

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

RICKY AARON BRADLEY,

Defendant and Appellant.

E052496

(Super.Ct.No. FVA900745)

OPINION

APPEAL from the Superior Court of San Bernardino County. Arthur Harrison, Judge. Affirmed.

Catherine White, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Kristen Kinnaird Chenelia, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Rickey Aaron Bradley appeals his conviction on one count of first degree murder with an enhancement for personal use of a firearm causing great bodily injury or death. He contends that the court erred in not instructing the jury on heat-of-passion voluntary manslaughter and on the rule that where a person has a right of self-defense, there is no duty to retreat before using reasonable force. He also contends that his trial attorney provided ineffective assistance by failing to ensure redaction of a transcript to omit defendant's admission that he had been to prison. We will affirm the judgment.

#### PROCEDURAL HISTORY

Defendant was charged with one count of murder in the death of Lamar Love. (Pen. Code, § 187, subd. (a).)<sup>1</sup> The information alleged that the offense was committed for gang purposes, within the meaning of section 186.22, subdivision (b)(1)(C). The information also alleged that a principal personally and intentionally discharged a firearm, resulting in death or great bodily injury within the meaning of section 12022.53, subdivisions (d) and (e)(1), or in the alternative, personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (c) and (e)(1) or personally used a firearm within the meaning of section 12022.53, subdivisions (b) and (e)(1). The

---

<sup>1</sup> All statutory citations refer to the Penal Code unless another code is specified.

information also alleged that defendant personally used a firearm within the meaning of sections 1203.06, subdivision (a)(1) and 12022.5, subdivision (a).<sup>2</sup>

A jury convicted defendant of first degree murder and found the allegations that defendant personally discharged a firearm true. The jury found the gang enhancement not true.<sup>3</sup>

The court sentenced defendant to a term of 25 years to life for murder, with a consecutive term of 25 years to life for the gun use allegation pursuant to section 12022.53, subdivisions (d) and (e)(1). The court imposed and stayed sentences on the remaining gun use enhancements.

Defendant filed a timely notice of appeal.

### FACTS

On January 5, 2008, Jasmine McHenry went to the home of Margaret Williams in Rialto. Jasmine's half brother, Chauncey, then age six, is Williams's son. While at Williams's home, Jasmine called her friend Kevin Jones to pick her up and take her

---

<sup>2</sup> The verdict forms all refer to "count 1." However, defendant was charged with murder in count 2 of the information, and was not charged at all in count 1: Count 1 of the information charged Kevin Jones as an accessory after the fact, in violation of section 32. (Jones was not tried with defendant and is not a party to this appeal.) The record does not explain the discrepancy between the information and the verdicts, but because defendant does not raise any issue pertaining to the discrepancy, and because the abstract of judgment reflects that defendant was convicted on count 2, as alleged, we will assume that any error is harmless.

<sup>3</sup> The case for first degree murder was submitted to the jury on the alternate theories that the murder was willful, deliberate and premeditated or that it was committed by intentionally discharging a firearm from a motor vehicle at a person outside the vehicle with the intent to kill. (§ 189 [degrees of murder].)

home. Jones arrived in a black Chrysler 300, with defendant in the passenger seat. Jones was 22 years old and defendant was 19. Jasmine and Williams's 15-year-old daughter Lamesha Love got into the car, and the four of them drove to a gas station not far from the house. Jones and defendant put some gas into the car and then went into the gas station convenience store. Lamesha wanted to go home because her mother would be "trippin' on" her, so Jones drove back to Williams's house.

Before they left the house to go to the gas station, Lamesha's older sister, Tatiana Love, came out at Williams's request and asked the two men how old they were. Williams also told her to get their license plate number. When Tatiana returned and told her that one of the men had said he was 22 and the other said he was "old enough," Williams told her to go back out and tell the girls not to go with them. Williams was upset when Tatiana told her that the car had already driven off.

When the car returned 10 or 15 minutes later, Williams came out of the house, yelling at the girls to get out of the car and yelling at Jones and defendant, asking what they were doing with the underage girls in their car. Williams's 16-year-old son Lamar heard his mother hollering and walked toward the car. He was wearing a "hoodie," and according to Jasmine had one hand in the pocket of the hoodie. It appeared to her that he might have something in his pocket. Williams testified, however, that when Lamar approached the car, he had his hands up in the air and asked what the two men were doing with his little sister in their car. Lamesha and Tatiana did not see where Lamar's hands were or exactly what he was doing just before the shooting. At some point during

the fracas, Tatiana and Williams were standing behind the car, banging on the car, and other people were standing in front of it. (In addition to Williams, Tatiana, Lamesha and Lamar, Chauncey and his 10-year-old cousin Guy were in the yard. Lamar's friend Delon or Dalon was also present and possibly Lamar's friend Lairdon.)

As Lamar approached from the passenger side, Jones drove forward. As the car rolled up to where Lamar was, the passenger window was rolled down and multiple shots were fired. Lamar was struck five times, including twice in the back or buttocks as he was running away. Lamar died two days later in the hospital.

Six spent nine-millimeter casings were found in the street in front of the house. Police went to Jones and defendant's residence and found a dismantled nine-millimeter gun. Even though the gun's barrel was missing, a firearms examiner was able to determine that two of the cartridges were definitely fired from the gun and that the other four might have been.

A gang expert testified that in his opinion, defendant was an active member of the Gilbert Street Bloods. He testified that in his opinion, the crime was triggered by an act of perceived disrespect and that it would benefit defendant as a gang member and benefit the gang as a whole.

## LEGAL ANALYSIS

1.

### THE OMISSION OF AN INSTRUCTION ON HEAT-OF-PASSION VOLUNTARY MANSLAUGHTER WAS NOT PREJUDICIAL

An intentional killing may be reduced from murder to voluntary manslaughter if there is evidence that the killing was committed without malice. Malice is presumptively absent when the defendant acts upon a sudden quarrel or heat of passion on sufficient provocation or kills in the unreasonable but good faith belief that deadly force is necessary in self-defense. (*People v. Manriquez* (2005) 37 Cal.4th 547, 583 (*Manriquez*)). Here, the trial court instructed the jury on imperfect self-defense but did not instruct on heat-of-passion voluntary manslaughter. Defendant did not request an instruction on that theory, but he argues that because there was evidence of provocation, the court had a sua sponte duty to instruct the jury on heat-of-passion voluntary manslaughter. He contends that Jasmine McHenry's testimony was sufficient to require the instruction.

In order to negate the element of malice and reduce a homicide from murder to voluntary manslaughter on a heat-of-passion theory, there must be substantial evidence that ““““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.”” [Citation.]’ [Citation.]” (*Manriquez, supra*, 37 Cal.4th at

p. 584.) Passion includes anger, rage, or any “[v]iolent, intense, or high-wrought or enthusiastic emotion” [citations],” except the desire for revenge. (*People v. Breverman* (1998) 19 Cal.4th 142, 163 (*Breverman*).)

Heat-of-passion voluntary manslaughter has both an objective element and a subjective element: The defendant’s response to the provocation must be objectively reasonable, i.e., “passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances,” because “no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.” [Citation.]’ [Citations.]” (*Manriquez, supra*, 37 Cal.4th at p. 584.) And, the defendant must “actually [and] subjectively” be acting under the influence of the passion engendered by the provocation when he or she uses deadly force. (*Id.* at p. 585.)

A trial court must instruct on a lesser included offense if there is substantial evidence which indicates that the defendant is guilty only of the lesser offense. (*Manriquez, supra*, 37 Cal.4th at p. 584.) In this context, substantial evidence is evidence from which a jury composed of reasonable persons could conclude that the lesser offense, but not the greater, was committed. (*Ibid.*) “The trial court is not required to present theories [that] the jury could not reasonably find to exist.” (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.) On appeal 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*, at p. 584.) We view the evidence in the light most favorable to the defendant in determining whether substantial evidence supports giving the instruction. (*Breverman, supra*, 19 Cal.4th at p. 163.) We do not assess the credibility of witnesses. (*Manriquez*, at p. 585.)

Defendant did not testify. In his police interview, which was played for the jury, defendant denied having been involved in the shooting. Consequently, there is no direct evidence that defendant felt rage, fear or any other emotion which would show that he “‘actually, subjectively, kill[ed] under the heat of passion.’ [Citation.]” (*Manriquez, supra*, 37 Cal.4th at p. 585.) However, circumstantial evidence may nevertheless warrant an instruction on heat-of-passion voluntary manslaughter, even if the defendant denies committing the homicide or testifies only that he or she acted in a perceived need for self-defense. (See *People v. Sinclair* (1998) 64 Cal.App.4th 1012, 1016-1017, and cases cited therein; *Breverman, supra*, 19 Cal.4th at pp. 162-163.)

In *Breverman, supra*, 19 Cal.4th 142, the defendant was attacked by a group of young men, one of whom had been injured the day before in an altercation which took place in front of the defendant’s home and at which defendant might have been present, although he denied having been involved in the altercation. (*Id.* at pp. 149-151.) As the court summarized it, the testimony of the defendant, as well as that of his mother and a friend who were both present, showed that a “sizeable group of young men, armed with

dangerous weapons<sup>4</sup> and harboring a specific hostile intent, trespassed upon domestic property occupied by [the] defendant and acted in a menacing manner. This intimidating conduct included challenges to the defendant to fight, followed by use of the weapons to batter and smash [the] defendant's vehicle parked in the driveway of his residence, within a short distance from the front door. [The] [d]efendant and the other persons in the house all indicated that the number and behavior of the intruders, which [the] defendant characterized as a 'mob,' caused immediate fear and panic." (*Id.* at p. 163.) The defendant, who testified that he thought he and his mother and his friend were going to be killed, responded by shooting out the front door, killing one of the assailants. (*Id.* at p. 151.) "Under these circumstances, a reasonable jury could infer that [the] defendant was aroused to passion, and his reason was thus obscured, by a provocation sufficient to produce such effects in a person of average disposition." (*Id.* at pp. 163-164, fn. omitted.) The court held that, based on this evidence, the trial court had a sua sponte duty to instruct the jury on heat-of-passion voluntary manslaughter. (*Id.* at p. 164.)

Defendant's situation, as described by Jasmine McHenry, similarly permits the reasonable inference that defendant felt fear amounting to a passion which obscured his reason. As Jasmine described the incident, when Williams came out of the house, yelling for Jasmine and Lamesha to get out of the car and yelling at Jones and defendant, a total of about 10 people swarmed around the car, "yelling and screaming and cussing" at the

---

<sup>4</sup> At least 12 people and perhaps as many as 15 to 20, armed with "bats and chains and stuff," as described by the defendant. (*People v. Breveman, supra*, 19 Cal.4th at pp. 151-152.)

car. Some were young children, but there were also a couple of boys in their late teens. Williams and her adult or late-teenage daughter Tatiana were standing behind the car. At some point, Jones tried to drive off, but “they” blocked the car.

Lamar approached the car with one hand in the pocket of his hoodie. It looked to Jasmine as though he might have had a gun in his pocket; he acted like he had a gun. She did not hear him say anything before the shots were fired, but she described his conduct as “very aggressive.” She said that Williams “started tripping” and that her actions or manner “pumped Lamar up” and that he came out and “started gang banging” on the men in the car. At some point during the confrontation, people were in front of the car, blocking the car from leaving. In addition, Jasmine testified that before they left for the gas station, Jones and defendant appeared scared or startled when Tatiana opened the passenger door of the car and Chauncey opened up a back door and jumped into the car.

We recognize that Jasmine’s description of the events differed from that of the other prosecution witnesses, and that Jasmine told the investigating officer that Lamar had his hands in the air as he approached the car. However, as noted above, for purposes of determining whether there is substantial evidence to support an omitted jury instruction, we view the evidence in the light most favorable to the defendant, and we do not assess the credibility of witnesses. (*Breverman, supra*, 19 Cal.4th at p. 163; *Manriquez, supra*, 37 Cal.4th at p. 585.) Viewed in that light, Jasmine’s testimony constituted substantial evidence which, if believed, would support a verdict of voluntary

manslaughter on a heat-of-passion theory. Accordingly, the court had a duty to give the instruction, even in the absence of a request by the defense.

Omission of a jury instruction on a lesser included offense requires reversal if an examination of the entire record establishes a reasonable probability that the error affected the outcome. (*Breverman, supra*, 19 Cal.4th at pp. 165-178.) Here, it is not reasonably probable that the jury would have returned a verdict of guilty of heat-of-passion voluntary manslaughter if the instruction had been given. There is no evidence which suggests that defendant's reason was obscured by any emotion except fear engendered by the circumstances. However, the jury was instructed that if defendant reasonably feared that he was in danger of imminent bodily injury or death, the homicide was justifiable, and that if defendant unreasonably acted out of that fear, the homicide was voluntary manslaughter. Thus, the precise factual scenario which defendant posits as the basis for the heat-of-passion instruction, i.e., that he shot Lamar out of fear for his safety, either reasonably or unreasonably, was rejected by the jury under the self-defense and imperfect self-defense instructions. In addressing a similar claim, the California Supreme Court observed, "Once the jury rejected defendant's claims of reasonable and imperfect self-defense, there was little if any independent evidence remaining to support his further claim that he killed in the heat of passion, and no direct testimonial evidence from defendant himself to support an inference that he *subjectively* harbored such strong passion, or acted rashly or impulsively while under its influence for reasons unrelated to his perceived need for self-defense." (*People v. Moye* (2009) 47 Cal.4th 537, 557.)

“Moreover, the jury having rejected the factual basis for the claims of reasonable and unreasonable self-defense, it is not reasonably probable the jury would have found the requisite *objective* component of a heat of passion defense (legally sufficient provocation) even had it been instructed on that theory of voluntary manslaughter.” (*Ibid.*) For the same reason, the omission of a heat-of-passion instruction was not prejudicial in this case.

2.

THE COURT’S RESPONSE TO A JURY QUESTION ON THE DEFINITION OF  
“PROVOCATION” WAS SUFFICIENT UNDER THE CIRCUMSTANCES.

Under the same heading as his argument concerning the omission of the heat-of-passion instruction, defendant also contends, as a separate basis for reversal, that the trial court’s response to a jury question asking for a definition of “provocation” was insufficient. He contends that rather than responding merely with a dictionary definition of the word, the court should have been prompted by the jury’s question to instruct on heat-of-passion voluntary manslaughter and to explain the concept of provocation in that context. This contention is rendered moot by our conclusion that although the evidence warranted a heat-of-passion instruction, the omission of the instruction was not prejudicial.

3.

IT WAS NOT ERROR TO OMIT AN INSTRUCTION THAT DEFENDANT HAD NO  
DUTY TO RETREAT IN ORDER TO HAVE A RIGHT TO SELF-DEFENSE

An optional portion of the standard jury instruction on self-defense provides: “A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of (death/great bodily injury/ <insert forcible and atrocious crime>) has passed. This is so even if safety could have been achieved by retreating.” (CALCRIM No. 505.) Here, the trial court stated that giving this portion of the instruction would be appropriate but then failed to do so. Defendant contends that this omission was reversible error.

We see no error in the omission of this portion of the self-defense instruction. A court must instruct on all material issues presented by the evidence which pertain to a defense on which the defendant is relying. (*Breverman, supra*, 19 Cal.4th at p. 157.) Here, although there was testimony concerning whether anyone was blocking the car, neither the questions or the responses nor the arguments of counsel raised any suggestion that defendant had a duty to retreat. Moreover, it was clear that defendant, as the passenger in the car, had no realistic ability to retreat. Because the question of retreat was not raised and because defendant could not have retreated even if he had wished to do so, the instruction that he had no duty to do so was not called for. (See *People v. Pruett* (1997) 57 Cal.App.4th 77, 89 [where evidence did not suggest that defendant

considered retreating or that he could have done so, evidence did not require instruction on right not to retreat].)

4.

COUNSEL'S FAILURE TO ENSURE COMPLETE REDACTION OF A  
TRANSCRIPT WAS NOT PREJUDICIAL

The prosecutor offered a video of defendant's police interrogation into evidence. The video was redacted to remove a number of questions and answers, including defendant's statements concerning having a criminal history, doing time in prison and being on parole. The transcript of the video was redacted as well, and a copy of the redacted transcript was provided to defense counsel.

After the video was played, the parties realized that although the video had been redacted completely, the transcript contained the following statement by defendant: "And I got out of prison. I went right back to jail in four days. So it kind of like – it kind of fucked me up, like, I was, like, really fucked up in the head. I couldn't believe I was back in jail in four days." The prosecutor acknowledged that although the jurors had not heard that statement, they might have seen it in the transcript, which was given to them to follow along as the video was played. Defense counsel acknowledged that although he had perused the transcript, that statement had gotten by him. He did not contend that the error in redaction was intentional and asked the court to have those lines blacked out and to admonish the jurors not to rely on the transcript but on the video alone. The court agreed, and told the jurors "[i]f there are discrepancies between the written transcript and

the video, you are to consider only what was said on the video as evidence and disregard any inconsistent portions of the transcript.” The court did not provide the transcript to the jury during deliberations.

Defendant now contends that his trial attorney’s failure to notice the unredacted lines, as well as his failure to seek a mistrial for prosecutorial error in causing inadmissible evidence to be presented to the jury, prejudicially deprived him of his constitutional right to the effective assistance of counsel. He also contends that the error required the court to appoint another attorney to bring a motion for new trial on his behalf.

A defendant in a criminal trial is deprived of his or her constitutional right to the effective assistance of counsel if trial counsel’s acts or omission caused his or her representation to fall below an objectively reasonable standard of professional conduct. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) Failure to provide constitutionally adequate representation is prejudicial and requires reversal if there is a reasonable probability that the outcome would have been more favorable to the defendant in the absence of the error or omission. Defendant bears the burden as to both prongs. (*Id.* at pp. 693-694.)

A claim of ineffective assistance of counsel can be disposed of without inquiry into counsel’s possible tactical reasons for his or her actions if the reviewing court can determine that even if there was attorney error it was not prejudicial. (*People v. Kipp* (1998) 18 Cal.4th 349, 366-367; *Strickland v. Washington, supra*, 466 U.S. at p. 697.)

Here, even if we assume that counsel's failure to ensure complete redaction of the transcript and/or his failure to assert prosecutorial error caused his representation to fall below reasonable professional standards, defendant has not met his burden to demonstrate that a more favorable outcome was reasonably probable if the transcript had been completely redacted. First, there is no evidence that any jurors actually read the offending passage. They were given the transcript as an aid to assist them in following the video, but the record does not tell us whether any of them actually read it. And, they were allowed to see it only while the video was being played. Even the fully redacted transcript was not provided to the jury during deliberations. Second, this jury clearly assessed even damaging evidence carefully, as can be seen from its rejection of the gang enhancement: Despite expert testimony that defendant was a member of a criminal street gang and that he committed this crime for the benefit of the gang, based on the usual gang expert position that any crime a gang member commits is somehow beneficial either to the gang or to the defendant's status within the gang, the jury found the gang enhancement allegation not true. Third, there was little truly credible evidence that defendant acted either in true self-defense or in the actual but unreasonable belief that Lamar was about to assault him, or that the circumstances were such that a reasonable person would have been provoked into shooting Lamar. Even though Jasmine testified that Lamar's hand was in his pocket when he approached the car, she told the investigating officer immediately after the shooting that Lamar had his hands in the air when defendant shot him. None of the other witnesses saw Lamar with his hands in his

pockets. Moreover, even under Jasmine’s scenario, defendant shot before Lamar made any threatening gesture. This was not a close case in which it is reasonably probable that a juror who might otherwise have voted for acquittal or for a lesser offense was swayed by defendant’s admission that he had been to prison and instead voted to convict him of first degree murder.

For the same reasons, even if the trial court had a duty to appoint another attorney to prepare a motion for new trial on grounds of ineffective assistance of counsel, its failure to do so was not prejudicial.<sup>5</sup>

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MCKINSTER  
J.

We concur:

RAMIREZ  
P. J.

KING  
J.

---

<sup>5</sup> Defendant has not cited any authority which holds that a trial court has a duty to appoint another attorney to prepare a new trial motion on grounds of ineffective assistance of counsel in the absence of a request from the defendant, and we are not aware of any such authority.