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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,
Plaintiff and Respondent,
v.
JAMIE THOMAS,
Defendant and Appellant.

A129933
(Alameda County
Super. Ct. No. C158950)

Defendant Jamie Thomas appeals after a jury convicted him of second degree murder and being a felon in possession of a firearm, and found true that he personally discharged a firearm causing great bodily injury. He argues that the trial court erred in denying his *Wheeler*¹ motion based on the prosecutor's challenges of three African-American jurors, refusing to instruct the jury on heat of passion that would reduce murder to manslaughter, and admitting evidence of lyrics he had written several years earlier depicting the use of an automatic weapon. We conclude the *Wheeler* motion was properly denied and admission of the rap lyrics was not error. We also conclude that the failure to instruct on provocation was harmless. Thus, we affirm.

¹ *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

BACKGROUND

Defendant and his father lived in the same apartment complex at 71 Pearl Street in Oakland as did the victim, Sam Navarro, and his wife Araceli Gamez.² The trial testimony presented a background of disputes concerning parking on the premises.

On approximately four occasions, defendant had parked his car in a manner that blocked Gamez's car. On all except one occasion, Gamez would wait for him to leave rather than confront him. On that occasion, Gamez knocked on defendant's door and asked the person who answered to move the car. After four or five minutes, someone came downstairs and did so. Navarro had also been blocked in several times, and Gamez had seen him go upstairs to talk to defendant or his father about it.

The apartment manager, Sergio Torres, testified he was friends with Navarro and helped him get an apartment at 71 Pearl Street. He testified that visitors to the apartments often parked in the spaces designated for other residents and that this had caused problems.

Ignacio Ortiz testified that he and Navarro were close friends. On January 8, 2007, Ignacio and his brother Jose³ drove to 71 Pearl Street because Ignacio was moving into an apartment there and planned to paint it. The two men arrived around six o'clock p.m. Jose and Navarro went to a store to get supplies while Ignacio painted. When the two men returned, it was dark outside. They parked Jose's truck in the space it had been in earlier. A station wagon pulled in immediately behind them. Defendant got out of the station wagon and Jose and Navarro exited the truck. Ignacio was standing in the doorway of the apartment and heard Navarro and defendant arguing. Navarro told defendant that he "had to move his car, that it wasn't the first time. He already told him that so many times about the parking spot, coming in and parking the car there" Navarro, sounding upset and angry, told defendant, "Motherfucker, you got to move your

² Gamez and Navarro were not legally married, but Gamez testified that they had been a couple for six years and that she considered him to be her common law husband.

³ Because the Ortiz brothers share a last name, we identify them by first name, intending no disrespect.

car.” Defendant responded, “Fuck off” and told Navarro to move the truck. Ignacio walked closer to the apartment stairs. Jose told Navarro, “Sam, leave that alone, man. It’s cool for me. We can handle it later on.” Jose began climbing the stairs.

Ignacio described the argument as “pretty heated.” Both men were using profanity but there was no pushing or physical interaction. When they reached the top of the stairs, Ignacio addressed Navarro in Spanish, “telling him to leave that alone. We can unload the truck later on. And that was when the defendant turned around and said, ‘What the fuck you say?’ ” Ignacio told defendant, “he’s telling you [to] move the car, man. Just move the car.” Defendant responded, “Fuck y’all.”

According to Ignacio, defendant was close enough to touch him and said, “What’s up?” Ignacio believed this was a challenge to fight. Defendant then swung at Ignacio’s face with his right hand. Ignacio ducked and “went for his legs, picked him up, body slammed him, and gave him a couple punches.” Defendant’s cell phone and keys fell from his pocket. Defendant began crying, then yelled, “You got me. It’s cool. It’s good.” Ignacio then stopped hitting him. He told defendant to pick up his phone and keys and to “get the fuck out of here and get that car out.” Defendant got up, retrieved his keys and cell phone, and left. None of the remaining three men attempted to follow him.

Ignacio saw defendant go to his car, open the driver’s side, reach under the seat and retrieve something. He was yelling for a woman in one of the apartments. She came out and defendant told her to call his father. The woman returned to the apartment and a moment later defendant’s father came out of a different apartment. Defendant’s father began speaking with Navarro. Neither Navarro nor the Ortiz brothers were armed. Navarro told defendant’s father, “Hey man, you got to talk to your son. You know, my friend over here, he’s whipped his ass over the parking lot. I already talked to him. I told him about the parking a few times. He just don’t listen.” Defendant’s father told Navarro he would “take care of it.”

Defendant’s father approached defendant in the parking lot and spoke with him for approximately one minute. Navarro followed defendant’s father into the parking lot. Ignacio tried to dissuade Navarro from going but Navarro told him, “he’s good. The dad

is already here. He's going to talk to him. Let me talk to him." Ignacio heard Navarro say, "Hey man. I just told you to move the car. You don't need to behave like that." Navarro and defendant's father appeared to be calm, but defendant appeared upset. Ignacio heard defendant's father say, "Son, don't do it." He heard defendant say, "I'm going to get this motherfucker." Defendant then pushed his father against the car with his left hand and Ignacio saw a flash and heard a loud bang. Ignacio estimated that Navarro was two feet from defendant when defendant shot him.

Ignacio testified that Navarro did not lunge at defendant or say anything to him. He testified that Navarro "was very, very calm." After defendant shot Navarro, Jose ran towards the street and Ignacio ran into Navarro's apartment and called 911. He told the operator there had been two shots even though he only heard one "I guess because I was nervous. I wanted the police to get there as soon as possible."

Ignacio did not tell the 911 operator or the police on the night of the shooting that he had punched defendant. He likewise did not tell the homicide detectives about the assault that preceded the shooting. The first three times Ignacio met with the prosecutor, he said that there had not been a fight. At the preliminary hearing, he testified that he never touched defendant. At trial he testified that he had lied "because at a certain point I felt that it was, I was responsible for Sammy's death, and [¶] . . . [¶] I didn't want the family to know that because of a nonsense fight, Sammy got killed." The prosecutor asked him in one of those meetings whether defendant had said, "fuck these Mexicans" before he shot, and Ignacio had told the prosecutor that he did. At trial he testified that was also a lie. He testified that defendant's actual statement was "I'm going to get this motherfucker."

The prosecution presented two other witnesses to the events of that evening. One of Navarro's neighbors, Mario Neal, testified that the evening of the confrontation he heard loud voices outside. He went outside and saw Navarro sitting on the steps with his two friends nearby. Navarro told him "they're tripping off of the parking." Navarro seemed upset but not angry, and he did not have any apparent scratches or other wounds. Neal saw as many as 10 people standing in the parking lot. Neal returned to his apartment

and about five minutes later heard “some type of tussle. I hear some running upstairs. You know, I hear more commotion.” Neal looked out of his window and saw defendant “pacing” in the parking lot but did not see anyone else. Defendant looked like he was in a scuffle, but did not appear to have any major injuries. Neal’s girlfriend told him to close the shades and stop looking, and he did so. “[N]o sooner than five more minutes” later he heard a gunshot. When he exited the apartment a short time later, he saw Navarro lying in the parking lot.

Kim Harris testified that although he is not related by blood to defendant, he calls defendant his nephew and defendant refers to him as “uncle.” He has known defendant since he was nine years old. Harris is close friends with defendant’s father. He was at the apartment complex on the night of the shooting visiting friends with whom he was drinking and using cocaine. A young woman whom Harris knew to be a friend of defendant came to the apartment door and Harris and defendant’s father went downstairs because they were concerned for defendant’s safety. At the bottom of the stairs, Harris saw two Hispanic men. Defendant was pointing at his face and asking the two older men to look at it. He seemed angry, but he was not hollering or shouting. Defendant’s father was trying to calm him down. Defendant’s face was red and a little swollen and Harris could smell alcohol on his breath, but defendant did not seem drunk.

Harris testified that Navarro seemed apologetic. Defendant did not appear to respond to Navarro’s apology, but said something to Navarro about stopping the other men’s behavior. Navarro was not threatening and did not appear to be trying to attack anyone. Navarro continued to apologize for a minute or two when Harris heard a pop, but did not see defendant shoot Navarro.

Defendant presented a version of events differing starkly from that testified to by Ignacio. He testified that he had a cordial relationship with Navarro. They did not argue and had no physical fights. Navarro never told defendant to move his car and defendant never asked Navarro to move his. He often had problems finding a place to park in the parking lot, although he was assigned stall number nine.

Defendant's wife was approximately eight months pregnant shortly before the shooting, and defendant would sometimes use his father's parking space, stall 10, because "nine was a tight fit and a lot of times I couldn't get out because of eight being parked behind me and number 10 being parked in front of me." Defendant was concerned that his wife would soon deliver the baby and he would not be able to get the car out. Space 10 was also difficult to get in and out of, however, because there was a tree stump in the space that blocked exit if another car was parked too closely behind defendant's. Defendant testified that he never fought with anyone over the parking issues but if someone was parked in his spot he "would just kind of pull up and honk the horn." When he did that, the person would come out and move their car.

When defendant first moved into the apartment on Pearl Street, he did not own a gun. After he and his wife moved in, she got a "deer rifle" from her grandfather who had recently died. Defendant purchased an SKS assault rifle after moving in although it was illegal for him to do so as a convicted felon. He testified that he "was just being overprotective. I was thinking about my family. We had a baby coming"

Defendant's wife asked him to return the gun. Defendant attempted to do so, but the man he purchased it from would not refund his money. Defendant "called a few gun shops" in an attempt to sell it. The gun shops would not purchase the rifle because it was not registered. He testified that no bullets came with the gun and that he purchased bullets and loaded the gun in order to sell it. "A lot of it has to do with stupidity, but also I'm a salesman. Just from . . . working at the flea markets, I buy a lamp or come across a lamp, before I sell it I buy a light bulb or put it in or, you know, things of that sort. So I just wanted it to be, all the accessories to be there . . . when I sold it."

Defendant cleaned and loaded the rifle on December 14. Prior to that date, he stored it in the apartment but then he put the loaded rifle in his car. "We just thought it was safer to have it in the car. My kids don't play in the car. They play in the house. And the gun was rather big, so it wasn't really nowhere to keep it." [*Sic.*] He says he put it in the back of his car underneath the rear carpet where the spare tire was stored. He did not move or touch the rifle again until January 8, 2007.

Defendant's daughter was born on January 3. His wife and daughter stayed in the hospital for a few days. On January 8, defendant and his wife took the baby to see the doctor and then planned to go home. They stopped at defendant's grandmother's house, where they met defendant's sister and mother and "a lot of people from my family." The family convinced them to stay at the grandmother's house. Defendant was frustrated because "[p]rior to my daughter coming home, I had . . . scrubbed my house from top to bottom. . . . So it was, like, I put in all that hard work and all that for nothing because now we're keeping her at my grandmother's house." Defendant returned to the apartment on Pearl Street to get clothes for the next few days.

When he arrived he "pulled into the slot number 10. There was a truck that was parked near the back fence back there, and I couldn't quite fit in so I just fit in as best as I could." He left the car and began walking to the stairs but was stopped by Ignacio, who was in the passenger seat of the truck. Ignacio got out of the car and told defendant that "they were about to leave and if I could just move my car." Defendant did so, backing all the way out of the driveway because every parking spot was taken and he could not turn around. The exchange with Ignacio "was fine." Defendant backed out of the driveway and waited for the truck to pull out. He waited two or three minutes, but the truck did not move. Defendant honked his horn and waited. After a short time, defendant saw that "[t]hey were still just kind of sitting there, so I decided just to pull back in."

Defendant parked and walked through the parking lot to his apartment. He ran up the stairs but was stopped by Navarro who was standing in the middle of the stairs with his arms folded. Defendant asked Navarro if he knew the men in the truck. Navarro told defendant "[y]ou don't want to fuck with them." Ignacio and Jose came up the stairs and said, "I thought I told you to move your car." Defendant said, "I did just move my car. Why didn't you leave?" Jose answered that he had been on the phone. Defendant testified, "I just kind of looked at them because I didn't know if he expected me to just wait in the middle of the street while he talked on his phone. So I just kind of looked at him" Defendant told Jose, "I was just about to run upstairs and grab a few items and I was about to come back down. If they could just try to pull their car out . . . if they

couldn't get out that I would go back down and move my car again." Defendant believed they could move the truck without him moving his car, however. Ignacio replied, "You know, man, you need to move your fucking car right now." Jose told Ignacio to calm down. Ignacio told defendant that "if I didn't move my car, he was just going to ram it on his way out." Defendant asked who the men were and whether they lived in the apartments. The men did not answer. Defendant told them that if they were visitors they were supposed to park on the street.

"I let them know, again, I'm on my way up and about to grab a few items. I made sure there was enough room for you guys to pull out. So either you guys can try to pull out, and if you can't get out I'll come back down there and I'll move my car or I'm going to go upstairs and you guys can wait." Ignacio responded, "You need to move that fucking car right now." Defendant told them "either you guys going to move the car, or I can just go upstairs and call the tow truck and have it towed out of here." Ignacio asked, "So you're not going to move your car?" Defendant told him he was not. Defendant felt that Ignacio "was being real aggressive," and felt that he was in the right because he lived there.

Ignacio hit defendant in the face. Defendant dropped the things he was holding and began hitting Ignacio back. Jose jumped into the fight and also hit defendant. Defendant was trying to get away because he was outnumbered. "I eventually got a good distance from him to where we wasn't exactly at arm's reach, and somebody hit me from behind." Defendant assumed it was Navarro. Defendant fell to the ground and someone began kicking him. Defendant covered his head and "balled up basically." Defendant yelled for his father. After being beaten for approximately a half minute, one of the men said to defendant, "So you're going to move your car right now. Right?" Defendant answered, "Yes" but did not move because he was afraid to uncover his face. He yelled for his father again, and Ignacio grabbed him by his shirt, pulled him up and told him to "shut up." Ignacio pulled defendant to his car and "told me to get in the car and fucking move it." Defendant had dropped his keys during the confrontation and at that point did not have them.

Ignacio told him to get in his car and leave, but defendant could not because he did not have the keys. Instead, he reached into the back of the car and got his rifle. Defendant aimed the gun at Ignacio “and I told him to leave me alone.” He didn’t intend to shoot Ignacio, only to scare him. Ignacio was only a few feet away. Ignacio ran back toward the stairs and behind Jose and Navarro. Defendant still did not feel he could get away because the men were standing at the top of the stairs and defendant did not have his car keys. Defendant stood there holding the weapon at his side and called for his father.

After hitting defendant on the head, Navarro had not intervened in the fight and did not tell defendant to move his car. Defendant testified that he did not demand that he be permitted to enter his apartment because “I just didn’t feel that would be the safest thing for me to do, despite the gun. I was scared. I was nervous. I wasn’t thinking clearly at the time, and I just thought it would be best if I stay behind that car and wait for help.” Defendant continued to yell for his father and his father came down the stairs one or two minutes after defendant first pointed his rifle at Ignacio. His father stopped about three feet from defendant’s car and defendant told him that Navarro had beaten him. Navarro began walking towards him and defendant “told [his] dad to tell him don’t come over here.” Defendant also said directly to Navarro, “Sam, don’t come over here.” Navarro proceeded across the parking lot and blocked defendant between his car and the fence. Navarro said, “I told you not to fuck with my homeboys. You should have moved your car. You think you’re tough,” in an aggressive tone. Navarro was trying to get around defendant’s father. Defendant told Navarro “just leave me alone” and asked him not to come closer, but Navarro stepped around defendant’s father. Defendant was holding the rifle in his left hand and testified that he did not push his father. Navarro was approximately four feet from defendant and lunged toward him, reaching out with one hand. Defendant pulled the trigger.

Defendant testified that he did not make a conscious decision to pull the trigger and that he did not intend to fire a shot. He was afraid of being injured or killed and felt he had no choice but to shoot. He was not thinking clearly about his options when he shot because “I was afraid. I was nervous. I just wasn’t thinking clearly. I told him to leave. I

told him to back up. I told him just to leave me alone. My dad asked him to leave me alone and he wouldn't. I don't know." Defendant testified that he was holding the gun level. Navarro "was crouched forward, bent at the waist as if he was reaching for something." Defendant believed he was reaching for the gun. After he shot, he left 71 Pearl Street with his father. He spent the night at the house of a friend of his father and the next morning his father told him he "needed to get away." Defendant went to Modesto and stayed with another friend of his father. Eventually he went to South Carolina because his father and wife "felt that just me being in California alone wasn't good enough." He did not believe that turning himself in "would be the wisest thing for me to do." However, after some time he returned from South Carolina and was arrested.

Dr. Thomas Rogers, a forensic pathologist, testified that he performed an autopsy on Navarro's body. Navarro had no bruises on his body and no cuts or scrapes on his hands. He observed a gunshot entrance wound on the right side of Navarro's chest "about six and a half inches below and about four inches to the side of the top of the breastbone." The exit wound was located on the left back, approximately 11 inches below "the bump at the base of your neck." From the examination, Rogers was able to determine that "the bullet entered in the right front side of the chest and its basic direction is that it was going towards the back of the body. It was going down towards the feet at about approximately a 35-degree angle, and it was going towards the left side of the body at approximately a 40-degree angle." Rogers testified that the entrance wound was oval-shaped and that the shape "may mean that the bullet is coming in not straight on, but let's say, at an angle." But he could not determine the victim's position when he was shot from the path of the bullet. He could have been in any of an infinite number of positions, including turning away from the bullet.

Rogers noticed stippling at the site of the entrance wound. He described stippling as unburned particles of gun powder that strike the skin and leave "little period-sized defects on the skin." He testified that stippling is the result of a close-range shot, and that if the victim were reaching toward the barrel of the gun when it was shot "it is possible that some stippling can be deposited on the hands. That does happen." However, he also

testified that there might not be stippling and he could not say based on the absence of stippling whether a victim was reaching toward the gun when it was shot. Nor did the absence of bruising on his hands exclude the possibility that he had punched someone shortly before he was killed.

Defendant was charged by information with one count of murder (§ 187, subd. (a)) with an allegation that he personally discharged a firearm and caused great bodily injury (§§ 12022.7, subd. (a), 12022.5, subd. (a), and 12022.53, subds. (b), (c), and (d)), and one count of being a felon in possession of a firearm (§ 12021, subd. (a)(1).) The information additionally alleged that defendant had one prior felony conviction and that he had served a prior prison term within the meaning of section 667.5, subdivision (b). The jury found defendant guilty of second degree murder and of being a felon in possession of a firearm, and found the firearm enhancements true.

Defendant was sentenced to 40 years to life imprisonment, consisting of 15 years to life for the murder, and 25 years to life for the personal use of a firearm enhancement. The trial court imposed but stayed sentence on the remaining firearm enhancements and imposed but stayed a two-year term for the felon in possession of a firearm conviction. The prosecutor dismissed the prior prison term enhancement. Defendant timely appealed.

DISCUSSION

Wheeler/Batson motion

Defendant argues that the prosecutor exercised peremptory challenges against three African-American potential jurors based on race in violation of *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *Wheeler, supra*, 22 Cal.3d 258. There are three steps to such a challenge. “First, the defendant must make out a prima facie case ‘by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.’ [Citations.] Second, once the defendant has made out a prima facie case, the ‘burden shifts to the State to explain adequately the racial exclusion’ by offering permissible race-neutral justifications for the strikes. [Citations.] Third, ‘[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has

proved purposeful racial discrimination.’ ” (*Johnson v. California* (2005) 545 U.S. 162, 168, fn. omitted.)

Here, as in *People v. Jordan* (2006) 146 Cal.App.4th 232, “the court found a prima facie case . . . , thus shifting the burden to the prosecutor, and the prosecutor gave facially neutral reasons for each strike. We are therefore concerned with the third step of the analysis [citations], whether there was purposeful racial discrimination. That step required the court to make ‘ “ ‘a sincere and reasoned attempt to evaluate the prosecutor’s explanation[s] in light of the circumstances of the case as then known’ ” ’ [citation]—i.e., ‘all of the circumstances.’ ” (*Id.* at p. 245.) “This final step involves evaluating ‘the persuasiveness of the justification’ proffered by the prosecutor, but ‘the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.’ ” (*Rice v. Collins* (2006) 546 U.S. 333, 338.)

The first African-American venire member to be questioned was K.C., who worked at a law firm. During voir dire she revealed that she had been convicted of misdemeanor DUI and welfare fraud and that her brother had recently been convicted of murder in Alameda County. When asked her opinion of the effectiveness of the criminal justice system, she wrote on her questionnaire, “It’s not perfect but it’s better than not having one at all.” When asked to clarify, she responded, “I think that sometimes we expect things to happen a certain way and they just don’t end up happening that way. Well, that’s definitely not perfection, but—I’m not sure, actually.” The prosecutor asked, “you obviously have some hesitation. There’s some problems you see with the system, is that fair to say?” She answered, “Somewhat.” The prosecutor asked what gave her hesitation about the justice system and she answered, “if you’re a person who doesn’t know anything about the justice system, you kind of tend to rely on information, and sometimes that information might not exactly be what would have benefited you in the long run and then you find out later you could have done something else. So I just feel like sometimes it’s not totally informing.”

The prosecutor exercised a peremptory challenge to strike K.C. and defendant made a *Wheeler/Batson* motion challenging the strike. Defense counsel stated that K.C.

was “the first African-American we’ve had on our jury panel, either in the box or the six-pack beyond it.” The court denied the motion, stating, “I don’t know that I need to turn to [the prosecutor] because I don’t believe that you’ve made a prima facie case that this particular peremptory was racially based.” The court nevertheless allowed the prosecutor to offer a race-neutral reason for excusing K.C. He stated he was concerned that “she was vacillating on how she felt about the system,” and the fact that she had a conviction for welfare fraud, which he stated “is a crime of moral turpitude.” Finally, he noted that she did not volunteer the information about being convicted of misdemeanor DUI, but that it was “information that’s already been provided in the venire panel criminal history from 1995.”

The court noted that at that point in jury selection the state had exercised nine peremptory challenges against venire members, four of whom were White, three of whom were Asian. The court did not know the race of the ninth panel member.

The next African-American venire member was L.B., a college student who was studying psychology and philosophy. Approximately one month earlier, his parent’s home was broken into and several items were stolen. No one had been arrested for the crime. He had been stopped for running a stop sign a few years earlier. He felt that the officer who stopped him was in the wrong and that he behaved rudely. He requested a trial, but the matter was dismissed because the officer did not appear to testify. Nothing in the process made L.B. doubt the court system. He felt he could set aside his feelings about the officer being rude if an officer testified during the instant trial. He had a friend who was arrested and L.B. believed the arrest was unreasonable. He objected to the fact that his friend was arrested for possession of a single pill containing a controlled substance but agreed that he would follow the law as he was directed by the court. When questioned by the district attorney, L.B. expressed his frustration at the slow pace of jury selection but also stated that he was excited at the prospect of serving on a jury because “I like group work and I think that jury duty is big group work and you’re, like, you all have to come together, make, like, an answer together, and that seems interesting to me.” The prosecution exercised a peremptory strike against L.B.

A.M., the third African-American venire member against whom a peremptory challenge was exercised, is an “on air personality” at a radio station. On his questionnaire, he stated that he had been convicted of petty theft and was briefly in jail in 1989. He also stated, “I am a radio announcer and could be recognized as such to the defendant or others involving this case since I appear at many functions in the Oakland area.” The court and attorneys spoke with A.M. in chambers and the district attorney characterized his comments as “concern[] that if he voted guilty some people would be mad at him and that potentially he even said his ratings would drop.” He stated during voir dire that he was given a jury trial in the petty theft case and convicted, but that he believed in the jury system. He also stated, however, that he felt “the judge was a little harsh.” When asked why he had chosen to go to trial he stated, “I was innocent.” He believed he was unjustly convicted. He also believed that the district attorney was wrong to have charged him. He had an uncle who was accused of robbery, and a friend and a brother who had been accused of drug crimes. When asked his feelings about the effectiveness of the criminal justice system he stated, “I think for the most part all is good.” He had visited a friend at the Santa Rita jail in 1994. The prosecutor exercised a peremptory strike against A.M.

Defendant again made a *Wheeler/Batson* motion, stating that he believed the prosecutor had made “improper use of peremptory challenges to remove the three African-American jurors that have been in the box.” Defense counsel conceded that there was “a legitimate reason to excuse [K.C.]” and that L.B. “was almost cause because he didn’t really seem to care about being here that much. Part of it was his youthful enthusiasm.” As to A.M., defense counsel stated, “the only justification I can see is a 21-year-old petty theft conviction and his answers about that 21-year-old petty theft conviction were, yeah, it bugged me. I was innocent. I went into a little more detail about what the facts were, and I don’t see . . . how a 41-year-old radio professional who looks and appears in every way to be a solid citizen . . . I don’t see any reason that he would be challenged by the prosecutor.”

The court noted that “it’s close” but found that defendant had made a prima facie case of discriminatory motive and asked the prosecutor to state his reasons for excusing the jurors. With respect to L.B., the prosecutor stated that “he was pretty close to a cause by the court’s own assessment, and it was further questioning that was going to elicit whether or not he was going to be cause or not. He was very flippant. He wore a tank top. He didn’t seem to really have a depth or gravity or appreciation for the proceedings. At times it looked like he was disinterested. At some times he said he was interested. At one point he said he was stoked. He didn’t seem to be able to, at the age of 19, be able to really adequately appreciate the consequence of what he was doing, and even [defense counsel] said the same.” The court said it had not indicated he might be dismissed for cause but said, “I did indicate to counsel that the court was okay dismissing the juror because of lack of maturity, which may be different from cause. . . . After [defense counsel] examined him, he seemed to rehabilitate himself as far as some of the issues of maturity and . . . he would not have been a cause after [defense counsel] talked to him because he acknowledged that he appreciated the seriousness of this thing.”

The prosecutor then pointed to L.B.’s statement that his friend’s arrest was unreasonable and “generally speaking, his inability to really appreciate the gravity of his proceedings. Friend was arrested for having [a controlled substance] with no [prescription]; that seemed unreasonable. And you take that in comparison, again, to his age, his experience, I don’t think he would have been a proper juror.”

As to A.M., the prosecutor pointed to the fact that he “spent a great deal of time saying how as a radio announcer and a public figure he would be potentially . . . I don’t know if he said frightened, but concerned about returning a verdict of guilty or not guilty.” The prosecutor continued, “I don’t know how realistic that was of a view, but it’s a view that he had. . . . He also said the same with respect to finding someone not guilty. That somebody else would be potentially upset or a segment of this listening community would be upset and that would affect his ratings.” He added, “the fact that this is a guy that not only went to trial on a case, so he failed to accept responsibility for what he did, but he feels that my office wrongfully convicted him. That a D.A. got up here and lied.

That's what he's essentially saying. That a D.A. got up here and lied to convict him because he's saying the D.A. didn't listen. He said that the judge didn't listen. He said that the judge was harsh, was rude." He concluded, "I don't feel, regardless of the answers he may try to say, that he wants to do the right thing. That's going to be a concern that I think is going to be hard for him to put out of his mind because he still feels pretty strong about it."

The court initially found that "the reasons for excusing [L.B.] and [A.M.] were not race neutral. And briefly, I believe that, from what I garner from [the district attorney's] comments, there was nothing wrong with [L.B.] except his immaturity. Now with respect to [A.M.], it's a close call. . . . Now, I understand the right to make a peremptory challenge, but in this case, I'm going to grant the *Wheeler/Batson* of the defense, and the remedy . . . is to call [A.M.] back." However, the court agreed to allow the prosecutor to present further argument. When the motion was next addressed the following Monday, the court stated, "since Friday, the court has had a chance to review the transcript and also the points and authorities in support of the motion to reconsider that was filed by the people . . . and the court is ready to find that the reasons given by the prosecution for the challenge of jurors were group neutral [*sic*] and that the *Wheeler/Batson* will be denied." The court offered no further explanation for the change of ruling.

The record supports the explanation the prosecutor gave for his challenges. K.C. expressed serious doubt about the criminal justice system based, it is reasonable to infer, on her own experience of being convicted of welfare fraud and DUI as well as on her brother's recent experience of being convicted of murder, the crime at issue in this case. Likewise, A.M. felt that he had been unjustly prosecuted and convicted by the same office that was prosecuting this case. These are sufficient race-neutral reasons for exercising a peremptory challenge. (See, e.g., *Wheeler, supra*, 22 Cal.3d at p. 277, fn. 18 [where prospective juror had stepson who was currently incarcerated the court observed that "[a] personal experience of this nature, suffered either by the juror or a close relative, has often been deemed to give rise to a significant potential for bias against the prosecution"] and *People v. Gray* (2005) 37 Cal.4th 168, 192 [no prima facie case made

where prospective juror “reported that someone close to her had been arrested and sent to jail for stealing a car”).) The fact that the prosecutor perceived L.B. to be flippant and disinterested, based in part on his inappropriate attire, supports a reasonable inference that the reasons for exercising the peremptory challenge were race neutral. (See *People v. Howard* (2008) 42 Cal.4th 1000, 1019 [sufficient that potential juror was “flippant in his answers”).) Moreover, L.B. expressed skepticism about the fairness of the criminal justice system when he stated that he felt it was wrong that his friend was arrested for possessing a controlled substance without a prescription.

As reflected in the trial court’s change of decision, the court obviously gave careful consideration to the prosecutor’s explanations and did not perfunctorily accept them. The court considered written points and authorities submitted by the district attorney over the weekend. “We review a trial court’s determination regarding the sufficiency of a prosecutor’s justifications for exercising peremptory challenges ‘with great restraint.’” [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court’s ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.” (*People v. Burgener* (2003) 29 Cal.4th 833, 864.) We see no reason to reject the trial court’s finding here.

People v. Long (2010) 189 Cal.App.4th 826, which defendant cites for the proposition that the appellate court must examine all of the prosecutor’s stated reasons for exercising peremptory challenges against African-American venire members, held that while an appellate court generally gives great deference to a trial court in these matters, “[d]oubt may undermine deference . . . when the trial judge makes a general, global finding that the prosecutor’s stated reasons were all ‘legitimate,’ and at least one of those reasons is demonstrably false within the limitations of the appellate record. A trial court ‘should be suspicious when presented with reasons that are unsupported or otherwise implausible.’” [Citation.] ‘Although an isolated mistake or misstatement that the trial court recognizes as such is generally insufficient to demonstrate discriminatory

intent [citation], it is another matter altogether when, as here, the record of voir dire provides no support for the prosecutor's stated reasons for exercising a peremptory challenge and the trial court has failed to probe the issue [citations]." (*Id.* at pp. 845–846.) Such is not the case here. The trial court did not make a finding that all of the reasons were legitimate. Indeed, as indicated above, the court considered and reconsidered the prosecutor's explanations and the record supports the reasons that were given. *Snyder v. Louisiana* (2008) 552 U.S. 472, also relied on by defendant, does not disagree.

Defendant also argues that the prosecutor did not exercise peremptory challenges against non-African-American jurors with similar experiences with the criminal justice system. Juror 3 reported on his questionnaire that while attending middle school, "I was friends with people who would steal. I got put on probation and now it is supposed to be off my record." He also stated that he had witnessed friends stealing and "did not report it because I was stupid." Juror No. 12 reported being convicted of a DUI in a different county and said he had no bad experiences with the officers, court or judges. He spoke about a recent incident with a police officer in Berkeley where he felt he was wrongly accused, but he did not receive a citation and said he would be able to "forget about that situation" in this case. When the prosecutor questioned him about the DUI, he reiterated that he did not feel he was mistreated by the district attorney's office. "I mean, it is what it is. I mean it's the law. I mean I didn't feel intoxicated, but according to the blood alcohol I was." He chose not to fight the charge because "it seems pretty clear-cut." The prosecutor in that case left no impression on him.

These jurors are not analogous. Both these seated jurors acknowledged their culpability, unlike A.M. who protested his innocence and felt mistreated, and L.B. who believed his friend should not have been prosecuted although he broke the law. The remaining seated jurors cited by defendant had relatives with criminal convictions as K.C. and L.M. did, but, as the Attorney General correctly observes, the prosecutor did not rely on that factor in excusing those two potential jurors. Finally, one of the seated jurors was African-American and "[a]lthough the circumstance that the jury included a member

of the identified group is not dispositive [citation], ‘it is an indication of good faith in exercising peremptories . . . ’ and an appropriate factor to consider in assessing a *Wheeler/Batson* motion.” (*People v. Clark* (2011) 52 Cal.4th 856, 906.)

The trial court did not err in denying the *Wheeler/Batson* motion.

Instruction on heat of passion

Defendant requested that the jury be instructed with CALCRIM No. 570 on voluntary manslaughter arising from heat of passion. The trial court denied the request, stating that “the court finds that . . . there’s not evidence that is substantial enough for the jury to merit consideration by the jury of a heat of passion instruction,” and cited *People v. Breverman* (1998) 19 Cal.4th 142 (*Breverman*). But the court did instruct on imperfect self-defense.

Heat of passion and imperfect self-defense negate the mental state of malice and render a defendant guilty of voluntary manslaughter, not murder. Both defenses must be presented to the jury when they have substantial support in the evidence whether they are requested by a defendant or not. (*Breverman, supra*, 19 Cal.4th at p. 160.) But the failure to instruct a jury on heat of passion when the evidence warrants is not structural error that commands reversal even in the absence of any showing of prejudice to the defendant. (*Id.* at p. 176.) Rather, the appellate court is to review the record to determine if it is reasonably probable the defendant would have obtained a more favorable verdict had the error not occurred. (*People v. Moye* (2009) 47 Cal.4th 537.)

There is a difference between sufficient evidence to warrant an instruction and sufficient evidence to affect the outcome of a trial. In considering whether the trial court should have instructed the jury, we “determine[] only [the] bare legal sufficiency [of the evidence], not its weight.” (*Breverman, supra*, 19 Cal.4th at p. 177.) But considering whether the failure to instruct affected the outcome of the trial, “takes an entirely different view of the evidence. Such posttrial review focuses not on what a reasonable jury *could* do, but what a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and

the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.”
(*Ibid.*)

In this case, even if we assume the heat of passion instruction should have been given, it is not reasonably likely defendant would have received a more favorable verdict. Some of the evidence is undisputed. The defendant got into a physical altercation with the victim Navarro and his friends. The group got the better of him, and when the initial physical altercation was over, he went to his car in the parking area and retrieved his assault weapon. There is no dispute that he was angry or that he pointed the assault weapon at Ignacio, who retreated up the stairs.⁴ There is also no dispute that defendant stood by his car holding the assault weapon at his side for some minutes before his father arrived and began telling him to calm down.

There is some difference in the testimony regarding how long it was between the time defendant was beaten by the victim and his friends and when he shot the victim. Defendant says he was standing in the parking lot after the altercation for one to two minutes before his father came downstairs, and that he shot Navarro shortly after his father arrived. Neal testified that at least five minutes passed between the time he heard a scuffle and looked out to see defendant pacing in the parking lot, and when he heard a gunshot. Ignacio says defendant talked with his father for approximately a minute before Navarro approached them. Harris testified that defendant fired the rifle after Navarro had been apologizing for a minute or two.

There is also a difference in the testimony related to Navarro’s demeanor and actions as he approached defendant and his father. Defendant says he told Navarro not to approach, but that Navarro persisted in an aggressive manner and seemed threatening. Defendant says Navarro stepped around defendant’s father, and lunged for the rifle defendant was holding when he was shot.

⁴ Defendant says he intended only to scare Ignacio, not shoot him.

Harris and Ignacio saw things differently. Harris says that Navarro was non-threatening and seemed to be apologetic. Defendant did not seem to respond to the apology, but said something to Navarro about controlling his friends. It did not appear to Harris that Navarro was trying to attack anyone. Ignacio says that Navarro and defendant's father appeared calm. He heard Navarro say, "Hey man. I just told you to move the car. You don't need to behave like that." Defendant seemed upset and said, "I'm going to get this motherfucker." Ignacio heard his father say, "Son, don't do it." Defendant pushed his father aside and shot Navarro. Ignacio said Navarro did not lunge at defendant or say anything to him.

The forensic pathologist testified that he could not tell from the path of the bullet in Navarro's body whether Navarro was lunging forward for the gun when he was shot. According to the pathologist, Navarro could have been in an infinite number of positions when he was shot, including possibly turning away from the bullet.

It is not reasonably probable that a jury would conclude from this evidence that defendant killed Navarro from sudden provocation or in the heat of passion. "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.' [Citation.]" (*People v. Barton* (1995) 12 Cal.4th 186, 201.) " '[T]he killing must be "upon a sudden quarrel or heat of passion" (§ 192); that is, "suddenly as a response to the provocation, and not belatedly as revenge or punishment. Hence, the rule is that, if sufficient time has elaps[ed] for the passions of an ordinarily reasonable person to cool, the killing is murder, not manslaughter.'" [Citations.]' " (*People v. Hach* (2009) 176 Cal.App.4th 1450, 1458.)

The events surrounding Navarro's killing do not reflect the sort of temporal connection between provocation and defendant's act of shooting that commonly negates malice. The pause between the physical altercation and the shooting, even if as short as two minutes, demonstrates that the events were not one continuous, chaotic response to fear and panic. (See, e.g., *Breverman, supra*, 19 Cal.4th at pp. 163–164.) "The record

shows no substantial evidence of provocation at the time the gun discharged. Even assuming the jurors believed defendant's testimony at trial about the initial phase of the interaction, that phase of the altercation had terminated by the time defendant killed [Navarro]." (*People v. Middleton* (1997) 52 Cal.App.4th 19, 34.) There was time for defendant's emotions to cool. Indeed, he even had the presence of mind to make the calculation that he should scare Ignacio by brandishing the rifle rather than shooting it. It does not seem reasonable in these circumstances that a jury would likely conclude that he killed Navarro due to fear and panic rather than revenge or punishment.

Moreover, even if the jury were to believe defendant's testimony that he shot Navarro when Navarro lunged for the weapon, Navarro's attempt to grab defendant's rifle cannot reasonably be considered an act of provocation. (See, e.g., *People v. Wickersham* (1982) 32 Cal.3d 307, 326, disapproved on another point in *People v. Barton, supra*, 12 Cal.4th 186, 201 [victim's grabbing of gun supported reasonable self-defense, but not provocation].) Moreover, the jury was instructed on and rejected defendant's theory of unreasonable self-defense. Thus, the jury was able to consider "virtually all of the defense evidence bearing on defendant's state of mind and the question whether he harbored malice when it entertained his claim of unreasonable or imperfect self-defense." (*People v. Moye, supra*, 47 Cal.4th at p. 541.) Although defendant was afraid and nervous when he shot Navarro, and he did not intend to fire the rifle, according to him, he did so because he was afraid "of being injured or possibly killed." The jury rejected that claim, and the failure to instruct the jury on provocation or killing in the heat of passion was harmless.

Rap lyrics

At the beginning of trial, defendant moved under Evidence Code section 352 to exclude from evidence certain rap lyrics that were found in his apartment. He argued the lyrics were of minimal probative value and unduly prejudicial to the extent they contained offensive language and a reference to firing of shots from a semi-automatic weapon. The prosecutor argued the lyrics were admissible because they tended to show

defendant owned a semi-automatic weapon and harbored an intent to use it. Defense counsel countered that the prosecution did not need to rely on the lyrics to prove defendant had a firearm. He said, “I doubt that there will be any rational doubt as to whether or not my client had a firearm. The conclusive evidence will be that Sam Navarro died of a gunshot wound, and the witnesses, I expect . . . will universally testify . . . that it was my client that did that.” The court ruled the lyrics admissible, and concluded that the dispute over their relevance and potential prejudice went to their weight, not their admissibility.

“Evidence Code section 352 provides the trial court with discretion to exclude otherwise relevant evidence if its probative value is substantially outweighed by the probability that admitting the evidence will unduly prolong the proceeding, prejudice the opposing party, confuse the issues, or mislead the jury. [Citation.] ‘We apply the deferential abuse of discretion standard when reviewing a trial court’s ruling under Evidence Code section 352. [Citation.] [For purposes of the statute,] “prejudicial” is not synonymous with “damaging,” but refers instead to evidence that “ ‘uniquely tends to evoke an emotional bias against defendant’ ” without regard to its relevance on material issues.’ ” (*People v. Zepeda* (2008) 167 Cal.App.4th 25, 34–35.) “In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors’ emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.” (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1009.)

Sergeant Tony Jones testified about the lyrics without objection. After the shooting, some handwritten documents were taken from defendant’s apartment. Sergeant Jones read the following writings to the jury: “ ‘Niggah I was raised in dah village. 9th n Willow is my home town, where candlez be getting lit, boxes of swishers get broke down. I share blood with niggahs ain’t no friends no moe and they took a oath that they go buss u lay a finger on folks so stop all that yolk-gas-brake-smashing cum throw doin it

moving and one of my young niggahs do end up blastin' cuz it be too much havoc the summer brings the static so if u [illegible] threw my section I suggest you use ya hazardz cuz Ima cause the panic the all of a sudden rush and I'm throwin up the village cuz I'm still a little nuts and I don't give a fuck about ya patnahs or ya blood line I'm pushin niggahs button out here gunnin at they flatline and I even take mine keep what's your jus keep a eye out on the doorbell and people knockin at yo door.' ”

Another document read: “ ‘Multiple shots fired from my semiautomatic a gunna bouncer out van and just start letting niggahs have it 2 of dem caught it I guess they didn't see it coming but I still I hit my target he somewhere in crowd running phuck that I'm her tha knock the dread up out sucka so I hike back grab the strap and commence 2a swing that muthaphucka n 2a knockin some shit down I'm bouncing up outta whips nigga out here chasing my kills down more consecutive round couple moe dozen I'm out and u betta watch um cuz when they fly please believe they hot it ain't ova until my clip drop or I knock off ya tic-toc and even though we aint secretive my niggahs don' kriss-kross.' ” On the long side of the paper was written, “ ‘Phuck friends niggahs.' ”

Defendant testified that he wrote these words as lyrics in 2006. He wrote them because “[a] guy wanted me to get featured on his album. He got in contact with a producer of mine and my producer contacted me and let me know there was some guys who wanted me to feature on their album.” Defendant performed rap on other people's albums “[m]aybe 15, 20 times” from 2000 to 2006. He testified the lyrics were not autobiographical but fiction. He testified the lyrics were in his apartment because he intended to mail them to himself “so I can have a copyright of it.”

To the extent these lyrics are comprehensible, defendant argues their admission was unduly prejudicial and inflammatory because they depict defendant writing about indiscriminately killing people with an assault rifle. He says they were also only marginally relevant and unnecessary to prove he owned a gun, because his ownership of the gun was undisputed. But when the trial court ruled on the motion in limine, defendant had not yet testified and it was unclear whether the murder weapon was an assault weapon or that defendant owned one. In determining whether the trial court abused its

discretion, we must consider the record before it at the time it made its ruling. (See, *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220.) When we do, we conclude the court did not abuse its discretion in allowing admission of the lyrics into evidence.

Moreover, the rap lyrics were given minimal emphasis by the prosecution in closing argument. The prosecutor said in his closing, “you have a man here who carries around a loaded SKS assault rifle in his Saturn station wagon, who glorifies, sort of this mentality or bravado—you can look at some of what he writes about.” Defendant’s counsel argued the lyrics had minimal probative value. They were fictional, the events depicted in the lyrics were highly dissimilar to anything that happened on the night of the shooting, and they were written before the shooting ever happened. In rebuttal, the prosecutor argued, “[w]ith respect to these rap lyrics, you’re right. Those didn’t prove he committed murder in and of themselves. I am not suggesting he went and wrote them when he went upstairs after the murder, but you’ve got certain things that are far too coincidental. He has a semiautomatic. He talks about having a semiautomatic. He says I yank back the strap and commence to swing it.”

Even if the jury were to consider the lyrics as circumstantial evidence of defendant’s state of mind and his intent when he shot Navarro, as the prosecutor argued in rebuttal and the attorney general argues before this court, the jury was instructed on the proper consideration of circumstantial evidence. “[B]efore you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and the other to guilt, you must accept the one that points to innocence.” Fiction or not, the lyrics were admissible as a prior statement of a party (Evid. Code, § 1220), and, in context, we cannot conclude they would have so inflamed the jury’s emotions that it could not logically evaluate the evidence, and would instead deliver a guilty verdict just to punish the defendant. The admission of defendant’s rap lyrics was not an abuse of discretion.

DISPOSITION

The judgment is affirmed.

Siggins, J.

I concur:

McGuinness, P.J.

POLLAK, J., Dissenting.

I agree that the trial court properly denied defendant's motion under *People v. Wheeler* (1978) 22 Cal.3d 258. The majority implicitly acknowledges that the court erred in refusing to give the instruction defendant requested on the heat of passion, but finds the error harmless. I agree that the trial court erred in failing to give the instruction but consider the error highly prejudicial, especially in view of what I consider to be the second error in admitting the inflammatory rap lyrics that had virtually nothing to do with the offense for which defendant was being tried.

Instruction on heat of passion

Defendant requested that the jury be instructed with CALCRIM No. 570 on voluntary manslaughter on the theory of heat of passion. The trial court denied the request, stating that "the court finds that . . . there's not evidence that is substantial enough for the jury to merit consideration by the jury of a heat of passion instruction," and cited *People v. Breverman* (1998) 19 Cal.4th 142 (*Breverman*). "[O]n appeal we employ a de novo standard of review and independently determine whether an instruction on the lesser included offense of voluntary manslaughter should have been given." (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.)

" 'Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) A defendant who commits an intentional and unlawful killing but who lacks malice is guilty of . . . voluntary manslaughter. (§ 192.)' [Citation.] Generally, the intent to unlawfully kill constitutes malice. [Citations.] 'But a defendant who intentionally and unlawfully kills lacks malice . . . in limited, explicitly defined circumstances: either when the defendant acts in a "sudden quarrel or heat of passion" (§ 192, subd. (a)), or when the defendant kills in "unreasonable self-defense"—the unreasonable but good faith belief in having to act in self-defense [citations.]' [Citation.] Because heat of passion and unreasonable self-defense reduce an intentional, unlawful killing from murder to voluntary manslaughter by negating the element of malice that otherwise inheres in such a homicide [citation], voluntary manslaughter of these two

forms is considered a lesser necessarily included offense of intentional murder.”
(*Breverman, supra*, 19 Cal.4th at pp. 153-154.)

“A heat of passion theory of manslaughter has both an objective and a subjective component. [Citations.] [¶] ‘ “To satisfy the objective or ‘reasonable person’ element of this form of voluntary manslaughter, the accused’s heat of passion must be due to ‘sufficient provocation.’ ” [Citation.] [Citation.] [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.] [¶] To satisfy the subjective element of this form of voluntary manslaughter, the 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.” ’ ” (*People v. Moye* (2009) 47 Cal.4th 537, 549-550.)

“[I]nsofar as the duty to instruct applies regardless of the parties’ requests or objections, it prevents the ‘strategy, ignorance, or mistakes’ of *either* party from presenting the jury with an ‘unwarranted all-or-nothing choice,’ encourages ‘a verdict . . . no harsher *or more lenient* than the evidence merits’ [citation], and thus protects the jury’s ‘truth-ascertainment function’ [citation]. ‘These policies reflect concern [not only] for the rights of persons accused of crimes [but also] for the overall administration of justice.’ ” (*Breverman, supra*, 19 Cal.4th at p. 155.) “[E]very lesser included offense, or theory thereof, which is supported by the evidence must be presented to the jury.” (*Ibid.*) “[T]he existence of ‘any evidence, no matter how weak’ will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the

defendant is guilty only of the lesser offense is ‘substantial enough to merit consideration’ by the jury. [Citations.] ‘Substantial evidence’ in this context is ‘“evidence from which a jury composed of reasonable [persons] could . . . conclude[]”’ that the lesser offense, but not the greater, was committed. [Citations.] [¶] In deciding whether there is substantial evidence of a lesser offense, courts should not evaluate the credibility of witnesses, a task for the jury.” (*Id.* at p. 162.)

In *Breverman*, two men were attacked by a group of men in front of the defendant’s house. The defendant was there but did not participate in the fight. The next night, the two men returned to the house where they had been attacked with several others looking for a fight. They vandalized a car in front of the house and shots were fired from the front door. When the men began to run away, the defendant came out of the house and fired another volley of shots, killing one of the men. The defendant told police that “[h]e broke the glass in the front door and fired three or four rounds ‘kind of . . . like downward.’ The intruders stopped hitting his car, but defendant came outside and shot six or seven more times as the group fled. He was not ‘aiming’ and did not intend to hit anybody. He was ‘trying to get them to stop’ because they had ‘done a lot of damage to [his] car,’ and he wanted to ‘hold [them] until the cops came’ so they would be ‘arrested or whatever.’ ” (*Breverman, supra*, 19 Cal.4th at p. 151, fn. omitted.)

The *Breverman* court concluded that the trial court had erred in failing to instruct on heat of passion even in the absence of a request, reasoning that “there was evidence that a sizeable group of young men, armed with dangerous weapons and harboring a specific hostile intent, trespassed upon domestic property occupied by defendant and acted in a menacing manner. This intimidating conduct included challenges to the defendant to fight, followed by use of the weapons to batter and smash defendant’s vehicle parked in the driveway of his residence, within a short distance from the front door. Defendant and the other persons in the house all indicated that the number and behavior of the intruders, which defendant characterized as a ‘mob,’ caused immediate fear and panic. Under these circumstances, a reasonable jury could infer that defendant was aroused to passion, and his reason was thus obscured, by a provocation sufficient to

produce such effects in a person of average disposition. [¶] A rational jury could also find that the intense and high-wrought emotions aroused by the initial threat had not had time to cool or subside by the time defendant fired the first few shots from inside the house, then emerged and fired the fatal second volley after the fleeing intruders.” (*Breverman, supra*, 19 Cal.4th at pp. 163-164, fn. omitted.)¹

¹ The Attorney General argues that there was insufficient evidence of provocation. The cases on which she relies do not support this proposition. In *People v. Gutierrez* (2009) 45 Cal.4th 789, the court relied on the fact that the defendant testified to his state of mind. The defendant testified that he was not provoked by the preceding assault in which the victim “scratched his chest, he kicked her, she kicked him in the leg and grabbed his shirt, and he pulled away. Simple assault, such as the tussle defendant described, also does not rise to the level of provocation necessary to support a voluntary manslaughter instruction. [Citation.] Indeed, rather than causing defendant to become enraged, defendant testified that he simply walked away.” (*Id.* at p. 827.)

In *People v. Manriquez* (2005) 37 Cal.4th 547, the trial court instructed the jury on voluntary manslaughter in the heat of passion with regard to three of four murders with which he was charged but refused the instruction on the fourth murder. As to the fourth, the evidence that most supported the instruction was that “the victim approached defendant and ‘started offending him,’ called defendant ‘a mother fucker,’ asking defendant whether he had a gun and daring him to use it. According to [a witness], defendant repeatedly told the victim to calm down and that he did not want any problems. [The witness] testified that she did not see the victim attempt to grab or stab defendant or hold a weapon, nor did she see one fall to the ground. She testified that defendant shot him from a distance of approximately four feet.” (*Id.* at p. 585.) In holding that the trial court did not err in refusing the instruction, the appellate court noted that the witness’s “testimony contained no indication that defendant’s actions reflected any sign of heat of passion at the time he commenced firing his handgun at the victim. There was no showing that defendant exhibited anger, fury, or rage; thus, there was no evidence that defendant ‘actually, subjectively, kill[ed] under the heat of passion.’ [Citation.] To the contrary, [the witness’s] testimony portrayed defendant as attempting to exert a calming influence on the victim.” (*Ibid.*)

The other cases relied on by the Attorney General are similar. In *People v. Najera* (2006) 138 Cal.App.4th 212, 226, the victim called the defendant a “faggot” but there was no other evidence of provocation. In *People v. Lee* (1999) 20 Cal.4th 47, 59, the court observed “There was evidence here that defendant and [the victim] were engaged in an argument prior to the shooting. There was no direct evidence that [the victim] did or said anything sufficiently provocative that her conduct would cause an average person to react with deadly passion. Nor was there direct evidence that defendant acted under the influence of such passion.”

There was substantial evidence here that the killing occurred in the heat of passion. Even in Ignacio's account of the evening, defendant, Ignacio and Navarro all were in a heated argument. Navarro and Ignacio were clearly aligned as allies in the altercation. And, although Ignacio did not report that Navarro and defendant were in a physical fight, Ignacio testified that he physically attacked defendant. Defendant's testimony portrayed an escalating conflict that began with threats from Ignacio, progressed to defendant being physically attacked by all three men, and culminated with Navarro trapping defendant between his car and the fence and lunging at defendant as defendant ordered him to leave. Defendant himself testified that he did not make a rational choice to shoot, that "I was afraid. I was nervous. I just wasn't thinking clearly." As in *Breverman*, "A rational jury could also find that the intense and high-wrought emotions aroused by the initial threat had not had time to cool or subside by the time defendant fired." (*Breverman, supra*, 19 Cal.4th at p. 164.)

The fact that the jury was instructed on imperfect self defense, a theory that the jury rejected, does not make the failure to instruct on the heat of passion defense harmless. The standard for imperfect self defense is whether the defendant had an honest but unreasonable belief that he was "*in imminent danger of being killed or suffering great bodily injury*" (CALCRIM No. 571), not whether his reason was eclipsed by passion that negated malice. Although, as the majority states, under the imperfect self-defense instruction the jury could consider the same evidence concerning defendant's state of mind that was relevant to heat of passion, under the evidence the jury might well have concluded that defendant was not in fear of his life but nonetheless acted "in a sudden quarrel or heat of passion." The defendant is entitled to have the jury instructed on *all* theories that are supported by the evidence. (*Breverman, supra*, 19 Cal.4th at p. 155.)

In *People v. Moye, supra*, 47 Cal.4th 537, upon which the majority relies in suggesting that the imperfect self-defense instruction cured the failure to instruct on the heat of passion, the court based its holding on the fact that "[d]efendant's own uncontested testimony established he did not act rashly, or without due deliberation and reflection, or from strong passion rather than from judgment, when he claimed to have

used the bat defensively to allegedly fend off an attack from the homicide victim.” (*Id.* at p. 541.) The court noted that the fight that preceded the killing in that case occurred the night before and the defendant testified that he was seeking the victim “to make peace.” (*Id.* at p. 551.) The only provocation immediately preceding the killing was that the victim kicked the defendant’s car. The court held “In short, neither the fight on the previous night, nor the car-kicking incident on Sunday morning shortly before the homicide, themselves constituted sufficient legal provocation without the necessary cooling-off period to warrant a heat of passion instruction. Both [the trial court and the Court of Appeal] also agreed that nothing in the record, including defendant’s own narrative of events leading up to the homicide, suggested he was actually, subjectively, under the influence of a ‘strong passion’ resulting from either of those occurrences when he killed Mark.” (*Id.* at p. 552.)

In contrast, here the escalating fight immediately preceded the killing and the defendant testified that he did not make a rational choice to shoot, that “I was afraid. I was nervous. I just wasn’t thinking clearly.” In my opinion, there is a reasonable probability that the jury would have found that defendant acted in the heat of passion and convicted him of voluntary manslaughter had it been instructed on that theory. Moreover, the likelihood of prejudice is compounded by the trial court’s admission of highly inflammatory but essentially irrelevant evidence against defendant.

Rap Lyrics

Sergeant Tony Jones testified that after the shooting, some handwritten documents were taken from defendant’s apartment. Sergeant Jones read the following writings to the jury: “ ‘Niggah I was raised in dah village. 9th n Willow is my home town, where candlez be getting lit, boxes of swishers get broke down. I share blood with niggahs ain’t no friends no moe and they took a oath that they go buss u lay a finger on folks so stop all that yolk-gas-brake-smashing cum throw doin it moving and one of my young niggahs do end up blastin cuz it be too much havoc the summer brings the static so if u [illegible] threw my section I suggest you use ya hazardz cuz Ima cause the panic the all of a sudden rush and I’m throwin up the village cuz I’m still a little nuts and I don’t give a fuck about

ya patnahs or ya blood line I'm pushin niggahs button out here gunnin at they flatline and I even take mine keep what's your jus keep a eye out on the doorbell and people knockin at yo door.' ”

Another document read: “ ‘Multiple shots fired from my semiautomatic a gunna bouncer out van and just start letting niggahs have it 2 of dem caught it I guess they didn't see it coming but I still I hit my target he somewhere in crowd running phuck that I'm her tha knock the dread up out sucka so I hike back grab the strap and commence 2a swing that muthaphucka n 2a knockin some shit down I'm bouncing up outta whips nigga out here chasing my kills down more consecutive round couple moe dozen I'm out and u betta watch um cuz when they fly please believe they hot it ain't ova until my clip drop or I knock off ya tic-toc and even though we aint secretive my niggahs don' kriss-kross.' ” On the long side of the paper was written, “ ‘Phuck friends niggahs.' ”

Defendant testified that he wrote these words as lyrics in 2006. He wrote them because “[a] guy wanted me to get featured on his album. He got in contact with a producer of mine and my producer contacted me and let me know there was some guys who wanted me to feature on their album.” Defendant performed rap on other people's albums “[m]aybe 15, 20 times” from 2000 to 2006. He testified the lyrics were not autobiographical but fiction. He testified the lyrics were in his apartment because he intended to mail them to himself “so I can have a copyright of it.”

Defendant moved to exclude the lyrics under Evidence Code section 352 and the trial court denied the motion. “Evidence Code section 352 provides the trial court with discretion to exclude otherwise relevant evidence if its probative value is substantially outweighed by the probability that admitting the evidence will unduly prolong the proceeding, prejudice the opposing party, confuse the issues, or mislead the jury. [Citation.] ‘We apply the deferential abuse of discretion standard when reviewing a trial court's ruling under Evidence Code section 352. [Citation.] . . . [For purposes of the statute,] “prejudicial” is not synonymous with “damaging,” but refers instead to evidence that “ ‘uniquely tends to evoke an emotional bias against defendant’ ” without regard to its relevance on material issues.’ ” (*People v. Zepeda* (2008) 167 Cal.App.4th 25, 34-35.)

In introducing the pretrial discussion about introduction of the lyrics, the trial court stated, “I did read the letter and everything else and there was only one thing that I saw. There was a reference to a witness who . . . let their talent get wasted. So there was nothing else that I could see that was inflammatory or strange.” When asked if he intended to introduce the lyrics the prosecutor stated, “He did have a semiautomatic or bolt action rifle. . . . I do think when we’re trying to prove that he had a gun that [had] him lyricizing about having a weapon and firing it is circumstantial evidence that he had a gun, albeit probably not as strong as somebody seeing him with a gun.” The trial court pointed out that the prosecution had witnesses who saw defendant with the gun. The prosecutor argued, “I never know what’s enough when it comes to the jury. It could be that they don’t believe any of my witnesses. It could be this last piece of evidence, based upon the evidence that my witnesses will be impeached with, all kinds of prior conduct, that they’re going to see them in sort of spotty light and this may just push them over the edge to say, okay, maybe I’m not making this entire thing up.” Defense counsel answered, “I doubt that there will be any rational doubt as to whether or not my client had a firearm. The conclusive evidence will be that Sam Navarro died of a gunshot wound, and the witnesses, I expect, . . . will universally testify . . . that it was my client that did that.”

There was no gang allegation in this case.² Defendant admitted to possessing and shooting the gun. Thus the lyrics, which were only marginally relevant at best, were cumulative in any event as to the issue of defendant being a felon in possession of a firearm. Moreover, beside the reference to shooting a gun, the lyrics bore no relationship to the events on the night of the shooting. The first set of lyrics read to the jury, to the

² In *People v. Zepeda, supra*, 167 Cal.App.4th 25, cited by the majority, the defendant, a member of a Norteño gang, was accused of killing a member of a Sureño gang in an incident motivated by gang animus. The court allowed the prosecution to play two rap songs from an album on which the defendant’s photograph was featured. The lyrics make repeated reference killing for the gang. (*Id.* at pp. 33-34.) The court held that “The evidence was probative of defendant’s state of mind and criminal intent, as well as his membership in a criminal gang and his loyalty to it. The songs showed that defendant’s gang had the motive and intent to kill Sureños.” (*Id.* at p. 35.)

extent they are intelligible to the court, do not appear to reference guns or shooting at all. The second set of lyrics describe multiple drive-by shootings from a van with no particular motivation. Since defendant's state of mind was the only issue for the jury to decide, the lyrics were highly inflammatory because they suggest that defendant is a person who kills randomly and glorifies the act. Indeed, the prosecutor argued as much in closing: "You have a man here who carries around a loaded SKS assault rifle in his Saturn station wagon, who glorifies, sort of this mentality or bravado — you can look at some of what he writes about." Again in rebuttal, the prosecutor argued: "With respect to these rap lyrics, you're right. Those didn't prove he committed murder in and of themselves. I am not suggesting he went and wrote them when he went upstairs after the murder, but you've got certain things that are far too coincidental. He has a semiautomatic. He talks about having a semiautomatic. He says I yank back the strap and commence to swing it."

Even the prosecutor did not argue that this was a random killing motivated by glorification of violence. His argument was in line with the testimony of every witness that the killing occurred as the result of an argument over parking. "[D]efendant came home. He was going to go to his apartment . . . and he blocked a truck in. [Jose and Sam] got out and there was an argument. This argument devolved. It got worse and it disintegrated into a fight, and the fight became more—it's what caused the defendant to eventually shoot and kill Sam Navarro." Thus the sort of killing described in the lyrics was not, even under the prosecutor's theory of the case, what occurred that night and therefore offered the jury little relevant evidence. The lyrics would tend to evoke an emotional bias against defendant with little or no relevance on material issues. The trial court abused its discretion in admitting the lyrics, and in combination with the failure to instruct on heat of passion, it is reasonably probable that defendant would have obtained a more favorable result absent the errors. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

I would reverse defendant's murder conviction and otherwise affirm the judgment.

Pollak, J.