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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. THEO ANDREW KRAH, Defendant and Appellant.	B332188 (Los Angeles County Super. Ct. No. SA093174)

APPEAL from a judgment of the Superior Court of Los Angeles County, William L. Sadler, Judge. Affirmed as modified.

Law Offices of Allen G. Weinberg and Derek K. Kowata, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Kristen J. Inberg and Megan Moine, Deputy Attorneys General, for Plaintiff and Respondent.

SUMMARY

A jury convicted Theo Krah of second-degree murder for killing Kris Anderson. Krah now raises two claims on appeal. First, he contends the trial court should have instructed the jury on the lesser-included charge of voluntary manslaughter under a heat-of-passion theory. Second, he asks us to independently review the trial court's determination that two officers' personnel files contained no discoverable information. (See generally *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).) We find no error and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The Los Angeles County District Attorney charged Krah with committing murder and second-degree robbery of Anderson, along with sentencing enhancements for using a knife. (Pen. Code, §§ 187, subd. (a), 211, 12022, subd. (b)(1).) We recount the trial evidence below, bearing in mind that we resolve evidentiary discrepancies in the light most favorable to appellant. (See *People v. Manriquez* (2005) 37 Cal.4th 547, 585 (*Manriquez*); *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137 (*Millbrook*).)

1. Krah Confronts Anderson at Santa Monica Pier

Krah accompanied his friend Carter Randall to her paddle board racing event at Santa Monica beach on June 11, 2016. Sometime that morning, Krah "seemed pretty upset" that someone was taking pictures of his friend. Later that day, Krah was "unhappy" and "upset" that someone was taking pictures of little children on the beach. He told Randall that he had to "go deal with something."

Krah and a security guard watched Anderson take photographs. The security guard told Krah that he had tried to

call the police about Anderson on prior occasions, but law enforcement said taking photographs in public was not a crime. The security guard estimated the female children were "in the ballpark of 6, 7, years of age," wearing bathing suits, and playing on the shoreline.

Around 4:00 p.m. that day, police officers responded to an altercation at the Santa Monica pier stairwell. Krah was kneeling behind Anderson with Krah's hand between Anderson's shoulder and neck restraining—but not choking—Anderson; both men appeared "very calm"; neither was struggling when the police arrived. Krah did not appear agitated or frustrated, and he released Anderson upon the officer's request.

Krah told the police that he was trying to get Anderson's camera because Anderson was taking inappropriate or illegal pictures of children on the beach. Krah did not know any of the people Anderson had photographed. Anderson was "distraught" and "embarrassed," but "reluctantly" gave the police his camera. Two officers reviewed roughly 25 photographs and determined Anderson had not committed any crime.

The officers testified that the photographs they reviewed showed "teenagers, younger women" in beach attire in public places along the pier or on the beach. One officer testified that a photograph of two 12- to 16-year-old girls wearing shorts was "zoomed in on their butts," and he addressed that photograph with Anderson. Law enforcement also confirmed Anderson was not on the sex offender registry and had no outstanding arrest warrants.

An officer then asked what Anderson was going to do with the photographs. Anderson said he did not know, and the officer responded the pictures were not illegal but were "not very

appropriate." Anderson replied he could delete them. He and an officer then deleted the pictures by reformatting the camera's memory card. Anderson declined to press charges against Krah, telling officers he just wanted to go home. Officers returned the camera to Anderson. Krah was roughly 10 feet from Anderson while this occurred.

An officer admonished Krah to notify law enforcement if he thought something inappropriate was happening because otherwise Krah could be arrested for battery or theft. The officer testified Krah was "very calm," "very stoic," and did not seem angry or frustrated; instead Krah seemed "very matter of fact." Krah told the officer he understood and "went on his way." The incident took roughly 15 minutes in total, and Anderson left a few minutes after Krah.

Krah went back to his friend Randall and told her he was "unhappy" and "upset" that the police had deleted the photos and let Anderson go. Randall thought Krah seemed upset because of "his demeanor and his body language. He just didn't seem the same to me." Krah then left again for roughly an hour.

Joseph Bark, a friend of Randall's and former fireman, testified that sometime between 4:00 and 5:00 p.m., Bark was approached by Krah saying, "I need your help." Bark described Krah's tone as excited but "not out of control." Krah asked Bark to follow Anderson and pointed down the stairs. Krah did not go down the stairwell with Bark. Bark arrived in the stairwell while the police were still speaking with Anderson, and the officers told him to leave. Bark walked back to where he had spoken to Krah, but Krah was no longer there. Bark waited a few minutes and then went home.

2. Krah Follows and Assaults Anderson

Traffic cameras and surveillance videos showed Krah following Anderson for approximately 16 minutes through the streets of Santa Monica. Video footage showed Krah alternatively hiding behind groups of people or trees and jogging through traffic. Around 5:00 p.m., a bystander saw an "altercation" between two people. He saw one person punching the other, the victim ended up on his back, and the assailant was "going through pockets" or something similar. After a few seconds, the assailant "started running away." The bystander then called 911. Another witness saw a man with blood on his forearm, presumed to be Krah, running away from Anderson.

Paramedics arrived within minutes and transported Anderson to the hospital. Anderson died the next morning from the wounds he suffered during the assault. Law enforcement never recovered Anderson's camera.

Surveillance video after the attack showed Krah had replaced his shirt with a new shirt. He then returned to his friend Randall. Randall testified Krah "just seemed very – like something had happened and that we needed to get away from that area more – or quickly." Krah eventually told Randall that Krah had "fuuuuucked this guy up," and Krah's arm wound bled in Randall's car. On the drive home, Krah "just seemed not as happy and excited to be around [Randall], and just more antsy, and wanting to get home." Randall testified that Krah seemed "nervous" and "more on edge" for the next two days after the incident. Blood evidence later obtained from inside Randall's car contained both Krah's and Anderson's DNA profiles.

3. Additional Evidence

The defense called multiple character witnesses who testified to Krah's peaceful, kind, and honest reputation. One of these witnesses was Krah's Navy Seal squad leader, who also testified Navy Seals receive training to remain calm in stressful situations. Krah did not testify.

4. Verdict, Sentencing, and Appeal

The trial court instructed the jury on first-degree murder, second-degree murder, felony murder, and involuntary manslaughter, but refused an instruction on a heat-of-passion theory of voluntary manslaughter. The jury found Krah guilty of second-degree murder and not guilty of robbery. The jury also found the use-of-knife enhancements untrue. The court sentenced Krah to 15-years to life. Krah timely appealed. While the appeal was pending, the court recalled and resentenced Krah to five years of felony probation and suspended the 15-years to life sentence.[1]

DISCUSSION

I. The Trial Court Did Not Err by Refusing to Instruct on a Heat-of-Passion Theory of Voluntary Manslaughter

During pretrial motions, the court explained its belief that Anderson "taking pictures of little girls . . . [was] not sufficient as a matter of law" to merit a heat-of-passion instruction without

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[1] The People ask us to correct the court's minute order to reflect the court's oral pronouncement at resentencing. Krah does not respond to the People's request in his reply brief. Accordingly, we will instruct the trial court to amend its minute order to accurately reflect its resentencing order. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.)

additional provocative conduct directed towards Krah. The court stated: "You have to have provocative conduct that the decedent engaged in with . . . the defendant. Provocation has to be directed towards him." However, the trial court did not let its pretrial views limit the defendant's introduction of evidence. The judge advised the defense that it was too early to determine whether the defense would get a voluntary manslaughter instruction and emphasized that the defense "can present [] evidence that . . . there might be a basis for a voluntary manslaughter instruction."

Near the end of trial, the trial court determined "there [was] no evidence of provocation" to support a heat-of-passion theory of voluntary manslaughter. The court then declined to give the instruction despite the defense's request. The trial court instead instructed on the following theories: first-degree murder, second-degree murder, felony murder, and involuntary manslaughter.

A trial court must instruct the jury on lesser-included offenses when substantial evidence exists in the record. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1206 (*Cole*).) Appellant argues that whether he was provoked was a question of fact for the jury to determine. Appellant is correct that a jury makes the ultimate determination whether there was sufficient provocation, but the trial court first has the obligation to determine whether substantial evidence exists to support the instruction. Put another way, " 'the court "has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction." ' " (*People v. Avila* (2009) 46 Cal.4th 680, 705 (*Avila*), quoting *Cole,* at p. 1215.) Evidence is substantial when " ' "a jury composed of reasonable [persons] could . . . conclude[]' "

that the lesser offense, but not the greater, was committed.' " [Citation.]' " (*People v. Wyatt* (2012) 55 Cal.4th 694, 704, quoting *People v. Huggins* (2006) 38 Cal.4th 175, 215; see also *People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8 [describing substantial as when "a reasonable jury could find [the evidence] persuasive"].) We review a failure to provide a lesser-included offense instruction de novo. (*Avila*, at p. 705 [" 'On appeal, we review independently the question whether the trial court failed to instruct on a lesser included offense.' "].) We do not evaluate witness's credibility or fault a defendant for presenting inconsistent defenses at this stage. (*Millbrook, supra,* 222 Cal.App.4th at pp. 1137-1138.)

As relevant here, " '[a] murder . . . may be reduced to voluntary manslaughter if the victim engaged in provocative conduct that would cause an ordinary person with an average disposition to act rashly or without due deliberation and reflection.' " (*People v. Enraca* (2012) 53 Cal.4th 735, 758-759 (*Enraca*); see also *People v. Nelson* (2016) 1 Cal.5th 513, 538 (*Nelson*) ["Manslaughter is a lesser included offense of murder, and a defendant who commits an intentional and unlawful killing but who lacks malice is guilty of voluntary manslaughter."].) The Legislature recognizes this type of voluntary manslaughter as heat of passion. (Pen. Code, § 192, subd. (a).) "Heat of passion is [thus] one of the mental states that precludes the formation of malice and reduces an unlawful killing from murder to manslaughter." (*Nelson*, at p. 538.) It arises " ' "when '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.' " ' " (*Manriquez, supra,* 37 Cal.4th at p. 584, quoting *Barton*, *supra*, 12 Cal.4th at p. 201.)

A. The Victim's Provocative Conduct Need Not Be Directed at the Defendant

In the pretrial rulings, the trial judge appeared to require that the victim's conduct be directed at the defendant in order to support a provocation defense. We decline to adopt such a bright-line rule. The parties have not cited any authority explicitly requiring that the provocative conduct be directed at the individual who later commits homicide, nor have we located any. The provocative conduct must be *caused by* the victim, but need not be *directed at* the defendant. " ' "[T]he 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." ' " (*Nelson, supra,* 1 Cal.5th at p. 540, quoting *People v. Moye* (2009) 47 Cal.4th 537, 549-550.)

In *People v. Brooks* (1986) 185 Cal.App.3d 687 (*Brooks*), the Court of Appeal concluded that a voluntary manslaughter instruction should have been given where the defendant was told that the victim murdered his brother earlier the same day. "[W]e conclude that the disclosure of information that the victim murdered a family member of the defendant is legally adequate provocation for voluntary manslaughter." (*Id*. at p. 694.) In *Brooks*, the victim's alleged provocative conduct (murder of the defendant's brother) was not directed towards the defendant.

In *People v. Fenenbock* (1996) 46 Cal.App.4th 1688 (*Fenenbock*), the Court of Appeal could have laid out the bright-line rule the trial court referenced but declined to do so. There, the provocative conduct was also not directed at the defendant.

Instead, the victim was alleged to have abused a five-year-old girl. (*Id.* at p. 1693.) Defendant and others accused the victim of being a child molester and then stabbed him. The Court of Appeal relied on the general rule that "[n]o specific type of provocation is required. [Citation.] The provocation may be anything which arouses great fear, anger, or jealousy." (*Id.* at p. 1704.) The court then held that the record did not contain sufficient evidence of adequate provocation. (*Id.* at p. 1705.) The fact that the victim's alleged provocative conduct (abuse of an unrelated young girl) was not directed at the defendant did not factor into the court's reasoning.

We are mindful that adequate provocation is generally a question of fact within the jury's purview. (*People v. Beltran* (2013) 56 Cal.4th 935, 947-948 (*Beltran*); *Millbrook*, *supra*, 222 Cal.App.4th at p. 1141.) Thus, we decline to apply a bright-line rule requiring the victim's conduct to be directed at the defendant. Nevertheless, we affirm the underlying judgment here because there was insufficient evidence to support a voluntary manslaughter instruction.

B. There Was No Substantial Evidence to Support a Voluntary Manslaughter Instruction

"Heat of passion has both objective and subjective components. 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. . . . [¶] Subjectively, 'the accused must be shown to have killed while under "the actual influence of a strong passion" induced by such provocation.' " (*Enraca, supra*, 52 Cal.4th at p. 759.) Both " 'must be affirmatively demonstrated.' " (*People v.*

Gutierrez (2009) 45 Cal.4th 789, 826.) We address each prong individually.

Under the objective prong, "the accused's heat of passion must be due to sufficient provocation." (*Manriquez*, *supra*, 37 Cal.4th at p. 584, quotation marks omitted.) "[S]uch provocation 'must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment.' " (*Id*. at pp. 585-586.)

Krah contends the trial record contains adequate provocation. We disagree. Krah saw Anderson taking pictures of children on the beach in public. Krah did not know any of the people in the photographs. (*Fenenbock*, *supra*, 46 Cal.App.4th at pp. 1704-1705 [finding no provocation where defendant had no connection to allegedly abused child].) Krah detained Anderson until the police arrived, and Krah then observed police officers review the pictures. The officers determined Anderson had not committed any crime, although the pictures were "not very appropriate." Anderson deleted the pictures, and the camera was returned to him. An officer admonished Krah to notify law enforcement if he thought something inappropriate was happening because otherwise Krah could be arrested for battery or theft.

We find no substantial evidence of provocation under these circumstances. Reporting a potential crime to law enforcement, observing them conduct an investigation, and simply disagreeing with the outcome would not cause "an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*Enraca*, *supra*, 53 Cal.4th at p. 759.) Therefore, we find no substantial evidence to support the objective component of heat of passion.

Under the subjective prong, " 'the defendant must actually, subjectively, kill under the heat of passion.' " (*Manriquez*, *supra*, 37 Cal.4th at p. 584.) " '[T]he accused must be shown to have killed while under "the actual influence of a strong passion" induced by such provocation. [Citation.] "Heat of passion arises when '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.' [Citations.]" ' " (*Enraca*, *supra*, 53 Cal.4th at p. 759.) " '[T]he passion aroused need not be anger or rage, but can be any " ' "violent, intense, high-wrought or enthusiastic emotion" ' " . . . other than revenge [citation.]' " (*People v. Lujan* (2001) 92 Cal.App.4th 1389, 1411.)

The record does not contain substantial evidence that Krah acted under the heat of passion. The officers who observed Krah before the attack described him as calm and stoic, not angry or frustrated. Joseph Bark testified that Krah's tone was excited but "not out of control." Krah's friend described him as unhappy and upset that the officers had let Anderson go, and that Krah "just didn't seem the same to me." Generalized testimony that Krah appeared upset, unhappy, or excited but not out of control is insufficient evidence to show Krah killed while actually under the heat of passion.

"A person in this state simply reacts from emotion due to the provocation, without deliberation or judgment." (*Beltran, supra,* 56 Cal.4th at p. 950.) No witness testified that Krah seemed to be "simply reacting," "snapped," or went "berserk." (Cf. *People v. Steele* (2002) 27 Cal.4th 1230, 1239, 1253 [evidence that defendant had a psychological dysfunction due to traumatic

experiences in the Vietnam War, and that he " 'just snapped' " when he heard a helicopter, may have satisfied the subjective element of heat of passion]; *Cole, supra,* 33 Cal.4th at p. 1216 [defendant's statements he went "berserk" may have satisfied subjective element of heat of passion].) Therefore, we find no substantial evidence to support the subjective component of heat of passion.

Because we find no error in the trial court's denial of the voluntary manslaughter instruction, we likewise deny Krah's claim that denial of this instruction violated his federal constitutional rights. (*People v. Benavides* (2005) 35 Cal.4th 69, 104 [finding defendant's claim of prejudice under the federal Constitution "fails because, as we have concluded, the court did not err" in denying manslaughter instructions].) Nor was the jury left with an inappropriate "all or nothing" choice; the court instructed on second-degree murder and involuntary manslaughter. (*Id*. at p. 103.)

II. The Trial Court Did Not Err When It Denied Krah's *Pitchess* Motion

Appellant filed a discovery motion seeking records within Santa Monica Police Officer Jeffrey Glaser's and Jacob Holloway's personnel records pursuant to *Pitchess, supra,* 11 Cal.3d 531. The court found "good cause to conduct an in-camera hearing for reports of fabrication, illegal search and seizure, false arrest, perjury, and writing false police reports." After an in camera review, the court explained there was "one item which has nothing to do with anything [Krah] requested" and ruled there were "no discoverable reports to be disclosed." Krah asks us to independently review the court's determination, and the People do not object to his request.

"The procedures attendant to a criminal defendant's right to discover relevant evidence in confidential peace officer personnel files . . . are established by both statute and decisional law." (*People v. White* (2011) 191 Cal.App.4th 1333, 1335 (*White*), fns. omitted.) When a defendant's *Pitchess* motion clears the initial good-cause hurdle, courts then "screen[] law enforcement personnel files in camera for evidence that may be relevant to a criminal defendant's defense." (*People v. Mooc* (2001) 26 Cal.4th 1216, 1225 (*Mooc*).) At the in-camera review stage, "the custodian [of records] must be placed under oath." (*White*, *supra*, at p. 1335, citing *Mooc*, at p. 1230, fn. 4.) "A court reporter should be present to document the custodian's statements, as well as any questions the trial court may wish to ask the custodian regarding the completeness of the record." (*Mooc*, at p. 1229.) The trial court should also make a record that allows for meaningful appellate review. (*Ibid.*) We then review a trial court's *Pitchess* discovery determination for abuse of discretion. (*People v. Hughes* (2002) 27 Cal.4th 287, 330; *People v. Jackson* (1996) 13 Cal.4th 1164, 1220-1221.)

We have independently reviewed the in camera proceedings and find no abuse of discretion. While some preliminary questioning of the custodian occurred prior to administering the oath, the court's subsequent under-oath questioning ensured the produced records were complete. (See *White*, *supra*, 191 Cal.App.4th at p. 1335 ["The completeness of the records is established through questioning of the custodian of records who produced them."].) The court thus followed the procedural requirements for its in camera review and provided a meaningful record for our review. Substantively, "[w]e have reviewed the record under seal and independently conclude that the trial court

did not abuse its discretion in its ruling upon the *Pitchess* motion." (*People v. Prince* (2007) 40 Cal.4th 1179, 1286.)

DISPOSITION

We order the trial court to issue an amended minute order to reflect its oral finding at Krah's resentencing hearing as follows: "The court finds . . . that because of the defendant's strength and training he did know that any assault he committed could cause death or great bodily injury." In all other respects, the judgment is affirmed.

UZCATEGUI, J.*

We Concur:

STRATTON, P. J.

WILEY, J.

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