidence could have supported a finding by the jury that Escobar engaged in provocative conduct that caused him to lose control and kill her in the heat of passion. This claim lacks merit.

Contrary to Lehnen's characterization, none of the evidence showed that Escobar engaged in provocative conduct that would cause an ordinary person of average disposition to lose reason and judgment. Rather, Lehnen's jailhouse statements reflected

that he brutally attacked Escobar because she rejected him when he attempted to initiate sexual intercourse with her. Escobar's refusal to engage in sexual activity with Lehnen clearly did not constitute legally sufficient provocation. (*People v. Dixon* (1995) 32 Cal.App.4th 1547, 1556 ["[w]e reject the notion that the refusal to engage in sexual relations with another after being provided drugs constitutes the kind of provocation recognized by California law to mitigate the crime of murder"].) There also was no evidence that Escobar "taunted" Lehnen when she rejected his sexual advances. While Lehnen told Hamilton that he was "going off about her fucking taunting me" as he was hitting her, Lehnen did not actually describe any taunting words or conduct by Escobar. Instead, Lehnen admitted that it was Escobar's act of "pulling away" from him during sexual intercourse that made Lehnen "feel like [he was] raping her" and led him to kill her.

Moreover, even assuming Escobar engaged in any taunting behavior toward Lehnen, it is settled law that "[a] voluntary manslaughter instruction is not warranted where the act that allegedly provoked the killing was no more than taunting words, a technical battery, or slight touching." (*People v. Gutierrez*, *supra*, 45 Cal.4th at pp. 826, 827 [defendant's testimony that he told victim to "'[g]et off me, you f...ing bitch,' and that she 'cuss[ed] back at' him . . . did not constitute sufficient provocation for voluntary manslaughter"]; see also *People v. Cole*, *supra*, 33 Cal.4th at p. 1216 ["[e]vidence that defendant was intoxicated and jealous, and . . . went 'berserk' after victim said she would put a 'butcher knife in your ass,' . . . 'does not satisfy the objective, reasonable person requirement, which requires provocation by the victim'"].) While Lehnen cites to *People v. Berry* (1976) 18 Cal.3d 509 (*Berry*) to support his argument that

sexual taunts can constitute legally sufficient provocation, that case is clearly distinguishable. In *Berry*, the Supreme Court held the trial court erred in refusing to instruct the jury on voluntary manslaughter where the evidence "chronicle[d] a two-week period of provocatory conduct" by the defendant's wife and victim, during which she "alternately taunted defendant with her involvement with [another man] and at the same time sexually excited defendant, indicating her desire to remain with him." (*Id*. at pp. 513, 515.) The *Berry* court concluded that such conduct by the victim "could arouse a passion of jealousy, pain and sexual rage in an ordinary man of average disposition such as to cause him to act rashly from this passion." (*Id*. at p. 515.)

In contrast to the facts in *Berry*, Lehnen's own statements showed that he brutally attacked Escobar shortly after meeting her because she refused to engage in sexual intercourse with him. The evidence further showed that, after Lehnen began the attack by hitting Escobar, he proceeded to repeatedly kick her face and body and stab her with a knife as she lay helpless on the floor. Because there was no substantial evidence to support a finding that Lehnen killed Escobar in the heat of passion based on legally sufficient provocation, the trial court did not err in failing to instruct the jury on voluntary manslaughter.

III. Presentence Custody Credits

Lastly, Lehnen asserts, and the Attorney General agrees, that the trial court erred in calculating his presentence custody credits. At the sentencing hearing, the trial court awarded Lehnen 1,607 days of actual custody credit. In the minute order and abstract of judgment, however, Lehnen was awarded 1,697 days of actual custody credit. Neither calculation is correct. It is undisputed that Lehnen was arrested on May 5, 2011 and

sentenced on January 7, 2016. Lehnen therefore should have been awarded 1,709 days of actual custody credit at sentencing. The abstract of judgment must be modified accordingly.

DISPOSITION

The judgment is modified to reflect an award of 1,709 days of actual custody credit. As modified, the judgment is affirmed. The superior court is directed to prepare an amended abstract of judgment, and to forward a certified copy to the Department of Corrections and Rehabilitation.

ZELON, Acting P. J.

We concur:

SEGAL, J.

FEUER, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.