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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DIANE BARRERA TREJO,

Defendant and Appellant.

D059352

(Super. Ct. No. FVI017755)

APPEAL from a judgment of the Superior Court of San Bernardino County, Jules E. Fleuret, Judge. Affirmed.

I.

INTRODUCTION

Defendant Diane Barrera Trejo appeals from a judgment of conviction after jury trial. A jury convicted Trejo of first degree murder. On appeal, Trejo contends that the trial court erred (1) in failing to instruct the jury on the principles of accomplice liability, and, in particular, in failing to instruct the jury that it could not convict her based solely

on an accomplice's testimony; and (2) in failing to instruct the jury on voluntary manslaughter based on a heat of passion/provocation defense. We conclude that both contentions are without merit and affirm the judgment of the trial court.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

1. *Additional background prior to the events leading to the charges*

Trejo and Richard Cortina had known each other for a number of years prior to 2000, and had three children together. By 2003, they were no longer romantically involved, but remained friends.

Sometime in 1997, Paris Follman met Trejo and Cortina. On New Year's Eve 1999, Cortina, Follman and Trejo engaged in a "threesome." Follman, who was married at the time, became pregnant with Cortina's child as a result of that encounter. Follman initially kept the paternity of her child a secret, but in 2003, she told Cortina for the first time that she believed he was the father of the child.

Follman separated from her husband and began dating Paul Sinohui. At some point after Follman became involved with Sinohui, Trejo had sex with Sinohui in retaliation for Follman not having told Trejo that Cortina had fathered Follman's child. Despite this, Follman and Trejo remained friends.

2. *The incident at Debbie Strause's home*

On September 2, 2003, Trejo and Follman were running errands, using Trejo's car. At some point during the day, Trejo's car broke down near the Apple Valley fire station.

Trejo and Follman left the car and went to their friend Cheri Laughead's apartment, which was nearby. Trejo, Follman, and the group of people who were hanging out at Laughead's apartment got drunk and high on drugs. Follman spent the night at the apartment, and left the following day.

On September 3, Follman and Sinohui were at Debbie Strause's house, which was also in the Apple Valley area. Follman and Sinohui were asleep when they were awakened by Trejo, who was standing in the doorway of the bedroom asking, "Where's my car?" Sinohui got out of bed and walked with Trejo into the garage. Follman did not know why Trejo had asked about her car.

When Sinohui returned to the bedroom, he told Follman that he had moved Trejo's car, and that he had told Cortina that Cortina could repay Trejo's debt (for moving the car) by giving Sinohui a quarter ounce of "speed."

A short time later, Strause arrived home with her husband and warned Follman and Sinohui that "parole was [going to] be stopping by." Follman was hiding from law enforcement officers because she had failed to report while on parole and had been using drugs. Heeding Strause's warning, Follman and Sinohui left Strause's house.

Follman and Sinohui drove to Laughead's apartment. Soon after they arrived, Trejo called Laughead's apartment and spoke with Follman. A few minutes later, a friend of Laughead's, Larry Taylor, arrived at the apartment. Taylor went into the kitchen with Laughead, and Follman went into the bathroom.

When Follman came out of the bathroom, Trejo opened the door to Laughead's apartment and entered the apartment without knocking. Taylor said hello to Trejo, but

Trejo did not respond. Trejo walked straight toward Follman and told Follman to "stay out of it." Cortina entered the apartment behind Trejo, and Trejo stepped out of his way.

Once Cortina was inside the apartment, he asked Sinohui, " '[D]o you have a problem with me fool?' " Cortina then said to Sinohui, " 'Here's your quarter ounce,' " pulled a gun from his shirt, and pointed it at Sinohui. Sinohui did not say anything, but started to stand up to face Cortina. When Sinohui was almost upright, Cortina shot him. Sinohui fell face down onto the floor. Follman screamed and Taylor yelled, " 'Gun.' " Taylor and Laughead ran out of the apartment through a sliding glass door that was near where they had been standing in the kitchen.

After a few seconds, Cortina pointed the gun at Follman and told her that he was sorry, but he '[had] to cut all ties." Follman thought Cortina was going to kill her. Trejo jumped in front of Follman to prevent Cortina from shooting Follman and said, " 'Don't Richard, don't. You don't have to do this. She won't rat. Don't.' " Trejo then told Cortina to "put him out of his misery." Cortina shot Sinohui a second time, in the head, while Sinohui was still lying face down on the ground. Taylor and Laughead both testified that they believed they heard the second gunshot after they ran out of the house.

Immediately after shooting Sinohui, Cortina said, " 'Come on, we have to go.' " Trejo also told Follman that they had to go. Although Follman was scared that Cortina was going to kill her, she ultimately got into Cortina's car with Trejo.

In the meantime, Taylor and Laughead had run to a nearby convenience store. After they arrived at the store, Taylor called 911. When deputies and paramedics arrived at the apartment, they found Sinohui's body in the living room, near the front door.

Sinohui had a visible gunshot wound to the top of his head. A spent bullet was later found on the floor where Sinohui's head had been.

Cortina, Trejo and Follman drove to the motel where Cortina had been staying. Once they arrived at the motel, Cortina told Trejo and Follman to go out and buy some bullets and alcohol. Trejo and Follman left in the car, but returned to the motel parking lot after dark without having purchased any bullets. At that point, Follman realized that she did not have to stay with Trejo and Cortina, and ran to the home of a friend who lived nearby.

3. *Additional evidence*

On September 9, 2003, Riverside County Sheriff's deputies went to a residence after they received information that Trejo might be there. A man at the home answered the door and allowed one of the deputies to enter. Inside the residence, the deputy encountered Trejo, who initially lied to the deputy, claiming that her name was Angela Bennett and providing a false date of birth. Trejo eventually gave the deputy her real name and date of birth.

The deputies took Trejo into custody and a detective advised her of her *Miranda*¹ rights. Trejo told the detective that her car had broken down while she was with Follman several days earlier. She explained that after her car broke down, she had borrowed Cortina's car to run errands and had spoken with her friend Strause, who told Trejo that Strause's husband would move Trejo's car for her. When Trejo eventually arrived at

¹ *Miranda v. Arizona* (1966) 384 U.S. 436.

Strause's house to retrieve her car, Strause was not home and Trejo's car was not there. Follman, who was at Strause's house when Trejo arrived, told Trejo that Sinohui had Trejo's car, and said that he would not return the car to Trejo unless she gave him \$1,000. Trejo became upset and started to cry. Follman promised that she would get the car back for Trejo and left. Trejo did not hear back from Follman that day.

Trejo told the detective that the following morning, she saw Cortina and told him about the car. Trejo told Cortina that she was angry at Sinohui. She told Cortina that Sinohui was going to fix the car but wanted \$1,000 to do the repairs. Trejo and Cortina went to Laughead's apartment to retrieve some of Trejo's clothing. They noticed Sinohui's car in the driveway of Laughead's apartment. Trejo entered the apartment and went into the room where Sinohui and Follman were sleeping, and demanded to know where her car was. Trejo, Cortina and Sinohui then went to the garage, where Sinohui retrieved a gun from the under the hood of his car. After retrieving the gun, Sinohui said to Trejo, "[I]f you want to see your car [again], . . . you can add a quarter ounce to pay your debt." Trejo told Sinohui that she and Cortina were going to leave, and asked that he have her car for her when they returned.

Trejo told the detective that she and Cortina left Laughead's apartment and went to Cortina's motel room. After they left, Trejo realized that she had forgotten her shoes. Cortina suggested they go back to Laughead's apartment. Trejo did not want to go, but Cortina insisted. According to Trejo, Sinohui was sitting in a chair in the apartment when she and Cortina arrived. Upon seeing Trejo and Cortina, Sinohui got up and "rushed" Cortina. Cortina then shot Sinohui. Despite having been shot, Sinohui kept

coming, so Cortina shot him again. Trejo claimed that the reason she had said to Cortina, "[O]ne more," was because she was scared that Sinohui might still come after her if Cortina did not kill him.

Trejo told the detective that she wanted to take a polygraph examination. Before the polygraph examination, a different detective conducted a pre-polygraph interview of Trejo. During that interview, Trejo told a story similar to the one she had told the other detective, although some of the details differed. However, when the detective asked Trejo whether she had known in advance that Cortina was going to shoot Sinohui, she responded that she knew something was going to happen. She explained that she had not told Cortina to kill Sinohui. Rather, Trejo said that she had told Cortina that *she* planned to kill Sinohui. However, they later decided that Cortina would shoot Sinohui. In fact, according to Trejo, she had told Cortina, "I need to get a hold of Kelly, he has my rifle and I want it, I'm going to kill [Sinohui]. [¶] . . . [¶] I'm tired of this shit. Who does he think he is. He took my fucking car. I know if I took his car, I'd be dead." When Trejo could not get in touch with her friend, Cortina told her not to worry and said, "I'll handle it." Trejo admitted that she knew that Cortina planned to shoot and kill Sinohui. She told the detective, "I knew Paul was going to die. [¶] . . . [¶] I wanted him to die. [¶] . . . [¶] I was very angry."

B. *Procedural background*

On November 28, 2005, the San Bernardino County District Attorney filed an information against Trejo, charging her with murder (Pen. Code, § 187, subd. (a)).² The information also alleged that a principal was armed with a firearm (§ 12022, subd. (a)).

On November 22, 2010, a jury found Trejo guilty of murder in the first degree, and found the enhancement allegation to be true.

The trial court sentenced Trejo to prison for a term of 26 years to life. Trejo filed a timely notice of appeal.

III.

DISCUSSION

A. *The trial court had no duty to instruct the jury on accomplice liability with respect to Follman*

Trejo contends that the trial court erred in failing to instruct the jury "on the principles governing the law of accomplices, including the need for corroboration, if the evidence at trial suggests that a witness could be an accomplice." She complains that there was sufficient evidence from which a reasonable jury could have concluded that Follman was an accomplice to Sinohui's murder, and therefore, the trial court should have given instructions cautioning the jury with respect to their reliance on accomplice testimony. We disagree with this contention. Further, we conclude that even if the court had erred in this regard, the error would not have been prejudicial because there was abundant evidence that corroborated Follman's testimony.

² Further statutory references are to the Penal Code unless otherwise indicated.

1. *Legal standards*

An accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (§ 1111.)

"The general rule is that the testimony of all witnesses is to be judged by the same legal standard. In the case of testimony by one who might be an accomplice, however, the law provides two safeguards. The jury is instructed to view with caution testimony of an accomplice that tends to incriminate the defendant. It is also told that it cannot convict a defendant on the testimony of an accomplice alone." (*People v. Howard* (2008) 42 Cal.4th 1000, 1021-1022, italics omitted; see § 1111 [accomplice testimony must be corroborated by "other evidence as shall tend to connect the defendant with the commission of the offense"].)

"Error in failing to instruct the jury on consideration of accomplice testimony at the guilt phase of a trial constitutes state-law error, and a reviewing court must evaluate whether it is reasonably probable that such error affected the verdict. [Citation.]"

(*People v. Williams* (2010) 49 Cal.4th 405, 456 (*Williams*)). "Any error in failing to instruct the jury that it could not convict defendant on the testimony of an accomplice alone is harmless if there is evidence corroborating the accomplice's testimony.

' "Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense." ' [Citation.]" (*Ibid.*)

2. *Analysis*

Trejo contends that the evidence suggested that Follman could have been liable for murder as an aider and abettor, and, therefore, the trial court should have instructed the jury that it could not convict Trejo based solely on Follman's testimony. We disagree with Trejo that there was substantial evidence to support a finding that Follman was an accomplice to Sinohui's murder. In fact, there was no evidence that Follman played any role in Sinohui's murder.

Trejo suggests that the following constitutes evidence from which one could conclude that Follman was an accomplice: 1) Follman was at Laughead's apartment before Trejo and Cortina arrived, and was there when Trejo called the apartment; 2) when Cortina shot Sinohui, the other two people who were present in the apartment at the time ran out the door, but Follman did not; and 3) Cortina wanted to shoot Follman, but not the other two witnesses who had run out of the apartment. According to Trejo, this evidence "tends to show that [Follman] had more to offer the police and prosecution than merely the fact that Cortina was in the apartment and shot the victim," and suggests that Follman "was in on the plot." Trejo also contends that the fact that Follman left with Trejo and Cortina after the shooting is evidence that Follman was an accomplice to Sinohui's killing. None of the facts that Trejo proffers provides an evidentiary basis to conclude that Follman was involved in Sinohui's murder. Trejo's contentions in this regard are nothing more than speculation.

The evidence demonstrates that the only role that Follman played in the relevant events is that of a potential victim of Cortina, not an accomplice. Follman's testimony

was consistent with the events as related in the prosecution's case as described above, and was consistent with Trejo's statements to police, as well. As Follman explained, she had been with Trejo when Trejo's car broke down, and Sinohui had taken Trejo's car and was demanding money or drugs from Trejo in exchange for its return. While Follman and Sinohui were in Laughead's apartment, Trejo telephoned Laughead, and Follman spoke with Trejo on the phone. At some point, Trejo and Cortina walked through the front door of the apartment. Trejo looked at Follman and said, "[S]tay out of it." Follman did not understand what Trejo meant. Cortina pulled a gun from his jacket, said, "I got your quarter ounce," and shot Sinohui. Follman screamed, and Taylor and Laughead ran out a sliding door.

Cortina then pointed the gun at Follman and said that he "[had] to cut all ties." Follman was afraid that Cortina was going to kill her. Trejo jumped between Cortina and Follman and said to Cortina, " 'She won't rat.' " Trejo then told Cortina to put Sinohui "out of his misery." Cortina shot Sinohui a second time in the back of the head. Follman tried to go over to Sinohui, but Trejo told her, " 'Come on, we have to go.' " Follman was fearful of what might happen, so she left with Trejo and Cortina.

Trejo also acknowledged to a detective that after Cortina shot Sinohui, he pointed the gun at Follman, and Follman screamed, "[D]on't kill me!" According to Trejo, Cortina asked her, "[S]hould I[?]" and Trejo stepped in and said "[D]on't" or "[S]top." Cortina then said to Follman, "I can't leave you here." Trejo told Follman, "[L]et's go," and they all left together.

There is no evidence that Follman was an accomplice to the murder of Sinohui, or that Follman was aware of Trejo and Cortina's plan prior to their execution of the plan. Neither the fact that Follman left with Trejo and Cortina *after* Cortina shot Sinohui, nor the fact that she accompanied Trejo to purchase more bullets for Cortina, constitutes evidence that she played any role in the plot to kill Sinohui.

Even if we were to assume that the evidence to which Trejo points was sufficient to warrant the jury instruction regarding the need for corroboration of accomplice testimony, and that the court therefore erred in not instructing the jury that it could not convict Trejo based solely on the testimony of an accomplice, such presumed error would clearly be harmless. As noted, an error in failing to instruct the jury that it may not convict on the testimony of an accomplice alone "is harmless if there is evidence corroborating the accomplice's testimony." (*People v. Williams, supra*, 49 Cal.4th at p. 456.) There was abundant evidence corroborating Follman's testimony. In addition to the fact that there were other eyewitnesses who testified about the shooting, Trejo admitted to detectives that she had been considering killing Sinohui herself because he had taken her car, but because a friend of hers had her rifle, she realized that she would have to obtain another gun. In the car on the way to Laughead's apartment, Trejo and Cortina discussed killing Sinohui, and Cortina said, "[D]on't worry [¶] . . . [¶] I'll handle it." Because there is abundant evidence that corroborates Follman's testimony, we reject Trejo's contention that the trial court's failing to instruct the jury that it could not convict her based solely on an accomplice's testimony requires reversal of her conviction.

B. *The trial court had no duty to instruct the jury on voluntary manslaughter based on a heat of passion/provocation defense*

Trejo contends that she was entitled to an instruction on voluntary manslaughter based on heat of passion/provocation, and that the trial court should have given this instruction sua sponte.

1. *Legal standards*

a. *Murder and the lesser included offense of voluntary manslaughter based on provocation or unreasonable self-defense*

" "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]." 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 [citation].' [Citation.]" (*People v. Moye* (2009) 47 Cal.4th 537, 549 (*Moye*), italics omitted.)

If " 'the People's own evidence suggests that the killing may have been provoked or in honest response to perceived danger,' or the defendant 'proffer[s] some showing on

these issues sufficient to raise reasonable doubt of his guilt of murder' then 'the People must prove beyond a reasonable doubt that these circumstances were lacking in order to establish the murder element of malice.' " (*People v. Rios* (2000) 23 Cal.4th 450, 461-462, citation omitted.)

The standard instruction for the defense of provocation is CALCRIM No. 570, which provides in relevant part:

"A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of a sudden quarrel or in the heat of passion if: [¶] 1. The defendant was provoked; [¶] 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured [his] reasoning or judgment; [¶] AND [¶] 3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment. [¶] Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection. [¶] In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time. [¶] It is not enough that the defendant simply was provoked. The defendant is not allowed to set up [his] own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment."

As this instruction indicates, a heat of passion/provocation defense has both an objective and a subjective component. To satisfy the objective component of the heat of passion/provocation theory of voluntary manslaughter, there must be evidence of

provocation that is " 'caused by the victim [citation], or [is] 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.]' [Citation.]" (*Moye, supra*, 47 Cal.4th at pp. 549-550, italics added.) To satisfy the subjective component, "the accused must be shown to have killed while under 'the actual influence of a strong passion' induced by such provocation. [Citation.]" (*Id.* at p. 550.)

b. *Instructing on lesser-included offenses*

" 'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct . . . on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.] The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155 (*Breverman*).)

Instructions on lesser included offenses "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. [Citations.]" (*Breverman, supra*, 19 Cal.4th at pp. 162-163.)

"On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support" (*Breverman, supra*, 19 Cal.4th at p. 162), even if the instructions have been specifically requested by the defense. (*People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12, superseded in part by statute on other grounds as stated in *In re Christian S.* (1994) 7 Cal.4th 768, 777.)

2. Analysis

Trejo contends that the evidence warranted a provocation instruction. She suggests that the following constitutes sufficient evidence to support the defense: "[E]vidence was presented that Appellant's car broke down and that the victim took the car and, in essence, held it hostage pending payment of \$1,000 or a quarter ounce of methamphetamine. Appellant indicated that this made her very angry and that she 'lost it' when she found this out and that she was very angry after thinking she might get the vehicle back and finding out that she was not going to be able to do so." As we will explain, this evidence is entirely insufficient to support a provocation defense. The trial court thus did not err in failing to instruct the jury on that defense.

In assessing Trejo's contention that there was sufficient evidence of provocation to reduce her murder conviction to voluntary manslaughter, we take guidance from the Supreme Court's analysis in *People v. Manriquez* (2005) 37 Cal.4th 547, 586 (*Manriquez*). In *Manriquez*, the Supreme Court concluded that derogatory insults

repeatedly directed at a defendant by the victim in the context of a barroom killing did not constitute substantial evidence of provocation. The *Manriquez* court reasoned:

"[The eyewitness] testified that [the victim] called defendant a 'mother fucker' and that he also taunted defendant, repeatedly asserting that if defendant had a weapon, he should take it out and use it. Such declarations, as recounted by [the eyewitness], comprised the only evidence of provocative conduct attributed to the victim, and plainly were insufficient to cause an average person to become so inflamed as to lose reason and judgment." (*Ibid.*)

Accordingly, the *Manriquez* court held that the trial court had properly denied the defendant's request for an instruction on voluntary manslaughter based on the theory of a sudden quarrel or heat of passion. (*Manriquez, supra*, 37 Cal.4th at p. 586.)

Similarly, in *Moye*, our Supreme Court held that the evidence did not support an instruction on a sudden quarrel/heat of passion theory of voluntary manslaughter, where the defendant bludgeoned his victim to death with a baseball bat. (*Moye, supra*, 47 Cal.4th at p. 540-541.) The defendant claimed to have used the bat defensively to fend off an attack from the homicide victim, but his own uncontested testimony established that he had not acted rashly, or without due deliberation and reflection, or from strong passion rather than from judgment. (*Id.* at p. 541.) For these reasons, the *Moye* court concluded that there was not substantial evidence to support giving a voluntary manslaughter instruction based on a sudden quarrel or heat of passion. (*Id.* at p. 553.)

Even if one were to accept as true Trejo's statements that she "lost it" and was very angry about Sinohui's conduct with respect to her car, there would not be sufficient evidence from which a reasonable trier of fact could conclude that either the objective or the subject element of a heat of passion/provocation defense existed. The evidence

established that Trejo and Cortina were upset because Sinohui in effect held Trejo's vehicle hostage and demanded payment before he would return it to them. However, there was no fight or angry interaction *at the time of the shooting*. There had been some interaction between Trejo, Cortina and Sinohui at some point in time before the shooting, during which Sinohui made the comment that Trejo and Cortina would have to bring him a "quarter ounce" in order to get the car back. However, after this interaction, Trejo and Cortina left the apartment and went to Cortina's hotel room before going to Laughead's apartment. When they arrived at Laughead's apartment, Cortina immediately shot Sinohui, who barely had time to stand up before he was shot. There is no evidence that Sinohui did anything at that time that would " 'cause [an] ordinarily reasonable person of average disposition to act rashly or without due deliberation and reflection' " (*Moye, supra*, 47 Cal.4th at p. 550, citation omitted). To the extent that Trejo was still angry from the previous interaction with Sinohui, there was plenty of time for her to deliberate and reflect between the time she and Cortina left Strause's house and the time she and Cortina arrived at Laughead's apartment.

Further, there is simply no evidence to support the subjective element of this form of manslaughter, i.e., that Trejo's desire to kill Sinohui arose while she was under " ' the actual influence of a strong passion' induced by such provocation. [Citation.]" (*Moye, supra*, 47 Cal.4th at p. 550.) Trejo initially told police that Sinohui lunged at Cortina, and Cortina shot at him in self-defense. She later admitted that she and Cortina had discussed killing Sinohui in retaliation for his refusal to return Trejo's car to her, before they arrived at Laughead's apartment. There was no other evidence presented at trial that

indicated what Trejo was thinking at the time of the murder, and there was no evidence that suggested that Trejo was acting "under 'the actual influence of a strong passion' induced by such provocation" (*ibid.*) when her desire to kill Sinohui arose. Rather, it appears that Trejo was angry with Sinohui and made a *deliberate* decision to kill him in retaliation for his refusal to return her car.

Because there is no evidence that would support a heat of passion/provocation defense as to Trejo, there is no basis for reversing Trejo's murder conviction on the ground that the trial court failed to instruct the jury on voluntary manslaughter based on heat of passion/provocation.

IV.

DISPOSITION

The judgment of the trial court is affirmed.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.