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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. ALBERT TRUJILLO, Defendant and Appellant.	2d Crim. No. B227422 (Super. Ct. No. NA079209-01) (Los Angeles County)

Albert Trujillo appeals a judgment following conviction of second degree murder, with findings that he personally used a firearm in committing the murder, suffered a prior serious felony and strike conviction, and served two prior prison terms. (Pen. Code, §§ 187, subd. (a), 189, 12022.53, subds. (b), (c), (d), 667, subd. (a), 667, subds. (b)-(d), 1170.12, subds. (a)-(d), 667.5, subd. (b).)[1] We affirm.

FACTS AND PROCEDURAL HISTORY

On August 1, 2008, between 2:00 and 2:30 a.m., a dark-colored sports utility vehicle entered an alley near 12th and Gaffey Streets in San Pedro. The driver, a heavyset man weighing approximately 250 to 300 pounds, and a passenger wearing dark shorts and a white shirt, left the vehicle and argued in the alley. The driver, later

[1] All further statutory references are to the Penal Code unless stated otherwise. All references to section 12022.53 are to the version in effect prior to repeal effective January 1, 2012.

determined to be Trujillo, fired several gunshots at the passenger, Gilbert Rodriguez, who collapsed and died from two gunshot wounds.

The alley was illuminated by lighting from residential garages, a nearby grocery store, and streetlights from Gaffey Street. Neighbors heard the argument and the ensuing gunshots and summoned police emergency assistance.

Neighbor Patrick Perry heard "[t]wo men arguing . . . [j]ust a lot of cursing going on." Perry testified that he hears "a lot of [arguments] in the alley," at least once a month. Perry went to his balcony and saw Trujillo "casually" walk to his vehicle following the sounds of gunshots and then drive away with his vehicle lights turned off. Perry did not see anyone else nearby, but he heard a person moaning.

Neighbor Allyson Vought heard the gunshots and saw Trujillo enter a sports utility vehicle and drive away. She also saw Rodriguez lying on the ground, moving his cell phone back and forth. Vought telephoned the 911 dispatcher and then shouted to Rodriguez to "hold on."

When police assistance arrived in the alley, Rodriguez was "choking, gurgling on blood," and moribund. Two ammunition casings but no weapons lay nearby. Paramedics were unable to resuscitate Rodriguez and he died shortly thereafter.

Meanwhile, two blocks away, Trujillo crashed into several vehicles and stalled at a sidewalk curb. Concerned neighbors asked Trujillo if he needed assistance. One neighbor observed that Trujillo "mumbled and looked confused and in shock," and another neighbor described Trujillo as "very nervous." Trujillo obtained some items from the vehicle, covered his head with a white T-shirt, and walked away while speaking on a cellular telephone. Police officers later brought Vought to the crash scene to identify the vehicle. Based in part on the roof rack and the shape of the taillights, Vought stated that the vehicle was the vehicle involved in the alley shooting. Inside the sports utility vehicle, police officers found Trujillo's wallet, registration papers bearing his name, and ammunition casings matching those found near Rodriguez's body.

Police officers later recovered a surveillance videotape from a nearby fast-food restaurant parking lot that depicted the sports utility vehicle entering the alley and

Trujillo and Rodriguez leaving the vehicle, and walking out of range of the surveillance camera. At trial, the prosecutor played the videotape.

Police officers were unable to locate Trujillo following the homicide. Approximately one year later, they located and arrested him in Connecticut.

The jury convicted Trujillo of second degree murder and found that he personally used a firearm in committing the crime. (§§ 187, subd. (a), 189, 12022.53, subds. (b), (c), (d).) In a separate proceeding, Trujillo admitted that he suffered a prior serious felony and strike conviction and that he served two prior prison terms. (§§ 667, subd. (a), 667, subds. (b)-(i), 1170.12, subds. (a)-(d), 667.5, subd. (b).) The trial court sentenced him to a prison term of 61 years to life, consisting of a doubled 15-year term for the murder pursuant to the three strikes law, a consecutive 25-years-to-life term for the firearm enhancement, a five-year term for the prior serious felony conviction, and a one-year term for one of the prior prison terms. The court imposed a $10,000 restitution fine, a $10,000 parole revocation restitution fine (stayed), a $30 court security fee, and a $30 conviction fine. (§§ 1202.4, subd. (b), 1202.45, 1465.8, subd. (a); Gov. Code, § 70373.) It awarded Trujillo 362 days of presentence custody credit.

Trujillo appeals and contends that the trial court erred by: 1) not instructing sua sponte regarding the definition of malice, among other legal principles; 2) not instructing sua sponte regarding voluntary manslaughter; and 3) not instructing that the prosecutor must prove the killing did not occur in a heat of passion. He argues that the trial court's errors deprived him of due process of law pursuant to the California and federal Constitutions.

DISCUSSION

I.

Trujillo argues that the trial court erred by not instructing regarding malice, jury unanimity, resolution of jury doubts in his favor, and voluntary manslaughter. (CALJIC Nos. 8.11 ["'Malice Aforethought'-Defined"], 8.74 ["Unanimous Agreement as to Offense – First or Second Degree Murder or Manslaughter"]; 17.11 ["Conviction of Lesser Degree"], 8.71 ["Doubt Whether First or Second Degree Murder"] 8.50 ["Murder

and Manslaughter Distinguished"], 8.72 ["Doubt Whether Murder or Manslaughter"].) Trujillo contends the error is of constitutional dimension and reversible per se because it is analogous to a directed verdict of guilt, or alternatively, not harmless beyond a reasonable doubt. He relies on *People v. Rogers* (2006) 39 Cal.4th 826, 866 [error to fail to instruct with CALJIC No. 8.30, regarding second degree murder and express malice].)

The trial court must instruct on the general principles of law relevant to the issues raised by the evidence, independent of a defendant's formal request for instructions. (*People v. Blair* (2005) 36 Cal.4th 686, 744.) This obligation includes instruction on lesser-included offenses that are supported by substantial evidence--evidence from which reasonable jurors could conclude that the factual support for a particular instruction exists. (*Id.* at p. 745.) In reviewing a claim of instructional error, we consider the instructions as a whole and each instruction in the context of the entire charge to the jury. (*People v. Huggins* (2006) 38 Cal.4th 175, 192 [if the charge as a whole is ambiguous, the question is whether there is a reasonable likelihood that the jury applied the instruction in a manner that violates the Constitution].)

Considering the instructions as a whole, we do not find any reasonable likelihood that the omission of CALJIC No. 8.11, defining malice, violated Trujillo's constitutional rights either by confusing the jury or relieving the prosecution of its burden of proof. (*People v. Catlin* (2001) 26 Cal.4th 81, 151.) The trial court instructed with CALJIC No. 8.10 that murder was the unlawful killing of another with malice aforethought, and CALJIC No. 8.20 requiring deliberation and premeditation with "a clear, deliberate intent on the part of the defendant to kill" for first degree murder. The court also instructed with CALJIC No. 8.30, regarding second degree murder, that the "unlawful killing of a human being with malice aforethought" equates to when "the perpetrator intended unlawfully to kill a human being but the evidence is insufficient to prove deliberation and premeditation." During summation, the prosecutor stated that the case involved "express malice . . . an intent to kill." Thus, pursuant to CALJIC Nos. 8.10, 8.20, and 8.30, the jury necessarily had to find that Trujillo had a deliberate intent to kill Rodriguez before they could convict him of first or second degree murder. (*People v.*

Smith (2005) 37 Cal.4th 733, 739 ["Intent to unlawfully kill and express malice are, in essence, 'one and the same'"].) Unlike *People v. Rogers, supra,* 39 Cal.4th 826, the court instructed here with CALJIC No. 8.30, regarding second degree murder and express malice.

The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole. (*People v. Burgener* (1986) 41 Cal.3d 505, 538-539, overruled on other grounds by *People v. Reyes* (1998) 19 Cal.4th 743, 754.) We assume that jurors are intelligent persons capable of understanding and correlating all the instructions given. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1321; *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1294.)

Moreover, omission of the other instructions was neither improper nor prejudicial error. The jury acquitted Trujillo of first degree murder, and omission of instructions regarding jury unanimity and reasonable doubt between first degree and second degree murder is harmless error. The trial court instructed regarding the presumption of innocence and the prosecution's burden of proof beyond a reasonable doubt. (CALJIC Nos. 2.90, 2.91.) Furthermore, as discussed *post,* the court did not err by omitting instructions regarding voluntary manslaughter because evidence of a heat of passion killing based upon provocation was insubstantial.

II.

Trujillo contends that the trial court erred by not instructing sua sponte regarding the lesser-included offense of voluntary manslaughter based upon a killing in the heat of passion. (§ 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 that evidence from neighbor Perry that he heard "[t]wo men arguing . . . [j]ust a lot of cursing" and "yelling" was sufficient to warrant a voluntary manslaughter instruction. Trujillo adds that doubts regarding the sufficiency of evidence

to warrant the lesser-included offense instruction must be resolved in favor of the defendant. (*People v. Tufunga* (1999) 21 Cal.4th 935, 944.)

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.*)

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. Lasko* (2000) 23 Cal.4th 101, 108.) The law does not demand a specific type of provocation, and the passion aroused need not be anger or rage. (*Lasko*, at p. 108.)

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 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, 583-584.) Perry testified

that he heard arguing, cursing, and yelling, followed by gunshots and Trujillo walking casually to his vehicle and driving away. He also testified that arguments in the alley were not uncommon and that he heard them at least once a month. """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.) Here there is no evidence of the specific words used, the person stating the words, or the context behind the words. (*Manriquez*, at p. 586 [cursing at defendant ("mother fucker") and taunting him to use a weapon insufficient provocation to warrant voluntary manslaughter instruction].) Trujillo's assertion that he killed in the heat of passion caused by the victim's provocation is mere conjecture and does not rest upon sufficient evidence.

III.

Trujillo argues that the trial court erred by not instructing sua sponte that the prosecutor bears the burden of establishing beyond a reasonable doubt that the killing was not committed in the heat of passion. He relies upon *Mullaney v. Wilbur* (1975) 421 U.S. 684, 704 [due process of law requires the prosecution to prove beyond a reasonable doubt the absence of heat of passion on sudden provocation when that issue is "properly presented"], and the dissenting opinion of Justice Kennard in *People v. Moye* (2009) 47 Cal.4th 537, 563-564 ["'Given the manner in which California has structured the relationship between murder and voluntary manslaughter, the complete definition of malice is the intent to kill or the intent to do a dangerous act with conscious disregard of its danger *plus the absence of* both heat of passion and unreasonable self-defense'"]. Trujillo adds that requiring him to present evidence of provocation through his own testimony violates his constitutional right against self-incrimination. He asserts that the error is reversible per se or, at the least, of constitutional magnitude.

The Maine law under consideration in *Mullaney v. Wilbur*, *supra*, 421 U.S. 684, 691-692, provided that absent justification or excuse, all intentional or criminally reckless killings were presumed to be murder, unless the defendant proved that the killing

was committed in the heat of passion due to provocation. Thus, the prosecution benefited from a statutory presumption that all homicide was murder, and punishable as such by life imprisonment. The Supreme Court found this presumption, which is at odds with the traditional view of the burden of proof in a criminal case, unconstitutional. (*Id.* at pp. 703-704.) In *Patterson v. New York* (1977) 432 U.S. 197, 215, the Supreme Court clarified this point when it cautioned that all *Mullaney* held was that the state must prove "every ingredient of an offense" and that it cannot shift to the defendant any part of that burden by means of a presumption. We have no such improper burden-shifting here.

In *People v. Breverman*, *supra*, 19 Cal.4th 142, 165, a majority of our Supreme Court held that in a murder prosecution, the failure to instruct on the lesser-included offense of voluntary manslaughter when supported by the evidence is state law error alone. Justice Kennard dissented and opined that where evidence of provocation exists in a murder case, the absence of provocation is an element of the murder charge and the trial court errs by failing to "instruct the jury that one who kills in the heat of passion lacks malice and is therefore not guilty of murder." (*Id.* at p. 187 (dis. opn. of Kennard, J.).) From this hypothesis, Justice Kennard concluded that failure to instruct on voluntary manslaughter is not only an error of state law, but also of federal constitutional dimension. (*Id.* at p. 194; see also *People v. Moye*, *supra*, 47 Cal.4th 537, 563-564 (dis. opn. of Kennard, J.).) A dissenting opinion in a California Supreme Court opinion, however, is not controlling authority. (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 829.)

Moreover, our Supreme Court has stated that in murder prosecutions, evidence of heat of passion or imperfect self-defense is relevant on the issue whether defendant acted with malice and thus committed murder, or without malice and thus committed voluntary manslaughter. (*People v. Rios* (2000) 23 Cal.4th 450, 454, 461.) In such cases, the People may have to prove the *absence* of provocation or of any belief in the need for self-defense in order to *establish the malice element of murder*. (*Id.* at p. 454.) Unless the prosecution's evidence suggests that the killing may have been provoked or in honest response to a perceived danger, it is "the *defendant's* obligation to proffer some showing on these issues sufficient to raise a reasonable doubt of his guilt of

murder." (*Id.* at pp. 461-462.) "If the issue of provocation or imperfect self-defense is thus 'properly presented' in a murder case [citation], the *People* must prove *beyond reasonable doubt* that these circumstances were *lacking* in order to establish the murder element of malice." (*Id.* at p. 462.)

In sum, there may be circumstances in which evidence of the absence of provocation is a factual predicate for establishing an element of murder, but those circumstances are not present in every murder case. The basic flaw in Trujillo's argument is that where, as here, there is no evidence of a heat of passion killing caused by sufficient provocation, it necessarily follows that the defendant cannot ask the jury to decide whether he acted under provocation. The law does not require the trial court to instruct on a theory that is without evidentiary support.

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.*

PERREN, J.

*Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Joan Comparet-Cassani, Judge

Superior Court County of Los Angeles

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