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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

OSCAR PAZ NICASIO,

Defendant and Appellant.

2d Crim. No. B270146
(Super. Ct. No. 1451818)
(Santa Barbara County)

Oscar Paz Nicasio appeals a judgment following conviction of attempted willful, deliberate, and premeditated murder, infliction of corporal injury to a child's parent, and assault with a deadly weapon, with findings that he personally inflicted great bodily injury and personally used a deadly weapon. (Pen. Code, §§ 664, 187, subd. (a), 273.5, subd. (a), 245, subd. (a)(1), 12022.7, subd. (e), 12022, subd. (b)(1).)¹ We affirm.

¹ All statutory references are to the Penal Code unless stated otherwise.

FACTUAL AND PROCEDURAL HISTORY

Nicasio and Eydi Justo lived together for 10 years in Santa Maria with their three children, Justo's 14-year-old daughter W., Beatriz Lomeli, and other family members. At times during their relationship, Nicasio committed acts of domestic violence against Justo, including slapping or choking her.

In February 2014, Nicasio left Justo to live with his then-girlfriend. Several months later, Nicasio's girlfriend asked him to leave. Nicasio then asked Justo to allow him to sleep on her living room sofa until he obtained permanent housing. Justo agreed but refused to resume their relationship because "it was too soon for everything that had happened."

On May 10, 2014, Justo planned to celebrate Mother's Day at a restaurant with her children and Lomeli. Nicasio telephoned Justo and invited her to dinner or to a barbeque, but she declined. He then stated that he would take the children to his sister's home that evening because "[Justo] didn't care much about the children" and she would have "a better time" without them. When Nicasio arrived to pick up the children, he appeared angry and stated to Justo: "I'm going to give you a surprise that you're never going to forget in your life."

Fifteen minutes later, Nicasio telephoned Justo and asked her to remain at home because he had planned for mariachis to serenade her. Instead of mariachis, however,

Nicasio arrived at Justo's residence. He entered her bedroom where W. and Lomeli were also present. Nicasio demanded that W. and Lomeli leave the bedroom, but they refused. Nicasio left, but returned 10 minutes later, and in a "furious" tone of voice, again demanded that W. and Lomeli leave. They left the bedroom and Nicasio locked the door.

Nicasio then threw Justo on the bed, choked her, and accused her of neglecting their children. He stated: "I could have forgiven you anything but [you] disregarding the kids." He then removed a knife from his clothing and thrust it toward Justo's chest. She "blocked" the knife with her hand, thereby suffering a wound to her left hand and a slight wound to her chest. Nicasio then stood near the bed, cut his throat and wrist with the knife, and collapsed on the bed. W. and Lomeli heard Justo's screams and met her in the hallway as she fled the bedroom.

Justo received treatment at a hospital for a significant defensive wound to her left hand. She now suffers nerve damage and numbness in two fingers.

Police officers and emergency medical personnel were summoned to Justo's home where they found Nicasio alive but bleeding from his self-inflicted wounds. Police officers also found the weapon, a broccoli knife used by fieldworkers, in the bedroom.

Nicasio did not present evidence at trial.

The jury convicted Nicasio of attempted willful, deliberate, and premeditated murder, infliction of corporal injury

to a child's parent, and assault with a deadly weapon. (§§ 664, 187, subd. (a), 273.5, subd. (a), 245, subd. (a)(1).) It also found that he personally inflicted great bodily injury and personally used a deadly weapon during commission of the crimes. (§§ 12022.7, subd. (e), 12022, subd. (b)(1).) The trial court sentenced Nicasio to seven years to life for the attempted murder conviction, plus five years collectively for the great bodily injury and weapon use enhancements. The court imposed but stayed sentence for the remaining counts pursuant to section 654. It also imposed a \$10,000 restitution fine, a \$10,000 parole revocation restitution fine (suspended), a \$120 court security assessment, and a \$90 criminal conviction assessment; ordered victim restitution; and awarded Nicasio 729 days of presentence custody credit. (§§ 1202.4, subd. (b), 1202.45, 1465.8, subd. (a); Gov. Code, § 70373.)

Nicasio appeals and contends that the trial court erred by not instructing sua sponte regarding attempted voluntary manslaughter (CALCRIM No. 570 [“Voluntary Manslaughter: Heat of Passion - Lesser Included Offense (Pen. Code, § 192(a))”].)

DISCUSSION

Nicasio argues that evidence of Justo’s unwillingness to reconcile as well as his belief that she neglected their children constituted sufficient provocation to require sua sponte instruction regarding attempted voluntary manslaughter based

on heat of passion. Nicasio relies upon Justo's testimony that, on several occasions, he offered reconciliation but she refused; his attorney's *questions* whether Justo visited the Indian Casino and left her children (she responded no); his statement that "[he] could have forgiven [her] anything but [her] disregarding the children;" and his belief that she would not invite their children to the Mother's Day dinner. He asserts the failure to instruct is prejudicial and reversible pursuant to any standard of review, in part, pointing out that the jury requested a readback of Justo's testimony.

In criminal cases, the trial court must instruct on general principles of law relevant to the issues raised by the evidence and necessary to the jury's understanding of the case. (*People v. Nelson* (2016) 1 Cal.5th 513, 538; *People v. Enraca* (2012) 53 Cal.4th 735, 758.) The evidence necessary to support a lesser included offense instruction must be substantial evidence from which reasonable jurors could conclude that the facts underlying the instruction exist. (*Ibid.*) The substantial evidence requirement is not satisfied by any evidence, no matter how weak, but evidence from which a jury could conclude that the lesser offense, but not the greater, was committed. (*Nelson*, at p. 538.) We independently review whether the trial court should have instructed concerning a lesser included offense. (*Ibid.*; *People v. Waidla* (2000) 22 Cal.4th 690, 733.) "Whether or not to give any particular instruction in any particular case entails the

resolution of a mixed question of law and fact that . . . is however predominantly legal. As such, it should be examined without deference.” (*Waidla*, at p. 733.) Doubts regarding the sufficiency of evidence to warrant a lesser included offense instruction, however, must be resolved in favor of the defendant. (*People v. Tufunga* (1999) 21 Cal.4th 935, 944.)

The crime of murder may be reduced to voluntary manslaughter if the victim engaged in provocative conduct sufficient to cause an ordinary person with an average disposition to act in the heat of passion, i.e., rashly or without due deliberation and reflection. (*People v. Enraca*, *supra*, 53 Cal.4th 735, 759; *People v. Gutierrez* (2009) 45 Cal.4th 789, 826 [“The provocation must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment”].) “Heat of passion” is a state of mind created by legally sufficient provocation causing a person to act not from rational thought, but from an unconsidered reaction to the provocation. (*People v. Nelson*, *supra*, 1 Cal.5th 513, 539 [legally sufficient provocation eclipses reflection and causes a person to act without deliberation or judgment]; *People v. Beltran* (2013) 56 Cal.4th 935, 942 [a person who acts without reflection in response to adequate provocation does not act with the mental state required for murder].) “Adequate provocation and heat of passion must be affirmatively demonstrated.” (*Gutierrez*, at p. 826.) It is not

sufficient that a person is provoked and then later kills. (*Nelson*, at p. 539.)

The heat of passion element of voluntary manslaughter has an objective and a subjective component. (*People v. Enraca, supra*, 53 Cal.4th 735, 758-759.) “Objectively, the victim's conduct must have been sufficiently provocative to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection.” (*Ibid.*) Subjectively, the accused must be shown to have killed while under the actual influence of a strong passion induced by such provocation. (*Ibid.*)

The trial court was not required to instruct regarding attempted voluntary manslaughter because there was insufficient evidence of provocation sufficient to cause a reasonable man to act rashly or without due deliberation and reflection. The objective or reasonable person element of attempted voluntary manslaughter requires a showing of “provocation which incites the defendant to homicidal conduct in the heat of passion [that was] caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim.” (*People v. Moya* (2009) 47 Cal.4th 537, 549-550.) Although Justo declined to reconcile with Nicasio because it “was too soon” given his infidelity, in a kind gesture, she allowed him to sleep on the sofa until he could arrange other housing. She also testified that she did not visit the Indian Casino and leave her children unattended; Nicasio's questions

regarding this point do not constitute evidence. (*People v. Samayoa* (1997) 15 Cal.4th 795, 843-844; CALCRIM No. 222 (“Evidence”).) Moreover, a reasonable inference from Nicasio's statement that Justo would have “a better time” at dinner without the children suggests that he believed that they would accompany her to Mother's Day dinner. Nicasio did not affirmatively demonstrate sufficient provocation that would cause a reasonable person of ordinary disposition to become so inflamed as to act without reflection, deliberation, or judgment.

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

John F. McGregor, Judge

Superior Court County of Santa Barbara

Elizabeth K. Horowitz, 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, Margaret E. Maxwell, Supervising Deputy Attorney General, Timothy L. O'Hair, Deputy Attorney General, for Plaintiff and Respondent.