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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

HECTOR GUATEMALA CORTES,

Defendant and Appellant.

D059074

(Super. Ct. No. SCN266187)

APPEAL from a judgment of the Superior Court of San Diego County, Aaron H. Katz, Judge. Affirmed.

A jury found Hector Guatemala Cortes guilty of the second degree murder of Alfonso Gomez. (Pen. Code, § 187, subd. (a); subsequent undesignated section references are to this Code.) The jury also found true the allegation Cortes personally used a deadly and dangerous weapon (a knife) in the murder. (§ 12022, subd. (b)(1).) The sentencing court imposed on Cortes a prison term of 15 years to life for the murder

(§ 190, subd. (a)) plus a consecutive prison term of one year for the weapon use (§ 12022, subd. (b)(1)).

Cortes appeals, contending the trial court should have instructed the jury on voluntary manslaughter as a lesser included offense of murder, because the jury could have found he killed Gomez "upon a sudden quarrel or heat of passion." (§ 192, subd. (a).) We reject this contention and affirm the judgment.

## I

### FACTUAL BACKGROUND

Because Cortes's only claim on appeal is that the trial court erroneously refused to instruct the jury on voluntary manslaughter, we do not follow the usual practice of summarizing the facts in the light most favorable to the judgment (see, e.g., *People v. Howard* (1976) 63 Cal.App.3d 249, 253, fn. 1), but instead present the facts in the light most favorable to Cortes's claim of error (see *People v. Turk* (2008) 164 Cal.App.4th 1361, 1368, fn. 5 [when considering whether trial court had duty to instruct on lesser included offense, we view evidence in light most favorable to defendant]; *People v. Lucas* (1997) 55 Cal.App.4th 721, 739 (*Lucas*) [same]). So viewed, the evidence presented at trial established the following:

Cortes and his wife, Nicolasa Vasquez, rented a room in a house where Gomez and others also rented rooms. Vasquez threw an evening birthday party for Cortes in the garage of the house. Approximately 25 guests attended the party, including Gomez, Juan Rosales, and Rosales's companion, Leticia Valdes.

During the party, some of the guests were dancing. Gomez asked Rosales if he could dance with Valdes, and Rosales said he could if Valdes so desired. Gomez then danced with Valdes.

Later in the evening, Rosales became upset that Valdes had danced with Gomez. He argued with Gomez, and the two men pushed each other. Rosales then left the party.

After Rosales departed, Gomez again asked Valdes to dance. She responded: "Hey, guy, just stop it. You have caused enough problems. . . . Are you happy now?" When Cortes told Valdes she should have left with Rosales, she started "yelling at [Cortes] that [he] was a jackass, a jerk, an idiot. She said, 'Pendejo, dumb ass, stupid, you're a good-for-nothing, a coward.'"

As Valdes hurled these insults at Cortes, Gomez "started laughing and mocking [Cortes] and repeating the same words." Cortes told Gomez he should respect women; and he asked Gomez whether, if he had a wife, he would like it if somebody were bothering her. Gomez kept on laughing and mocking Cortes.

Next, Gomez approached Cortes's wife, Vasquez, "kind of grabbed her hand and said, 'Come on. Let's go dance.'" When Vasquez refused, Cortes told Gomez to leave her alone and approached him. Gomez threw a punch at Cortes but missed. Cortes then punched Gomez in the face, and the two men struggled.

During the struggle, Valdes smashed a beer bottle over Cortes's head. When Cortes was struck with the bottle, he was standing face to face with Gomez; Cortes did not see Gomez holding a bottle and did not know who hit him over the head with the bottle. When Cortes felt the beer bottle smash on his head, he "got scared" because he

"felt that [he] was being wounded, and [he] thought [he] was going to get killed." Cortes then "pulled out [a] knife to scare [Gomez]" and stabbed him in the chest. Gomez died from stab wounds to the heart.

After Cortes realized he had killed Gomez, he threw the knife away and drove toward Mexico. Border Patrol agents detained Cortes as he attempted to cross into Mexico.

## II

### PROCEDURAL BACKGROUND

During the conference on jury instructions, Cortes's counsel requested the jury be instructed on voluntary manslaughter based on theories of sudden quarrel/heat of passion and imperfect self-defense. (See § 192, subd. (a); CALCRIM Nos. 570, 571.) The trial court ruled the state of the evidence did not warrant instruction on the sudden quarrel/heat of passion theory, and the requested instruction was later withdrawn. The court did instruct the jury on imperfect self-defense.

## III

### DISCUSSION

Cortes's only claim on appeal is that the trial court erred by refusing to instruct the jury on the lesser included offense of voluntary manslaughter based on a sudden quarrel or heat of passion. (See, e.g., *People v. Manriquez* (2005) 37 Cal.4th 547, 583 (*Manriquez*) ["manslaughter has been considered a lesser, necessarily included, offense of intentional murder"].) As discussed below, we conclude the trial court did not err in this regard.

A. *Standard of Review*

On appeal from a murder conviction, "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." (*Manriquez, supra*, 37 Cal.4th at p. 584.) "Instruction on a lesser included offense is required only when the record contains substantial evidence of the lesser offense, that is, evidence from which the jury could reasonably doubt whether one or more of the charged offense's elements was proven, but could find all the elements of the included offense proven beyond a reasonable doubt." (*People v. Moore* (2011) 51 Cal.4th 386, 408-409.) In this context, "[s]ubstantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive." (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8 (*Barton*)). To determine whether there was substantial evidence of the lesser included offense, we evaluate the evidence in the light most favorable to the defendant. (*Lucas, supra*, 55 Cal.App.4th at p. 739.)

B. *General Legal Principles*

An intentional killing is reduced from murder to voluntary manslaughter if the evidence negates malice by showing the defendant acted upon a sudden quarrel or in the heat of passion. (§ 192, subd. (a); *Manriquez, supra*, 37 Cal.4th at p. 583.) The factor that distinguishes this type of manslaughter from murder is provocation. (*Manriquez*, at p. 583.) To reduce murder to voluntary manslaughter under section 192, subdivision (a), the provocation may be physical or verbal, but it must be engaged in (or reasonably believed by the defendant to have been engaged in) *by the victim*, and it must be

sufficient to "'cause an ordinary person of average disposition to act rashly or without due deliberation and reflection.'" (*Manriquez*, at pp. 583-584.) The provocation requirement for voluntary manslaughter has both a subjective and an objective component: (1) the defendant must actually and subjectively kill under the impulse of a sudden quarrel or the heat of passion (*id.* at p. 584); and (2) the provocation "'must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment'" (*id.* at pp. 585-586). If either component of provocation is absent, the killing is not voluntary manslaughter under section 192, subdivision (a), and the trial court need not instruct on this type of manslaughter as a lesser included offense of murder. (*Manriquez*, at pp. 585-586.)

C. *Analysis of Cortes's Claim of Error*

Cortes contends he stabbed Gomez after Gomez tried to punch him and shortly after Gomez "mocked him by calling him profane names and harassed [Cortes's wife]." According to Cortes, this sequence of events "raised a reasonable doubt as to whether [he] was guilty only of voluntary manslaughter based upon heat of passion rather than second degree murder." We disagree.

There was no substantial evidence from which the jury reasonably could have found Cortes "'actually, subjectively, kill[ed] under the heat of passion.'" (*People v. Moya* (2009) 47 Cal.4th 537, 554.) Cortes testified Gomez did not do anything at the party that Cortes considered "inappropriate" except dance with some of the women, and Cortes admonished Gomez about that behavior. Cortes also testified he did not become angry until *Valdes* started yelling at him and calling him names, and did not become

fearful until he was hit over the head with a beer bottle. Cortes further testified he did not blame Gomez for Valdes's insults; and he knew Gomez did not smash the bottle on his head, because Cortes was facing Gomez when he was hit with the bottle, but Gomez did not have a bottle. Cortes thus neither subjectively believed *Gomez* had done anything to provoke his (Cortes's) anger or fear, nor subjectively felt anger, fury, rage or other powerful emotion *toward Gomez* that compelled the stabbing. Rather, Cortes's testimony he "felt that [he] was being wounded, and [he] thought [he] was going to get killed" indicates the stabbing was a defensive reaction to being hit over the head with the beer bottle. Accordingly, on this record "[t]he subjective element of the heat of passion theory clearly was not satisfied, and for that reason the trial court did not err in refusing to instruct the jury as to heat of passion with regard to the killing of [Gomez]." (*Manriquez, supra*, 37 Cal.4th at p. 585 [no error in not instructing on sudden quarrel/heat of passion when defendant tried to calm victim and there was no showing defendant exhibited anger, fury or rage toward victim]; see also *Moye*, at p. 554 [same when "thrust of defendant's testimony below was self-defense"].)

There also was no substantial evidence from which the jury could have found provocation by Gomez that was sufficient to "'cause an ordinary person of average disposition to act rashly or without due deliberation and reflection.'" (*Manriquez, supra*, 37 Cal.4th at pp. 583-584.) Cortes contends Gomez's "repeated harassment" of Vasquez (Cortes's wife), "the taunting and the attempted battery" constituted "legally adequate provocation." We disagree. Gomez's request that Vasquez dance with him at the party and his "grabb[ing] her hand" cannot reasonably be characterized as "repeated

harassment"; and such acts "plainly were insufficient to cause an average person to become so inflamed as to lose reason and judgment." (*Id.* at p. 586.) Furthermore, according to Cortes, it was *Valdes* who provoked his anger and fear when she called him names and smashed a beer bottle on his head. Such conduct *by Valdes* would not provoke an ordinary person of average disposition to homicidal rage or passion *against Gomez*. (See *People v. Spurlin* (1984) 156 Cal.App.3d 119, 125-126 [killing not voluntary manslaughter when defendant killed victim due to passion provoked by third party].)

Even if Gomez had provoked Cortes to anger or fear by attempting to get Valdez to dance with him, laughing at Cortes, repeating Valdes's insults or unsuccessfully attempting to strike Cortes, none of these acts would have been sufficient to provoke an ordinary person of average disposition to stab Gomez to death. (See, e.g., *People v. Avila* (2009) 46 Cal.4th 680, 686-687, 705-707 (*Avila*) [verbal altercation at social gathering unaccompanied by exchange of blows insufficient to provoke defendant to stab victims in the heart]; *People v. Gutierrez* (2009) 45 Cal.4th 789, 826 (*Gutierrez*) ["a voluntary manslaughter instruction is not warranted where the act that allegedly provoked the killing was no more than taunting words, a technical battery, or slight touching"]; *Manriquez, supra*, 37 Cal.4th at p. 586 [victim's calling defendant "a 'mother fucker'" and repeated taunting of defendant insufficient to provoke reasonable person to bludgeon victim to death]; *Lucas, supra*, 55 Cal.App.4th at pp. 739-740 [laughing, smirking and name-calling insufficient to provoke reasonable person to shoot].) Therefore, because the objective element of the sudden quarrel/heat of passion theory was not satisfied on this

record, the trial court did not err in refusing to instruct the jury on this type of voluntary manslaughter. (*Manriquez*, at p. 586.)

In support of his contention the trial court should have instructed on the sudden quarrel/heat of passion theory of voluntary manslaughter, Cortes relies on *People v. Valentine* (1946) 28 Cal.2d 121 (*Valentine*), *Barton, supra*, 12 Cal.4th 186, and *People v. Lee* (1994) 28 Cal.App.4th 1724 (*Lee*). None of these cases is on point.

In *Valentine, supra*, 28 Cal.2d 121, our Supreme Court held it was error for a trial court to instruct a jury that provocation by words alone was insufficient to reduce an intentional homicide with a deadly weapon from murder to manslaughter. (*Id.* at pp. 137, 139.) The *Valentine* court "express[ed] no opinion as to whether the evidence in [that] case show[ed] conduct on the part of [the victim] as would arouse in a reasonable man the 'heat of passion' referred to in section 192 of the Penal Code." (*Id.* at p. 144.) The Supreme Court subsequently has made clear, however, that the insults repeated by Gomez in this case — e.g., calling Cortes a jackass, an idiot, and a good-for-nothing — were not sufficiently provocative to reduce murder to manslaughter. (See, e.g., *Gutierrez, supra*, 45 Cal.4th at p. 827 [victim's "'cuss[ing] back at'" defendant "did not constitute sufficient provocation for voluntary manslaughter"]; *Manriquez, supra*, 37 Cal.4th at p. 586 [victim's calling defendant "a 'mother fucker'" was "insufficient to cause an average person to become so inflamed as to lose reason and judgment"].)

In *Barton, supra*, 12 Cal.4th 186, the victim, Marco Sanchez, had threatened the defendant's daughter "with serious injury by trying to run her car off the road" and "spat on the window of her car." (*Id.* at p. 202.) "When defendant and his daughter confronted

Sanchez about his conduct, Sanchez called defendant's daughter a 'bitch' and he acted as if he was 'berserk.' Defendant and Sanchez angrily confronted each other and Sanchez assumed a 'fighting stance,' challenging defendant. After defendant asked his daughter to call the police, Sanchez started to get into his car; when defendant asked Sanchez where he was going, Sanchez replied, 'none of your fucking business,' and taunted defendant by saying, 'Do you think you can keep me here?' Screaming and swearing, defendant, before firing, ordered Sanchez to 'drop the knife' and to get out of his car, threatening to shoot if Sanchez did not do so." (*Ibid.*) The *Barton* court held "[t]his testimony provided substantial evidence from which a reasonable jury could conclude that when defendant killed Sanchez, defendant's reason was obscured by passion to such an extent as would cause an ordinarily reasonable person to act rashly and without reflection, and that defendant thus shot Sanchez in a sudden quarrel or heat of passion." (*Ibid.*)

Here, by contrast, Gomez did not threaten Cortes or his wife with serious injury, did not spit on either of them, did not direct any obscenity at either of them, and did not wield a knife or other weapon at them. This case is therefore not factually similar to *Barton, supra*, 12 Cal.4th 186, where the court held an instruction on voluntary manslaughter based on a sudden quarrel or heat of passion was properly given. Rather, this case is more like *Avila, supra*, 46 Cal.4th 680, *Gutierrez, supra*, 45 Cal.4th 789, and *Manriquez, supra*, 37 Cal.4th 547, "where the act that allegedly provoked the killing was no more than taunting words, a technical battery, or slight touching" (*Gutierrez*, at p. 826), and our Supreme Court held a sudden quarrel/heat of passion instruction was not warranted.

Finally, *Lee, supra*, 28 Cal.App.4th 1724, has no application to this case. In *Lee*, the defendant was charged with attempted murder, *and the jury was instructed on attempted voluntary manslaughter as a lesser included offense.* (*Id.* at pp. 1728, 1732.) The *Lee* court thus had no occasion to consider the only claim of error raised by Cortes, and its opinion does not support his argument for reversal. (See, e.g., *People v. Knoller* (2007) 41 Cal.4th 139, 155 [case not authority for proposition not considered]; *People v. Barragan* (2004) 32 Cal.4th 236, 243 [same].)

In sum, we conclude the trial court did not err by refusing to instruct the jury on voluntary manslaughter based on a sudden quarrel or heat of passion. We therefore need not and do not address the parties' arguments concerning whether any such error was harmless.

#### DISPOSITION

The judgment is affirmed.

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IRION, J.

WE CONCUR:

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NARES, Acting P. J.

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McDONALD, J.