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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL DARRIEN SIMMONS, Defendant and Appellant.	2d Crim. No. B231752 (Super. Ct. No. F443283) (San Luis Obispo County)

Michael Darrien Simmons appeals a judgment following conviction of attempted murder and assault with a deadly weapon, with findings that he personally used a deadly weapon, personally inflicted great bodily injury, and suffered a prior serious felony strike conviction. (Pen. Code, §§ 664, 187, subd. (a), 245, subd. (a)(1), 12022, subd. (b)(1), 12022.7, 667, subd. (a), 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)[1] We affirm.

FACTS AND PROCEDURAL HISTORY

In the evening of February 5, 2010, David Stratton went to a casual bar in Avila Beach to watch a basketball game. Simmons and his wife sat at a nearby table and were arguing. Stratton turned to them and stated, "Nobody wants to hear that shit. Take

[1] All further statutory references are to the Penal Code. References to sections 12022 and 12022.7 are to versions in effect prior to repeal effective January 1, 2012.

it outside." Stratton and Simmons then exchanged unpleasant remarks and Stratton told Simmons to "kiss my ass and go outside."

A short time later, Stratton saw Simmons standing with his back against the bar. Simmons was shouting racial vulgarities regarding President Obama. Stratton walked over to Simmons, placed his hand on his shoulder, and warned him to "stop before they throw [his] rotten ass out of here."

As Stratton then looked to the televised basketball game, he realized that Simmons had cut his throat. Stratton placed his hand to this throat and sensed that his hand was not "on [his] throat" but "in [his] throat." Another patron placed her jacket against Stratton's throat to stop the bleeding until Stratton received emergency medical assistance. Ken Gerard, Stratton's roommate, sat near the bar, heard the commotion, and saw Simmons slide a silver object into his back pocket.

Other bar patrons had heard Stratton and Simmons raise their voices and argue. Stratton seemed "tense," but Simmons appeared "very relaxed," as he leaned against the bar. Patron John Brown had attempted to separate the two men, and saw Stratton place his hand on Simmons's shoulder. Brown heard Stratton state to the bartender, "You need to kick this guy out or else I am going to beat the crap out of him."

On February 6, 2010, San Luis Obispo County Sheriff's Detective Patrick Zuchelli interviewed Simmons. After receiving advice of and waiving his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, Simmons admitted that he cut Stratton with a box cutter because Stratton was talking "trash[]" and "shit" to him and his wife, stating that Simmons was "full of shit," "a dick" and "a pervert." Simmons believed that Stratton was "ready to pounce" on him, and therefore he "reached around and whacked [Stratton] in the throat." Simmons also admitted hiding the box cutter in his wife's dress afterward. The interview was tape-recorded and the prosecutor played the recording at trial.

Simmons testified that he and his wife were having a "date night" that evening and were not arguing. He testified that Stratton was confrontational, stating that Mrs. Simmons did not "deserve a pussy-whipped motherfucker." Stratton also stated that he was a former boxer and asked Simmons if he thought that he could "kick [Stratton's]

ass." Stratton then declared that he was "going to beat [Simmons] to death, [his] wife is not going to recognize [him]." At that point, "everything went black," and Simmons cut Stratton's throat. Simmons testified that he did not recall whether Stratton struck him, but he later discovered bruises on his arm and chest.

Several surveillance cameras inside the bar recorded the events that evening. The prosecutor played a portion of one videotape that depicted Stratton confronting Simmons and Simmons's assault on Stratton. Simmons played a portion of a two-hour videotape obtained from a different surveillance camera inside the bar. He initially sought to play the entire videotape, but later agreed to limit the videotape evidence to several minutes prior to the assault, the assault, and other specific time frames pertaining to his defense.

The trial court instructed the jury that attempted murder could be reduced to attempted voluntary manslaughter if defendant acted in imperfect self-defense or defense of others. (CALCRIM No. 604.) The court did not instruct sua sponte regarding attempted manslaughter committed in the heat of passion.

The jury convicted Simmons of attempted murder and assault with a deadly weapon, and found that he personally used a deadly weapon and personally inflicted great bodily injury. (§§ 664, 187, subd. (a), 245, subd. (a)(1), 12022, subd. (b)(1), 12022.7.) In a separate proceeding, Simmons admitted and the trial court found that he suffered a prior serious felony strike conviction. (§§ 667, subd. (a), 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) The court sentenced Simmons to a prison term of 23 years, including seven years for attempted murder (which it then doubled), five years for the prior serious felony conviction, and four years for the weapon use and bodily injury enhancements. The court also imposed a $5,000 restitution fine and a $5,000 parole revocation restitution fine, ordered Simmons to pay victim restitution, and awarded him 449 days of presentence custody credit. (§§ 1202.4, subd. (b), 1202.45.)

Simmons appeals and contends that: 1) the prosecutor committed misconduct during summation, and 2) the trial court erred by not instructing sua sponte

regarding attempted voluntary manslaughter based upon a heat of passion theory. (CALCRIM No. 570.)

DISCUSSION

I.

Simmons argues that the prosecutor committed misconduct during summation by asserting, over defense objection, "The defense is presenting you with a video that, apparently, is two hours in length, but they only want to show you about 20 minutes' worth. I urge you folks to consider that." He contends that there is a reasonable likelihood that the jury understood the prosecutor's statement as an assertion that defense counsel sought to deceive the jury. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1302.) Simmons argues that the prosecutor's comment violated his constitutional rights to due process of law and a fair trial. He also asserts that it is reasonably probable that he would have obtained a more favorable outcome absent the prosecutor's comment.

The standards governing review of claims of prosecutorial misconduct are well settled. (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1275.) "When a prosecutor's intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the federal Constitution is violated. Prosecutorial misconduct that falls short of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the trial court or the jury." (*People v. Panah* (2005) 35 Cal.4th 395, 462.) To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood that the jury understood or applied the complained-of comments in an improper or erroneous manner. (*People v. Gamache* (2010) 48 Cal.4th 347, 371.) Although a defendant singles out words and phrases of claimed misconduct, we view the statements in the context of the whole argument. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.)

In view of the prosecutor and defense counsel's summation, there is no reasonable likelihood that the jury improperly understood or applied the prosecutor's comment. Defense counsel and the prosecutor each encouraged the jury to view "the

video of the entire night, and . . . figure out what happened" and to "watch the video, even the portions [played in court]." Considering the summation as a whole, it is not reasonably likely that the jury drew the inference that defense counsel was concealing evidence by editing the videotape. (*People v. Frye* (1998) 18 Cal.4th 894, 970 [reviewing court does not "lightly infer" that jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements], overruled on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

II.

Simmons contends that the trial court prejudicially erred by not instructing sua sponte regarding the lesser-included offense of attempted voluntary manslaughter based upon a heat of passion theory. (§ 192, subd. (a) [voluntary manslaughter is an unlawful killing without malice and "upon a sudden quarrel or heat of passion"]; *People v. Breverman* (1998) 19 Cal.4th 142, 163 [voluntary manslaughter is a killing committed in a sudden quarrel or heat of passion such that the killer's reason was obscured due to provocation sufficient to cause a reasonable man to act rashly or without due deliberation and reflection].) He asserts the error is a denial of his federal and state constitutional rights to due process of law and a fair trial.

Simmons points to evidence provided by his trial testimony and recorded police interview that Stratton taunted him and described him as a "dick," "pervert," "pussy wussy," and "a pussy-whipped motherfucker." He adds that Stratton insulted his (Simmons's) wife by stating, "Shut the fuck up, bitch."

In criminal cases, the trial court must instruct on general principles of law relevant to the issues raised by the evidence and necessary to the jury's understanding of the case. (*People v. Enraca* (2012) 53 Cal.4th 735, 758.) The evidence necessary to support a lesser-included offense instruction must be substantial evidence from which reasonable jurors could conclude that the facts underlying the instruction exist. (*Ibid.*; *People v. Moon* (2005) 37 Cal.4th 1, 30 [trial court may properly refuse instruction that is not supported by substantial evidence].) We independently review whether the trial court should have instructed concerning a lesser-included offense. (*People v. Waidla* (2000) 22

Cal.4th 690, 733.) "Whether or not to give any particular instruction in any particular case entails the resolution of a mixed question of law and fact that . . . is however predominantly legal. As such, it should be examined without deference." (*Ibid.*) Doubts regarding the sufficiency of evidence to warrant a lesser-included offense instruction, however, must be resolved in favor of the defendant. (*People v. Tufunga* (1999) 21 Cal.4th 935, 944.)

The crime of murder may be reduced to voluntary manslaughter if the victim engaged in provocative conduct sufficient to cause an ordinary person with an average disposition to act rashly or without due deliberation and reflection. (*People v. Enraca*, *supra*, 53 Cal.4th 735, 758-759; *People v. Gutierrez* (2009) 45 Cal.4th 789, 826 ["'The provocation must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment"'].) "'Adequate provocation and heat of passion must be affirmatively demonstrated.'" (*Gutierrez*, at p. 826.)

The heat of passion element of voluntary manslaughter has an objective and a subjective component. (*People v. Enraca*, *supra*, 53 Cal.4th 735, 759.) "Objectively, the victim's conduct must have been sufficiently provocative to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*Ibid.*) Subjectively, the accused must be shown to have killed while under the actual influence of a strong passion induced by such provocation. (*Ibid.*)

The trial court was not required to instruct regarding voluntary manslaughter because there is insufficient evidence of either a heat of passion killing, or provocation sufficient to cause a reasonable man to act rashly or without due deliberation and reflection. (*People v. Manriquez* (2005) 37 Cal.4th 547, 585-586.) Here Simmons was "relaxed" as he leaned against the bar and responded "whatever" to Stratton's statements. He testified that "everything went black" as he slashed Stratton's throat in self-defense. Moreover, insults and offensive statements do not induce sufficient provocation in an ordinary person to merit an instruction regarding voluntary manslaughter. (*Id.* at p. 586 [taunting defendant, calling him "mother fucker," and daring him to use a weapon is "insufficient to cause an average person to become so inflamed as

to lose reason and judgment"]; *People v. Lucas* (1997) 55 Cal.App.4th 721, 739 [insufficient provocation where occupants of vehicle smirked and shouted at defendant].) """A provocation of slight and trifling character, such as words of reproach, however grievous they may be, or gestures, or an assault, or even a blow, is not recognized as sufficient to arouse, in a reasonable man, such passion as reduces an unlawful killing with a deadly weapon to manslaughter.""" (*People v. Najera* (2006) 138 Cal.App.4th 212, 226.)

We reject Simmons's contentions and conclude there is no cumulative error. The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Barry T. LaBarbera, Judge

Superior Court County of Ventura

Jean Matulis, 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, Senior Assistant Attorney General, James William Bilderback II, Supervising Deputy Attorney General, Alene M. Games, Deputy Attorney General, for Plaintiff and Respondent.