

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL PACHECO,

Defendant and Appellant.

B267355

(Los Angeles County

Super. Ct. No. TA068726)

ORDER MODIFYING OPINION;

NO CHANGE IN JUDGMENT

The opinion filed October 11, 2016, and not certified for publication, is modified as follows:

1. On page 4, third paragraph, lines 2 through 4, the sentences read as follows:

At some point, either Pacheco pushed Gomez to the ground or Gomez fell on his back in the street. Pacheco reached inside the car and pulled out a gun.

It should read:

At some point, either Pacheco pushed Gomez to the ground or Gomez fell on his back in the street and Pacheco reached inside the car and pulled out a gun.

2. On page 10, first full paragraph, lines 14-15, the sentence read as follows:

Not even Pacheco's lawyer believed the evidence supported a heat of passion instruction.

It should read:

Not even Pacheco's lawyer was prepared to argue at the hearing on the jury instructions that the evidence supported a heat of passion instruction.

3. On page 11, first full paragraph, lines 7-9, the sentence read as follows:

Instead of abandoning the fight or getting in his car to drive away, Pacheco grabbed his gun, smiled at Gomez's wife in response to her pleas for Gomez's life, and shot Gomez while he was on his back.

It should read:

Instead of abandoning the fight or getting in his car to drive away, Pacheco pointed his gun at Gomez, smiled at Gomez's wife in response to her pleas for Gomez's life, and shot Gomez while he was on his back.

This order does not change the judgment. Appellant's petition for rehearing is denied.

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ZELON, Acting P. J.    SEGAL, J.    GARNETT, J. (Assigned)

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(Los Angeles County  
Super. Ct. No. TA068726)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Patrick Connolly, Judge. Affirmed and remanded with directions.

Allen G. Weinberg, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant  
Attorney General, Lance E. Winters, Senior Assistant Attorney General, and Scott A.  
Taryle, Deputy Attorney General, for Plaintiff and Respondent.

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## INTRODUCTION

A jury convicted Daniel Pacheco of second degree murder for the killing of Victor Gomez outside a party in 2003. Pacheco argues that the trial court erred by not instructing the jury on heat of passion voluntary manslaughter as a lesser included offense of murder. We conclude there was no substantial evidence to support giving such an instruction, and affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. *Party*

Raquel Alvarez hosted a baptismal party for her nephew at her house on February 15, 2003. Gomez and his wife Rosenda Chavez were invited. Pacheco was not. The party began at 6:00 p.m., and over the course of the evening approximately 100 people attended.

Maria Ortega was one of the guests at the party. Ortega knew Pacheco through his girlfriend Belinda Montelongo, with whom Pacheco had two children. Ortega had a personal dispute with Montelongo over money from a car wash fundraiser for Pacheco's deceased brother. Montelongo, who was at the party and wanted to fight Ortega, left the party at some point to get Pacheco. Montelongo told Pacheco she had seen Ortega at the party, and she wanted Pacheco to accompany her back to the party so she could fight Ortega.

Pacheco went with Montelongo and two other women to "call out" Ortega to fight. Pacheco, who testified at trial, explained that Montelongo "was angry. She was being stubborn about it. Plus, I wasn't going to let her go out there and get beaten up or cause any problems at the party." Pacheco brought a gun with him that he had purchased "on the streets" and that he usually carried whenever, as here, he was going to "an unsure place, an unknown place" where anything could happen. Pacheco parked his car across

the street from Alvarez's house, and left the gun on the driver's side floor mat. Montelongo stayed by the car.

Pacheco walked across the street to Alvarez's house to look for Ortega. Carlos Zavala was standing at the gate. Pacheco asked Zavala for Ortega, but Zavala did not know who Ortega was. Pacheco then went into the party, found Ortega, and said that Montelongo was outside and wanted to fight her. Ortega said she was drunk and did not want to fight, and it was a family party with a lot of children. Pacheco said that the fight would not be in the party, but across the street. Ortega agreed to fight Montelongo and followed Pacheco outside. Ortega gave her cell phone, keys, and jewelry to a friend to hold while she fought Montelongo.

#### B. *Fight*

Ortega walked across the street and saw Montelongo near Pacheco's car. Pacheco testified that the two women "already knew what they were going to do." They briefly exchanged words and started fighting, with Pacheco standing behind Montelongo. Ortega and Montelongo fought on a grassy area next to the sidewalk across the street, near a fire hydrant, beside the passenger side door of Pacheco's car. They exchanged blows and pulled each other's hair. Pacheco stood by to make sure no one else joined the fight. After a minute Ortega overpowered Montelongo and got on top of her.

Pacheco tried to pull Ortega, who appeared to have the upper hand in the fight, off Montelongo, who was still underneath Ortega. The women were "locked together," pulling each other's hair, and refusing to let go. Pacheco tried to hit Ortega as he attempted to separate the two women.

Meanwhile, back at the party, Alvarez heard there was a fight outside and she ran across the street. Alvarez asked one of her friends why there were people at the party who were not invited. Alvarez asked Pacheco what he was doing at her party and why he was "disrespecting" her house. Pacheco responded, "Shut up, bitch. If I wanted to, I would have shot everybody in your house."

Chavez also heard there was a fight, and she saw Gomez run out the front door. Chavez ran after Gomez and screamed at him because she did not want him to become involved. Gomez may have taken off a jersey he was wearing as he ran out of the house.

Gomez crossed the street and ran towards the fight. He was holding a bottle of beer down at his side in his right hand. Gomez approached the grassy area where the women were fighting, told Pacheco to leave Ortega alone, and the two men began arguing. Gomez tried to pull Pacheco away from the fight. Pacheco hit Gomez, and the two men began fighting, first on the sidewalk and then in the street next to the driver's side door of Pacheco's car. Gomez, who was seven inches shorter than Pacheco, may have tried to hit Pacheco with the beer bottle, but he dropped it when Pacheco hit him. Montelongo, who did not have a good recollection of the fight and admitted she had lied to detectives about some of the events of that evening, told the detectives that she saw a bottle smashed over Pacheco's head and five men attacking Pacheco and a friend who had come to his aid, so that it was five men against two.

When Gomez was finally able to pull Pacheco away from the two women, Pacheco ran around the front of his car to the driver's side. Gomez followed. At some point, either Pacheco pushed Gomez to the ground or Gomez fell on his back in the street. Pacheco reached inside the car and pulled out a gun. Pacheco stood over Gomez and pointed the gun down at him while he was on his back on the ground. Chavez screamed at Pacheco, "No, no. Please don't. We have four kids, four children." Pacheco smiled at Chavez, and then pulled the trigger. Chavez testified, "He smiled at me. For many years I would close my eyes and I would see that smile."

After Pacheco shot Gomez, he pointed the gun at the crowd of approximately 15 people who had been watching the fight, and he ran to his car. The crowd dispersed. Pacheco told the women he had come with to get into the car, and he drove away. Pacheco said to Montelongo, "Don't say anything." Pacheco had no injuries.

Gomez ran back across the street toward Alvarez's house, bleeding. Gomez collapsed in the driveway, and told Chavez to call for an ambulance. Gomez died from a single gunshot wound to his abdomen.

Law enforcement recovered two shell casings fired from a semiautomatic handgun at the scene.<sup>1</sup> Pacheco testified that his gun expels casings when it fires a bullet. A medical examiner testified at trial that Gomez had a “shored exit wound” in his back, which indicated the skin on his back where the bullet exited his body “was supported by a firm surface,” like pavement or a wall. He explained that the wound was consistent with a wound that would occur if the victim was on his back.

### C. *Flight*

Pacheco fled and was absent from California for 12 years, trying to avoid any contact with law enforcement. He went to Mexico for two or three years, and eventually to Illinois. While Pacheco was living in Illinois, his two children with Montelongo came to visit him each summer. Pacheco paid for their tickets and bought them school clothes. Pacheco was captured in Illinois in March 2015 on an arrest warrant issued February 19, 2003.

### D. *Conviction*

The trial court instructed the jury pursuant to CALCRIM Nos. 505 and 3471 on self-defense and the right to self-defense where the defendant engages in mutual combat or starts a fight. The trial court also instructed the jury pursuant to CALCRIM No. 571 on voluntary manslaughter based on unreasonable or imperfect self-defense, as a lesser included offense of murder. The court did not, however, instruct the jury pursuant to

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<sup>1</sup> Detective Teri Bernstein, a homicide investigator who took over the investigation, explained, “So what everyone calls a bullet, there is actually different parts to it. There is a shell casing, and there is the projectile that is actually what we call the bullet, that sits in the front. And then there is gunpowder or some sort of form of accelerant that makes the bullet fly out of that shell casing. So when you have a semiautomatic weapon, the shell casing actually comes out of the side of the gun in one direction or another, depending on the type of the gun. So we expect to find at our scenes a shell casing and a bullet associated with that one live round that initially went into the gun.”

CALCRIM No. 570 on voluntary manslaughter based on heat of passion. The trial court discussed these instructions with counsel:

“The Court: Now, I will tell you right now that imperfect self-defense, as far as the testimony, definitely applies here. Did you want to make a pitch or argument for heat of passion?”

“[Counsel for Pacheco]: No, sir.

“The Court: Okay. And I don’t believe that it actually applies, based on the testimony that we’ve had here. All right. So we will not be giving 570. But 571 is applicable.

“[The Prosecutor:] So, we’re taking out all of 570?”

“The Court: Correct. That goes to heat of passion. And so 571 will be given.”

The jury found Pacheco guilty of second degree murder. The jury also found true the allegations that Pacheco personally used, and personally and intentionally discharged, a firearm causing great bodily injury and death. The trial court sentenced Pacheco to an aggregate prison term of 40 years to life, and imposed various fines and fees.

## DISCUSSION

### A. *The Trial Court Did Not Err by Failing To Instruct the Jury on the Lesser Included Offense of Voluntary Manslaughter Based on Heat of Passion*

Pacheco argues that the trial court erred because, although the court instructed the jury on voluntary manslaughter based on imperfect self-defense, the court did not also instruct the jury on voluntary manslaughter based on heat of passion.<sup>2</sup> Pacheco contends there was substantial evidence to give such an instruction because he and Gomez “were

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<sup>2</sup> The standard of review for an alleged failure to instruct on a lesser included offense like heat of passion theory of manslaughter is de novo. (*People v. Nelson* (2016) 1 Cal.5th 513, 538; *People v. Brothers* (2015) 236 Cal.App.4th 24, 30.)

seen in a heated argument prior to the shooting, and Gomez came at [Pacheco] with a beer bottle in his hand.” Pacheco points to his testimony that Gomez “had two other men with him, was ‘mad dogging’ [him],” and was chasing him when he reached into his car and got the gun. Pacheco also cites his testimony that “he was in fear of Gomez and his friends . . . .”

““In criminal cases, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence. [Citation.] This obligation includes giving instructions on lesser included offenses when the evidence raises a question whether all the elements of the charged offense were present . . . . [Citation.] The trial court must so instruct even when, as a matter of trial tactics, a defendant not only fails to request the instruction, but expressly objects to its being given.”” (*People v. Moyer* (2009) 47 Cal.4th 537, 548-549 (*Moyer*). On the other hand, “[w]hen there is no evidence the offense committed was less than that charged, the trial court is not required to instruct on the lesser included offense.” (*People v. Booker* (2011) 51 Cal.4th 141, 181; see *People v. Nelson, supra*, 1 Cal.5th at p. 538 [“[a]n instruction on a lesser included offense must be given only if there is substantial evidence from which a jury could reasonably conclude that the defendant committed the lesser, uncharged offense, but not the greater, charged offense”].) “The ‘substantial evidence requirement is not satisfied by “any evidence . . . no matter how weak,” “but rather by evidence from which a jury could conclude ‘that the lesser offense, but not the greater, was committed.’”” (*People v. Nelson, supra*, at p. 538.)

““Murder is the unlawful killing of a human being with malice aforethought. [Citation.] A defendant who commits an intentional and unlawful killing but who lacks malice is guilty of . . . voluntary manslaughter. [Citations.]” 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’ [citation], or when the defendant kills in ‘unreasonable self-defense’—the unreasonable but good faith belief in having to act in self-defense [citations].” 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 [citations].”” (Moye, *supra*, 47 Cal.4th at p. 549.)

“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.’ [Citations.] ‘[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.”” (Moye, *supra*, at pp. 549-550; see *People v. Nelson*, *supra*, 1 Cal.5th at p. 539.)

Here, there was no substantial evidence of either the subjective or objective component of heat of passion. The only evidence on the subjective component of heat of passion was the testimony of Pacheco, who stated that, as he was trying to get into the car, Gomez swung at him with the beer bottle, and Pacheco tried unsuccessfully to block it with his hands. Pacheco also testified Gomez was “kind of mad dogging me, holding

the bottle, with two guys to his left -- to my right, but to his left.”<sup>3</sup> He testified, “Q: Now, when you have Mr. Gomez in front of you, what are you thinking at this point?” “A: I knew that he was going to -- him and all -- both of the other guys were going to beat me down.” Pacheco stated, “I’m scared already, you know, trying to block my head from getting hit.”

Pacheco testified that he reached into his car and grabbed the gun because, “as soon as I pushed [Gomez] as hard as I could, I knew he was going to come back at me and hit me again with the bottle. I didn’t want to get hit. . . . I was expecting the two other guys to actually hit me too.” Pacheco added, “I turned around and reached for the gun, expecting him to hit me again, knowing that he was going to hit me again, or somebody else was going to hit me. As soon as I reached and pulled the gun, I loaded it, at the same time turning. And as I turned, I [saw] him coming up, and I shot two times. It was just so quick. I panicked. Panicked.” When asked why he shot Gomez, Pacheco responded, “I was scared. It was -- I can’t even think about it. It was a quick reaction. I wasn’t even thinking about it. It was just something that reacts. I’m getting hit again. React. There was no time there.”

Pacheco’s testimony supported self-defense instructions, but not a heat of passion instruction. As the Supreme Court stated in *Moye*, in words equally applicable to this case, “the thrust of defendant’s testimony below was self-defense -- both reasonable self-defense (a complete defense to the criminal charges), and unreasonable or imperfect self-defense (a partial defense that reduces murder to manslaughter). There was insubstantial evidence . . . to establish that defendant ‘actually, subjectively kill[ed] under the heat of passion.’” (*Moye, supra*, 47 Cal.4th at p. 554.) Like the defendant in *Moye*, Pacheco’s

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<sup>3</sup> “Mad dogging” means staring in a negative or intimidating way. (*People v. Monterroso* (2004) 34 Cal.4th 743, 772; *People v. Thomas* (2012) 211 Cal.App.4th 987, 995; *People v. Torres* (2008) 163 Cal.App.4th 1420, 1423, fn. 2.) “Mad dogging” alone is not enough “to provoke a reasonable person to shoot someone” and does not justify an instruction on voluntary manslaughter based on heat of passion. (*People v. Lucas* (1997) 55 Cal.App.4th 721, 740.)

“only claim was that he acted out of self-defense” (*ibid.*) in shooting Gomez. Like the defendant in *Moye*, Pacheco “testified he acted deliberately in seeking to defend himself from each successive advance by the victim who, defendant claimed, turned and attacked him . . . .” (*Id.* at p. 555.) The “thrust of [Pacheco’s] testimony, in every particular” (*id.* at p. 553), was that he shot Gomez because he was defending himself from Gomez (and perhaps others), believed Gomez was trying to get up off the ground to come back at him, and reached for his gun “knowing” or “expecting” that Gomez was going to hit him. Pacheco’s testimony supported an instruction on self-defense, not heat of passion.

True, Pacheco in his testimony mentioned that he was “scared” and that he “panicked.” Like the defendant in *Moye*, however, Pacheco made it clear “he was referring to his thought processes being caught up in the effort to defend himself . . . .” (*Moye, supra*, 47 Cal.4th at p. 554.) Like the defendant in *Moye*, Pacheco “took great pains in his testimony to justify” (*ibid.*) shooting Gomez “as a direct, defensive response to successive advances” (*ibid.*) by Gomez. (See *id.* at p. 555 [the defendant “testified he acted deliberately in seeking to defend himself from each successive advance by the victim who, defendant claimed, turned and attacked him”].) Pacheco was, according to his testimony, deliberately defending himself with a weapon he brought to the scene for that purpose. There was no evidence that Pacheco’s ““reason was, at the time of his act, so disturbed or obscured by some passion . . . to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.””<sup>4</sup> (*People v. Nelson, supra*, 1 Cal.5th at p. 538.) Not even Pacheco’s lawyer believed the evidence supported a heat of passion instruction. A trial court does not have to give an instruction on heat of passion voluntary manslaughter as a lesser included defense every time a defendant gets in a fight and claims he or she killed in self-defense. (See *Moye*, at p. 555 [“an instruction on heat of passion is [not] required in every case in which the *only* evidence of unreasonable self-

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<sup>4</sup> Pacheco testified that in 2003 he did not have a “bad” temper and did not “snap” quickly. Montelongo, called by the People as a rebuttal witness, testified that Pacheco had a “high temper,” although Pacheco suggested that was only with her.

defense is the circumstance that a defendant is attacked and consequently fears for his life”].)

Nor was there substantial evidence of the objective component of the heat of passion form of voluntary manslaughter. (See *People v. Manriquez* (2005) 37 Cal.4th 547, 585-586 [“provocation ‘must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment’”].) When Pacheco shot Gomez, Gomez had fallen to the ground. The immediate danger had passed. Although Pacheco testified he thought Gomez might get up and “come back” at him again, Pacheco reached for his gun, not his car keys. Instead of abandoning the fight or getting in his car to drive away, Pacheco grabbed his gun, smiled at Gomez’s wife in response to her pleas for Gomez’s life, and shot Gomez while he was on his back. There was no substantial evidence that Pacheco acted from events that would “cause an ordinary person of average disposition to act rashly or without due deliberation and reflection.” (*Moye, supra*, 47 Cal.4th at p. 550; cf. *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1141-1142 [trial court erred in failing to instruct on heat of passion where the victim insulted and “had a serious argument” with the defendant’s girlfriend, engaged in “belligerent and threatening behavior,” and “had been aggressive throughout the night”]; *People v. Thomas* (2013) 218 Cal.App.4th 630, 645 [trial court erred in failing to instruct on heat of passion where the victim and two associates were aggressive toward the defendant, had a “heated” argument with him, and fought with the defendant three against one, and where the defendant was angry, crying, pacing, may have been dragged across a parking lot, and later fired his gun because he was “afraid, nervous and not thinking clearly”].)

Finally, although it is unclear whether Pacheco or Gomez threw the first punch, it is undisputed that Pacheco actively participated in creating the situation in which the fight that led to the shooting occurred. Pacheco went with Montelongo to Alvarez’s house to arrange a fight between Montelongo and a guest at Alvarez’s party, and brought a gun with him for security. He went into the party to get Ortega so the fight between the two women would take place, he enabled the fight by standing by and making sure no one intervened, and he joined the fight when his girlfriend started to lose. And when the

confrontation he helped create escalated, he reached for his gun and shot Gomez. As someone who had primary responsibility for the violence that evening, Pacheco was not entitled to a voluntary manslaughter instruction based on heat of passion. (See *People v. Oropeza* (2007) 151 Cal.App.4th 73, 83 [“[t]he claim of provocation cannot be based on events for which the defendant is culpably responsible”].)

B. *The Trial Court Should Amend the Abstract of Judgment To Reflect That the Jury Convicted Pacheco of Second Degree Murder*

Pacheco asserts, the People concede, and we agree that the abstract of judgment mistakenly states that Pacheco was convicted of first degree murder, not second degree murder. We correct that mistake. (See *People v. Jones* (2012) 54 Cal.4th 1, 89 [court has power to correct clerical errors on an abstract of judgment]; *People v. Mitchell* (2001) 26 Cal.4th 181, 188 [an appellate court has the authority to correct a clerical error in the abstract of judgment].)

**DISPOSITION**

The judgment is affirmed. The trial court is directed to correct the abstract of judgment to reflect that Pacheco was convicted of second degree murder, and then to send a copy of the modified abstract of judgment to the Department of Corrections and Rehabilitation.

SEGAL, J.

We concur:

ZELON, Acting P. J.

GARNETT, J.\*

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