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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

GILBERT EGURROLA,

Defendant and Appellant.

D060436

(Super. Ct. No. SCD220411)

APPEAL from a judgment of the Superior Court of San Diego County, Joan P. Weber, Judge. Affirmed.

A jury found Gilbert Egurrola guilty of first degree murder (Pen. Code, § 187, subd. (a)) and kidnapping (Pen. Code, § 207, subd. (a)). Egurrola challenges the murder conviction, contending the homicide instructions taken as a whole, and the standard CALCRIM No. 522 instruction in particular, were unconstitutionally ambiguous with respect to the ability of provocation to reduce murder from first to second degree. We reject this contention and affirm the judgment.

## FACTUAL BACKGROUND

At the time of his death, Ralph Barrera was 81 years old and lived in a downtown San Diego residential facility for senior citizens operated by the Salvation Army. Several women visited Barrera from time to time, and the building's security guard understood Barrera to have a sexual relationship with those women. One of the women that occasionally visited Barrera was Yolanda Diaz.

In 2009, Diaz was homeless and had known Barrera for about 10 years. She kept some of her belongings at Barrera's apartment and he sometimes gave her money. Though Diaz and Barrera had sex on one occasion, she considered him a friend and in the past had declined Barrera's requests to be his girlfriend and to marry him.

By April 23, 2009, Diaz had been dating Egurrola, who was 25 years old and also homeless, for three to four months. Egurrola had told Diaz he loved her, and Diaz had said the same to Egurrola, though she did not actually feel that way. Egurrola had met Barrera twice before while accompanied by Diaz, but Diaz never told Egurrola that she had sex with Barrera. On April 23, Diaz and Egurrola went to Barrera's apartment, planning to stay for two days, then go to Mexico. While staying with Barrera, Diaz planned to pick up some of her belongings and get money from him. When they arrived at Barrera's apartment, Theresa Araiza, a friend of Barrera who was staying with him for a short time, was also at Barrera's apartment.

The following morning, Barrera went to the bank to get Diaz some money. When Barrera returned, he and Egurrola went to a store to buy beer. On the way back to Barrera's apartment, they ran into a homeless acquaintance of Egurrola named Salvador

Padilla. Barrera invited Padilla back to his apartment, offering to let him shower there. Padilla accepted and accompanied the men to Barrera's apartment.

Upon returning to Barrera's apartment, Barrera, Egurrola, Diaz, and possibly Padilla,<sup>1</sup> began drinking. The group drank for a couple of hours. At one point, Diaz sat on Barrera's lap. Barrera was intoxicated and began rubbing Diaz in a sexual manner. Egurrola appeared unhappy about it, but did not say anything. Araiza left the apartment because she was uncomfortable with the tension between Barrera, Diaz, and Egurrola. Araiza planned to return in a couple days once Diaz and Egurrola were to have departed.

Tension continued to build between Barrera and Egurrola. At one point, Barrera asked Diaz, "Are you with him or are you with me?" Egurrola appeared angry and responded, "She's with you," then pushed Diaz closer to Barrera. Around this time, Padilla left the room to take a shower.

Padilla was in the bathroom for roughly five to 15 minutes before returning to the living room to ask Barrera if he could use a certain towel. As Padilla was returning, he heard Egurrola ask Barrera from the kitchen if Barrera had any coffee. Barrera responded from the living room, "I told you I don't have any coffee. I've got tea." Egurrola asked if he could make some tea and Barrera responded that he could.

After Egurrola and Barrera's exchange about coffee and tea, Padilla asked Barrera, who was sitting on the couch, if he could use the towel. As soon as Barrera responded, Egurrola came from the kitchen and lunged at Barrera with a kitchen knife. Egurrola

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<sup>1</sup> Padilla testified that he did not drink that day, but other witnesses testified that he drank with the others.

jumped on top of Barrera and repeatedly swung the knife at and around Barrera's neck. Barrera plead for Egurrola to stop, but Egurrola continued. Diaz became hysterical and started to cry. Padilla was scared and did not know what to do, eventually running to the bathroom to put his clothes back on before returning to the living room where Egurrola was still attacking Barrera with the knife.

Egurrola ordered Padilla to help him move Barrera to the bathroom, but Padilla refused. This upset Egurrola who then threatened to kill Padilla if he moved. Egurrola moved Barrera to the bathroom himself, dragging Barrera by the arms. At this point, Barrera was still protesting but had mostly stopped struggling against Egurrola. Egurrola put Barrera in the bathtub and ordered Padilla and Diaz into the bedroom adjacent to the bathroom so he could watch them. Egurrola claimed he had a gun and would shoot either Padilla or Diaz if they tried to do anything. Once Barrera was in the bathtub, Egurrola resumed his attack with the knife.

Egurrola subsequently confronted Padilla and Diaz in the bedroom. Egurrola swung the knife at both Padilla and Diaz, but it did not touch either of them. At that time, Barrera tried to get out of the bathtub, and Egurrola returned to the bathroom. Barrera pleaded to Egurrola, "Please let me die in peace. Let me talk to my kids." Egurrola responded, "Why don't you just shut the fuck up and die in peace." Egurrola then stabbed Barrera more, again focusing around the neck.

Soon thereafter, Egurrola took Barrera's wallet, money, and cards, cut the phone line, and told Padilla and Diaz to gather their possessions. Egurrola then led Padilla and

Diaz out the back of the building, threatening that if they did not go with him, he would kill them.

The next day, a friend of Barrera's entered the apartment, found Barrera dead in the bathtub, and reported it to the police. Barrera had suffered numerous cuts to his neck, including two deep incised wounds and one stab wound that cut his carotid artery, almost severing it completely. Barrera also suffered cuts to his hands, wrists, and forearm consistent with defensive wounds.

The prosecution's theory of the case was that Egurrola committed first degree, premeditated murder. The defense theory was that Egurrola was not the killer, but even if he was, he committed voluntary manslaughter, reduced from murder by provocation. From the instructions, the jury also had the option to convict Egurrola of second degree murder in the event it found imperfect provocation. A conviction of voluntary manslaughter in this case would be based on provocation that would cause a reasonable person to act rashly and without due deliberation. A conviction of second degree murder in this case would be based on provocation that caused Egurrola to act rashly and without due deliberation, but would not cause a person of average disposition to act that way. The jury found Egurrola guilty of first degree murder. Egurrola filed a timely appeal.

## DISCUSSION

The court instructed the jury on homicide generally, the requirements for first degree and second degree murder, the potential mitigating effect of provocation, and the lesser charge of voluntary manslaughter for a heat of passion homicide. On appeal, Egurrola contends the instructions on provocation as related to first versus second degree

murder were ambiguous and it is reasonably likely those instructions led the jury to believe (1) it must apply an objective standard or a standard of its own creation to assess whether provocation was sufficient to negate premeditation and deliberation, and (2) it could disregard evidence of provocation entirely.<sup>2</sup>

## I

Following a claim of ambiguous jury instructions, we assess "whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction." (*People v. Smith* (1999) 20 Cal.4th 936, 963.) In this assessment, we consider the instructions as a whole rather than analyze each instruction or any part of an instruction individually. (*Ibid.*) We assume the jurors are intelligent persons capable of integrating the instructions and understanding each in the context of the others. (*Hernandez, supra*, 163 Cal.App.4th at p. 1332.) To assess the likely interpretation of the instructions by the jury, we also consider the arguments of counsel relevant to the instructions and charges at issue. (*People v. Young* (2005) 34 Cal.4th 1149, 1202.) A court that adequately instructs the jury on the law has no duty to give clarifying or amplifying instructions absent a request from counsel. (*Hernandez, supra*, at p. 1331.)

To evaluate Egurrola's claim of instructional error, we first summarize the law regarding the three grades of homicide applicable to this case. We then consider the

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<sup>2</sup> Although during trial defense counsel did not object to the instructions as given, we decline to find forfeiture of the instructional issue on appeal because if the trial court did provide misleading instructions to the jury, that error would affect the defendant's substantial rights. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1315, fn. 43; *People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1331, fn. 2 (*Hernandez*).

instructions given to the jury from the court and counsel's statements to the jury regarding the charges at issue to determine how a reasonable jury would likely interpret the law. Finally, we determine whether the instructions, as likely understood by a reasonable juror, correctly state the law.

## II

"First degree murder is an unlawful killing with malice aforethought, premeditation, and deliberation. [Citation.] Malice may be express (intent to kill) or implied (intentional commission of life-threatening act with conscious disregard for life). [Citation.] Second degree murder is an unlawful killing with malice, but without the elements of premeditation and deliberation which elevate the killing to first degree murder. [Citation.] To reduce a murder to second degree murder, premeditation and deliberation may be negated by heat of passion arising from provocation. [Citation.] If the provocation would not cause an average person to experience deadly passion but it precludes the defendant from subjectively deliberating or premeditating, the crime is second degree murder. [Citation.] If the provocation would cause a reasonable person to react with deadly passion, the defendant is deemed to have acted without malice so as to further reduce the crime to voluntary manslaughter. [Citation.]" (*Hernandez, supra*, 163 Cal.App.4th at p. 1332.)

## III

### A

Here, the jury was instructed that murder and manslaughter are homicides, murder being the crime charged and manslaughter being a lesser offense. (See CALCRIM No.

500.) The jury was then instructed with CALCRIM No. 520 that first and second degree murder both require malice aforethought, that malice could be express or implied, and that if the jury decided the defendant committed murder, it must decide whether it was in the first or second degree. Next, the jury was instructed that the defendant was guilty of first degree murder only if he acted willfully, deliberately, and with premeditation, and that all other murders are second degree murders. (CALCRIM No. 521.)<sup>3</sup> The court continued instructing with CALCRIM No. 521, specifying that willfully means the defendant intended to kill, deliberately means the defendant weighed the considerations for and against his choice and acted knowing the consequences of his decision, with premeditation means the defendant decided to kill before completing the act which caused death, and a "decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated."

The jury was subsequently instructed with CALCRIM No. 522, an instruction titled "Provocation: Effect on Degree of Murder," as follows:

"Provocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter."

Finally, the jury was instructed on voluntary manslaughter in the language of CALCRIM No. 570 that a homicide that would otherwise be murder is reduced to

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<sup>3</sup> CALCRIM No. 521 does not explicitly instruct that all other murders are in the second degree, but the court modified the instruction to include that language.

voluntary manslaughter if it was committed because of a sudden quarrel or in the heat of passion. The instruction stated that a homicide resulted because of a sudden quarrel or in the heat of passion if "(1) [t]he defendant was provoked; [¶] (2) [a]s a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; [¶] [and] [¶] (3) [t]he provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment." The instruction continued, specifying that the provocation was to be judged from the objective standard of a person of average disposition and should take into account whether the amount of time between the provocation and the killing would have allowed a person of average disposition to "'cool off' and regain his or her clear reasoning and judgment . . . ." (CALCRIM No. 570.)

## B

After the court instructed the jury,<sup>4</sup> counsel had the opportunity to give closing remarks. During its closing statement, the prosecution differentiated first degree murder from second degree, and murder from manslaughter. After discussing how the evidence fit the first degree murder requirements of being willful, premeditated, and with deliberation, the prosecution specified that the defendant's decision was not rash or impulsive, noting that a "decision made rashly, impulsively or without careful consideration is not premeditation and deliberation." The prosecution then discussed the

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<sup>4</sup> The jury heard instructions from the court, and each juror was provided written instructions once the jury began its deliberations.

requirements for voluntary manslaughter before giving the following argument of why voluntary manslaughter does not fit this case:

"There's no provocation in this case. [¶] Maybe there's a couple things that made the defendant jealous, and that was his motive for doing it. [¶] His motive, you don't have to understand that or think it's reasonable. It's his motive. [¶] But for provocation, a person of average disposition would have had to have reacted rashly, as well. [¶] So what happened that would have made the defendant's deliberate attack under the direct and immediate influence of provocation? [¶] Look at the evidence and you'll see nothing. [¶] Is that how a person of average disposition would react? Is there anything about this evidence that would suggest to you that a person of average disposition would have killed Mr. Barrera in the way that the defendant killed him? [¶] You'll find nothing."

Egurrola contends that CALCRIM No. 522, the only instruction given explicitly addressing the relationship between provocation and the degrees of murder, was improperly ambiguous regarding whether an objective or subjective standard should be used to assess whether the provocation was sufficient to reduce murder from first to second degree. Further, because outside of CALCRIM No. 522 provocation was addressed only by CALCRIM No. 570 and the prosecutor, and then only as an objective test to reduce murder to voluntary manslaughter, Egurrola claims a reasonable jury would likely infer an objective test is also to be used when determining whether provocation reduces a murder from first to second degree.

#### IV

#### A

Preliminarily, we note that in *People v. Rogers* (2006) 39 Cal.4th 826, 877-880, our Supreme Court specifically rejected the contention that a trial court must sua sponte

instruct the jury that provocation insufficient to reduce murder to manslaughter may still be sufficient to reduce first degree murder to second degree. The court reasoned that such an instruction would be a "pinpoint instruction" as it relates particular facts to a specific legal issue (here, whether provocation prevented Egurrola from premeditating and deliberating) to "pinpoint" a potential defense theory. (*Id.* at p. 878.) The court determined that the absence of a provocation instruction specifically relating to reducing first degree murder to second degree did not mislead the jury "because the jury is told that premeditation and deliberation is the factor distinguishing first and second degree murder." (*Id.* at p. 880.) Regarding potential confusion resulting from giving manslaughter instructions on provocation without second degree murder instructions on provocation, the *Rogers* court stated that "the manslaughter instruction does not preclude . . . the jury from giving weight to any evidence of provocation in determining whether premeditation existed." (*Ibid.*)

In *Hernandez, supra*, 183 Cal.App.4th at pages 1333 to 1334, we determined that a reasonable jury instructed with CALCRIM No. 521 and CALCRIM No. 522 would interpret those instructions together to mean that provocation can cause a person to make a rash and impulsive decision to kill. As the jury was instructed that a rash and impulsive decision to kill was not first degree murder because it was not made with premeditation and deliberation, a jury could not logically apply those instructions, find provocation, and then convict a defendant of first degree murder. If it found provocation, the jury's only remaining question would be whether the homicide was second degree murder or voluntary manslaughter. CALCRIM No. 570 serves to clarify that question.

CALCRIM No. 570 emphasizes that provocation only reduces murder to voluntary manslaughter if it would cause a person of average disposition to act rashly and without deliberation. CALCRIM No. 522, however, instructs the jury to consider provocation both in reducing murder to voluntary manslaughter and in reducing first degree murder to second degree. A reasonable jury would not infer that the same objective standard should apply in both cases. Such an inference would not allow for provocation to reduce a first degree murder to second degree without further reducing it to voluntary manslaughter, an interpretation in direct conflict with the plain direction of CALCRIM No. 522. Given the objective standard used to reduce murder to manslaughter and the instruction that the difference between first and second degree murder is whether the defendant acted with premeditation and deliberation, the logical conclusion is the correct one: that reducing first degree murder to second degree depends on provocation of the specific defendant and whether it caused him to act without due premeditation and deliberation.

## B

Egurrola's contention that the prosecutor's closing remarks conflated the two acceptable uses for provocation also fails. Egurrola's argument is essentially that the prosecutor emphasized that there was no provocation because a person of average disposition would not have been provoked to kill Barrera, and by doing so led the jury to believe provocation should only be judged from the objective standpoint of a person of average disposition. Taken in context, however, those remarks were directed solely at whether the jury should return a verdict of voluntary manslaughter. The prosecutor had

already discussed the difference between first and second degree murder, doing so in the same language as the jury instructions, i.e., emphasizing that since Egurrola did not act rashly, but rather acted with premeditation and deliberation, the jury should find him guilty of first degree murder. In short, nothing in the prosecutor's argument misstated the law or implied that provocation insufficient to reduce murder to voluntary manslaughter could still have prevented Egurrola from acting without premeditation and deliberation, thereby reducing first degree murder to second degree. As there is no requirement for the court to provide pinpoint instructions highlighting a defense theory, there is certainly no obligation on the prosecutor to do so.

### C

Egurrola further contends that the language of CALCRIM No. 522 allows the jury to elect its own standard for applying provocation, or to disregard evidence of provocation entirely. Specifically, Egurrola notes that the instruction states provocation "may reduce" the degree of murder and it is up to the jury to decide the "significance of the provocation, if any." We considered and rejected a similar claim in *Hernandez*, determining that the most likely interpretation of the instruction to decide the "significance of provocation" was whether the provocation was sufficient "to create a doubt as to whether the offense was deliberate, premeditated first degree murder rather than a rash, impulsive second degree murder." (*Hernandez, supra*, 183 Cal.App.4th at pp. 1334-1335.) Here, the significance of the provocation was also relevant to whether the jury should find second degree murder or voluntary manslaughter. Similarly, the modifiers "may reduce" and "if any" do not give the jury complete discretion on whether

and how to apply evidence of provocation once the jury finds it. Rather, they instruct that it is for the jury to determine whether the evidence shows provocation at all and, if so, whether it was sufficient to cause either a person of average disposition or the defendant to act rashly as opposed to deliberately and with premeditation.

The trial court did not err in instructing the jury regarding the potential role of provocation. A reasonable jury was not likely to infer that the jury instructions, read as a whole and in light of counsel's arguments, required provocation to be considered only from the perspective of a person of average disposition or that evidence of provocation could be ignored in its entirety.

## V

Egurrola also brought a tentative claim for ineffective assistance of counsel in the event we declined review of the instructional issue. Because we have evaluated the merits of Egurrola's instructional claim, we assume he does not submit the ineffective assistance of counsel claim. However, even if Egurrola still wishes to pursue that claim, we are presented with an insufficient record to evaluate it on the merits. The record does not shed light on counsel's reasons, if any, for the arguments made or not made in Egurrola's defense. For that reason, if Egurrola wishes to pursue a claim of ineffective assistance of counsel, he should bring it by writ of habeas corpus in the superior court. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

McDONALD, J.

IRION, J.