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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID STUART,

Defendant and Appellant.

E052891

(Super.Ct.No. FSB054642)

OPINION

APPEAL from the Superior Court of San Bernardino County. Ronald M. Christianson, Judge. Affirmed.

Law Offices of William J. Kopeny and William J. Kopeny, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Christine Levingston Bergman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant David Stuart and his wife, Patricia Stuart, were home alone on the night of February 17, 2006, eating dinner. In the midst of this quiet night at home, defendant unexplainably shot Patricia point blank in the head with a .44-caliber Magnum revolver, and she died instantly. Stuart immediately called the police and claimed that Patricia committed suicide.

Defendant was convicted of second degree murder and personal use of a handgun causing great bodily injury or death.

Defendant now contends on appeal as follows:

1. Insufficient evidence was presented to support that he committed second degree murder.
2. Improper opinion evidence on domestic violence was presented at trial.
3. The trial court had a sua sponte duty to instruct the jury on voluntary manslaughter.

I

PROCEDURAL BACKGROUND

Defendant was found guilty by a jury of second degree murder within the meaning of Penal Code section 187, subdivision (a).¹ In addition, the jury found the special allegation that he personally and intentionally discharged a firearm causing great bodily

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

injury or death within the meaning of section 12022.53, subdivision (d) true. Defendant was sentenced to 40 years to life in state prison.

II

FACTUAL BACKGROUND

A. *People's Case-in-Chief*

1. *The shooting*

On February 17, 2006, Jennifer Sherman lived across the street from the Stuarts in Forest Falls. Jennifer's husband, Lloyd Sherman, was a member of the San Bernardino County Fire Department.

Early that evening, between 6:00 and 7:30 p.m., the Stuarts helped Lloyd split and move some logs. Patricia seemed to be in a good mood and was willing to help. Both defendant and Patricia had been drinking that night; Lloyd and Jennifer described the Stuarts as "drinkers." However, they did not appear to Jennifer to be intoxicated. Lloyd noted that defendant's speech was a little slurred.

Later that evening, Lloyd had gone on a fire call and had just returned to his home. He was outside watching the snow fall. He heard a "tremendous blast" and saw a bright flash coming from the direction of the Stuarts' house. Lloyd went inside the house and changed. He was planning to go in their Jacuzzi.

Around 8:40 or 8:50 p.m., after Lloyd went outside to the Jacuzzi, his pager went off. Jennifer looked at it. It stated there was a "GSW" at the Stuarts' home. Lloyd

estimated that the pager went off about four minutes after he heard the loud blast. He went back in the house to get dressed. At this point, defendant came to their house.

Defendant kept yelling “no.” He told Jennifer that Patricia had shot herself. He was not crying. Jennifer went over to the Stuarts’ home. She went to the doorway of their bedroom. She did not recall if there was a light on in the room, but it was light enough for her to see Patricia. She saw a gun next to Patricia and blood on a wall. Jennifer immediately realized that she could not help Patricia and left the room. She never went in the room or touched Patricia. Lloyd did not go into the house.

Two other San Bernardino County Fire Department personnel responded. They both entered the master bedroom and saw Patricia dead on the bed. Neither of them disturbed the scene and had no blood on them when they left the room. Defendant was distraught and crying. He repeatedly stated, “I don’t know what I’m going to do, I’ve lost the love of my life. I don’t know how I’ll go on from now.” Defendant told one of the responding fire officials that he and Patricia were having dinner when Patricia walked into the bedroom. Defendant heard a gunshot and went in the bedroom, where he saw her lying on the bed.

Shannon Kovich was the sole San Bernardino County Sheriff’s Deputy assigned to patrol the Forest Falls area. At 8:50 p.m., Deputy Kovich was called to the Stuarts’ home on a report of suicide. He entered the master bedroom, where Patricia lay on the bed face up in a pool of blood. There was a gun near her right hand. Deputy Kovich could not recall if the lights were on or off in the bedroom. He did not touch Patricia; it was

obvious that she was dead. There was blood throughout the room, and he did not walk in the area with blood and had no blood on him.

Deputy Kovich spoke with defendant. Defendant told him that he and Patricia were eating dinner. He asked her if there was any more barbecue sauce. She went to the refrigerator and reported there was none. She then walked into the bedroom. Defendant heard a loud noise or gunshot. Defendant yelled to Patricia, but she did not respond. Defendant went into bedroom. He insisted that he did not see the gun. He pulled on Patricia's feet to get her attention and at that point he saw the blood. He left the room and called 911. He did not mention that he touched her body or moved her other than pulling on her feet.

Defendant reported to Deputy Kovich that Patricia had not been depressed and was in a good mood prior to this happening. They had planned to go on a trip the following day.

Dr. James Evans lived about seven houses away from the Stuarts. Dr. Evans was advised that Patricia had been shot and went in the master bedroom to see if he could provide any assistance. He checked her pulse at her left wrist and put his hand on her chest to feel for a heartbeat. He did not move anything or move Patricia. He made every effort not to step on any blood. His hand was not dripping with blood when he left the room. He could have had a little blood on his hands, but he was not sure. Dr. Evans did not move any items in the room. As a rule, any time that Dr. Evans found someone deceased, he considered it might be a crime scene.

2. *Investigation*

San Bernardino Sheriff's Department Sergeant Steven Harbottle was assigned to investigate the case. Sergeant Harbottle first spoke with defendant at the residence. At that point, it was suspected that Patricia might not have committed suicide. Defendant told Sergeant Harbottle that he and Patricia were eating dinner. Defendant asked for barbecue sauce, but Patricia informed him there was no more in the refrigerator after she got up and checked. Patricia walked into the bedroom, and then defendant heard a gunshot. He walked toward the bedroom and smelled gunpowder. He said that he touched Patricia and asked what she was doing. He said his "heart just dropped." He did not give any detail as to how he touched her.

Defendant said that he saw blood and that he had blood on his hand. He left the room, washed his hands, and then called 911. He claimed this only took him 5 seconds. He had no explanation for why Patricia committed suicide. He had blood on his pants and explained that he must have wiped his hands on his pants.

Defendant was interviewed again by Sergeant Harbottle after he was arrested and taken back to the sheriff's station. Defendant verified that Patricia was not suffering from mental illness or any type of chronic pain. During the interview, while discussing the events that night, defendant said, "[F]or some girl to do that to herself" Sergeant Harbottle thought it was a strange way to reference his wife.

Defendant essentially stated the same story but added that Patricia went from the kitchen to the bathroom and then to the bedroom. From the time that they sat down for dinner and the time he called 911, defendant estimated it was about 15 minutes.

Defendant claimed he touched Patricia on the bicep of her left arm and shook her a little when he entered the room, but she did not respond. He also grabbed her feet and may have moved her a few inches down the bed.² He saw blood. He claimed he then “lost it.” He washed his hands (which he described as just rinsing them under water) and called 911. He did not turn on the light or check her pulse.

Defendant’s clothes were examined. Both pant legs had blood spatter on them. He also had blood on his sleeves. Defendant said at one point he may have pushed up his sleeves with his bloody hands.

The .44-caliber Magnum revolver belonged to defendant. He kept it in the headboard area of the bed because he claimed that he and Patricia had received a threat from a neighbor. Defendant made another comment during the interview that he did not “kill that lady.”

Sergeant Harbottle confronted defendant about washing his hands when the love of his life had just died. Defendant said that it did sound kind of funny and laughed a little.

² Based on photographs of Patricia, she did not have much blood on her left bicep area, nor was there a lot of blood on her pants.

Sergeant Harbottle said that defendant was crying in both interviews. Sergeant Harbottle “lied” at one point in the interview, telling defendant that gunshot residue was found on his hands even though the results of tests were not complete. Defendant maintained his innocence. However, after Sergeant Harbottle told defendant about the gunshot residue, the sergeant left the room. Through a camera, he observed defendant smell his hands.

3. *Scientific evidence*

Heather Harlacker was a crime scene specialist employed with the San Bernardino County Sheriff’s Department. She had over eight years of experience at the time of the shooting. Harlacker took pictures of the crime scene.

Harlacker noted that there were two dinner plates on the dinner table. There was also a flashlight with blood on the handle on the table. A bloodstain was found on the back of a couch. There was also a bloodstain on the carpet in the living room. In the bathroom, in the trashcan, there was toilet paper with blood on it. There was a blood stain on the side of the bedroom door facing out to the living room. There was a bloodstain on blankets next to Patricia’s body. There was human tissue on a blanket on the floor of the bedroom. There were bloodstains on the dresser. There were also bloodstains and hair on the ceiling almost directly above Patricia.

A .22-caliber Ruger pistol was found underneath a pillow on the east side of the bed. There were also two bloodstains on the wall that were identified as bloodstains M and N.

Close-up photographs of Patricia's left hand were taken. There was blood on that hand. There was also a black substance on the palm of her hand. There was an injury to the tip of her finger on the same hand. There was also what appeared to be a small bloodstain on her right hand. There was some substance on Patricia's right knee. There was blood and hair on Patricia's slippers. Her slippers were on the wrong feet. On the floor south of Patricia, two skull fragments were found. A bullet fragment was found on the floor near the door leading out of the bedroom. Another bullet fragment was found on the bed under some blankets after Patricia's body was removed.

Harlacker diagramed all of the stains found on defendant's shirt, and they all tested positive for blood. Defendant had both human tissue and blood on his jeans. There was a bloodstain on the back pocket of his jeans.

William Matty was a firearms examiner with the San Bernardino County Sheriff's Department at the time of Patricia's shooting. He had testified numerous times as a firearms expert. He examined the particles left by the gunshot on Patricia, which he described as stippling. He was given the .44 Magnum and used it for his tests. He fired the gun several times and kept track of the gunpowder pattern. The stippling on Patricia was three and one-half inches by two inches. This would mean that when she was shot, the gun was between three to four inches from her head.

The black mark on Patricia's palm could be explained by her having her hand over the barrel of the gun when the shot was fired. The injury to her finger could have been caused by having contact with the gun with it wrapped around the other side. Blood was

found on various areas of the gun. The blood on her left hand, the blood in the barrel of the gun, and the blood on the gun itself came from the entrance wound. A great deal of blood would have come out of the entrance wound. The location of Patricia's hands on the gun was consistent both with shooting the gun herself and trying to hold back the gun in a defensive posture.

Robert Ristow was a criminalist employed by San Bernardino County crime laboratory. He explained that gunshot residue was anything that came out of a firearm when it was discharged. When gunshot residue is found on a person, that person had either fired a firearm, had been in close proximity to a discharging firearm, had handled a firearm, or had touched a surface containing gunshot residue. Samples were taken from the web portion of both hands on Patricia and defendant.

Four particles were found on defendant's hands, two on the left hand and two on the right. Washing hands could remove some, but not necessarily all, gunshot residue. Patricia had at least 16 particles on each of her hands. It was possible that one of Patricia's hands was on the gun and the other somewhat away from the gun and still show residue.

Dr. Frank Sheridan was a forensic pathologist employed by the San Bernardino County coroner's office. Another doctor performed the autopsy on Patricia but had since left the office. Patricia died from a single gunshot wound to the head. The entry wound was on the top of her forehead and had a star shape. The exit wound was on the back of her head below the entry wound. Some skin came off the back of her head. Her brain

was essentially destroyed. Due to the massive brain damage, she would have died instantly. She could not have moved after the gunshot; she would not have been able to sit up or sit down. She would have collapsed and remained in the position in which she fell. The gunshot would not have propelled the body in any direction.

The blood, after the initial spatter, would flow with gravity. Patricia had a .12 blood alcohol level at the time of her death. There was no evidence that she had been beaten or abused prior to the shooting.

The autopsy could not be definitive on whether this was suicide or a homicide. Dr. Sheridan surmised that the black marks on Patricia's palm showed she was in contact with the gun when it was fired. He thought the soot could indicate either defensive wounds or a suicide. He believed, however, that there were some inconsistencies with this being a suicide. First, the most common area for an entry wound was either the temple or mouth in a suicide. Further, suicide wounds were usually contact wounds; in this case, the weapon had been fired a few inches away from the head. Moreover, the angle was unusual for suicide.

Kimberley (Branson) Shapiro³ had been employed by San Bernardino County to do crime scene investigation for eight years. She had investigated over 250 crime scenes. Shapiro showed examples of different blood patterns, including flow of blood, swipe patterns, and spatter, to the jury. Spatter from a gunshot wound could come from the

³ This witness had appeared as Branson on the reports but subsequently had gotten married. We refer to her by her married name.

entry or exit wound. The blood coming from the entry wound was back spatter; the blood from the exit wound was forward spatter.

Shapiro marked all of the bloodstains in the Stuarts' master bedroom with letters. Bloodstains M and N were on the east wall of the bedroom. Bloodstain M was on the wall and trailed down to a pool of blood on the floor. There was a source of blood or injury, i.e. Patricia's head, at that location that was enough to drip down and pool on the floor. She estimated the source of the injury would have had to been there for a few seconds based on the amount of blood. The mark above the pool of blood at M also was indicative of something coming in contact with the wall and then moving down. N was a swipe pattern that was indicative of an injury swiping against the wall. There were hair follicles between stain M and N consistent with Patricia's hair.

Another stain was designated O and was near the east side of the bed. There was more pooling of blood that appeared to be from the injury being present for a short amount of time. There were skull fragments and brain matter in this area too.

Patricia's slippers were on the wrong feet. There was a clump of hair hanging from them, and there was a bloodstain on the sole of one slipper.

On the ceiling, there was a high to medium energy bloodstain. It was directly above where Patricia laid on the bed. It was also in the area of stain M. It was consistent with coming from the shooting itself. There was a wiping pattern on the ceiling that occurred after the stain was initially made.

Shapiro could not make any conclusions regarding the bloodstains on Patricia's hands. Since there was blood on Patricia's left hand and blood on the gun, it was evidence that it was back spatter. If Patricia used her right hand to pull the trigger, it would be expected that there would have been blood on the thumb, webbing area, and wrist area. No such blood was found.

Shapiro examined other bloodstains in the house. The stain on the couch was a contact stain. There were no droplets of blood on the carpet outside the bedroom consistent with dripping blood. There were some bloodstains on the door leading from the bedroom. There was a bloodstain on Patricia's pants.

Based on the bloodstains on Patricia's face, it appeared she was somewhat upright when she was shot. There was dried blood in her ear that was opposite of how the blood trail would have gone with gravity when she was on the bed. It would not be explained by her being up on the pillows and then dragged down on the bed as defendant claimed he moved her. A swipe pattern on a pillow was consistent with her being dragged down on the bed.

There was not enough blood on Patricia's legs to cause the dripping blood to make stain O at the end of the bed. Shapiro estimated that Patricia was on the bed just west of the spatter when she was shot. Somehow, Patricia's face was somewhat down. M and N were caused by the head coming in contact with the wall when defendant was moving her. At one point, Patricia's head was below her hands. The blood on the bed also was consistent with someone moving her around. The ceiling mark was impact spatter and

was likely caused by forward spatter from the exit wound. Forward spatter did not always go in the direction of the trajectory of the bullet. It could go perpendicular to the head wound. Shapiro concluded that the bloodstains were difficult to reconcile with natural causes and were consistent with someone tampering with the scene.

Shapiro explained her testimony differed from the defense experts who would testify because she was at the scene. She had no logical explanation on how a bullet fragment was found under the bedding.

Daniel Gregonis was criminalist with the Los Angeles County Sheriff's Department specializing in blood analysis and blood spatter. He examined the blood on defendant's clothing. It was hard to identify the type of spatter on defendant's jeans because of the absorbency of his clothes. The stains on the jeans were not consistent with a swipe of the hand but could have been made if he just touched his fingertips on the jeans. There was blood on the sleeves of defendant's shirt. Some were consistent with impact spatter or contact. There was a smear type stain on his T-shirt. Gregonis indicated back spatter does not travel far and would not necessarily appear on the defendant.

B. *Defense*

One of Patricia's coworkers and her supervisor testified regarding her unhappiness at work. In the six months preceding her death, Patricia was having trouble with her supervisors. Patricia had had a closed-door meeting with the supervisor who testified, and she emerged from the meeting crying. Patricia would ignore her supervisors at staff

meetings and be disrespectful. She left early from work the day she died, but she did not seem upset.

Gerald Reid and his wife, Denise, had known defendant and Patricia since 2000. Gerald described Patricia as a “tomboy.” Denise and Patricia spent time alone together hiking and talking. Both Gerald and Denise felt that Patricia was happy in her personal life but did not like her job. Patricia was drinking more prior to her death.

Gerald indicated that defendant was having a feud with a neighbor. Gerald felt that it was not an overreaction for defendant to arm himself with a gun due to the feud.

Gerald went to the Stuarts’ home on the night Patricia was shot. When he arrived, defendant was outside on the patio with firemen and policemen. He was crying.

Josh Loy lived next door to the Stuarts at the time of the shooting. He had gone to the Stuarts’ home on the day Patricia had been shot. He was at the house when Patricia and defendant were sitting down to eat dinner. Josh said that he saw Patricia drinking and dancing around with the dog in the room. She was happy and appeared inebriated. Josh went back to his house. He never heard a gunshot. He then saw commotion and defendant distraught on his porch. He estimated it was five minutes from the time he left the Stuarts’ home until he saw the commotion outside, but he was only estimating the time.⁴

⁴ The parties stipulated that he told deputies that night that he heard the fire engines 10 to 15 minutes after he left the Stuarts’ home.

Dr. Terri Haddix was a pathologist employed by a private independent crime laboratory and had 16 years of experience. She had testified for the prosecution several times in prior cases. She was hired by the defense to investigate Patricia's death.

Dr. Haddix reviewed the autopsy. She agreed with Matty's conclusion that Patricia's left hand was cupped over the gun when it was shot. She indicated that gunshot residue could be on the hands of the victim in both suicide and homicide. She believed that Patricia's left hand was closer to the back of the gun when it was fired. If Patricia was pushing it away, her hand would have been closer to the muzzle of the gun.

Dr. Haddix had reviewed a study published in Italy that concluded it was more common for it to be a case of suicide rather than homicide when the entrance of the gunshot wound was on the forehead.⁵ She indicated that this gunshot was in an unusual location whether it was a suicide or homicide.

Dr. Haddix "favored" the theory that Patricia's death was a result of suicide based on the location of the entrance wound and the soot on Patricia's hand. Dr. Haddix only looked at the autopsy report and not the crime scene. She admitted the crime scene played a large role in the final determination.

Dr. Wong was also hired by the defense and worked with Dr. Haddix. He was a criminalist and had worked for a sheriff's crime laboratory for 17 years. He had

⁵ She admitted in another study only three suicides involved the higher part of the forehead.

bloodstain analysis experience and training.⁶ In the past, he had been hired by both the defense and the prosecution.

Dr. Wong had looked at the autopsy reports, police reports, and photographs. He had read the reports by Shapiro and Matty.⁷ Dr. Wong agreed with Matty that Patricia's hand was on the firearm when it was fired.

Dr. Wong believed that this was a suicide and not a homicide. He based this in part on there being no sign in the bedroom of a struggle between Patricia and defendant.⁸ There were no signs of a struggle throughout the house. A bloodstain on a pillow above Patricia's head was consistent with defendant moving Patricia down from the pillow.

Dr. Wong agreed that the blood spatter on the ceiling was high energy blood spatter. It came from the exit wound. Dr. Wong indicated that the gunshot "liquefied" her brain. It created a massive hole in the back of her head and sent skull fragments around the room.

Dr. Wong surmised that the hair on her slippers came from walking around the home prior to her death. Other loose hair probably came from the wound. The only explanation he could offer on how the blood got on the sole of her slipper was that it

⁶ On cross-examination, he admitted he only had been involved in eight cases involving blood spatter evidence.

⁷ He admitted that on-scene investigation of blood spatter was better, but he had not had that opportunity.

⁸ He agreed that the gun could have been shot in a millisecond by defendant with little or no struggle.

could have been a “contact-transfer stain[.]” He did not know the mechanism by which it got on her slipper.

Dr. Wong believed that the back of her head was toward the ceiling where the blood splatter was found when she was shot. He had reviewed Shapiro’s report. He was not sure what caused the bloodstains M and N. It did appear to be some swipe of blood. He believed that bloodstains M, N, O, and P were consistent with the southeasterly direction that the bullet and jacketing took out of the exit wound causing blood and tissue to go out. However, he did not know how Patricia’s head came in contact with M and N, which were 18 inches from the bed. If defendant moved even just Patricia’s head, he suspected there would have been a lot of blood on his clothes, and it would have taken a lot of strength to move her.

The only evidence that Patricia was moved was the drag mark from the pillow on the bed. Dr. Wong believed the swipe mark on the ceiling was caused by a skull fragment. He believed that it basically “rained” blood and tissue in the room.

Dr. Wong surmised that Patricia pulled the trigger with the thumb of her right hand. There was no blood on her hand possibly due to the position of her hand when she fired or the bedding. Her head was likely tipped forward. The gunshot residue on her hands was consistent with shooting the gun or being in close proximity to a discharged gun. Dr. Wong believed that if defendant was the shooter he would have back spatter on him.

Dr. Wong agreed that his diagram of the angle of the entry wound was not consistent with the blood spatter in the room. He did not know her exact body position, but her head would have been tilted down due to the blast on the ceiling. In this position, she would have had a significant amount of blood on her forearms from back spatter, and he admitted that there was not.

Dr. Wong agreed with Shapiro that the pool of blood on M could only have come from a blood source and that the only source was the wound on Patricia's head. He had no explanation for how the stain got on the wall. He said that it was not always possible to have an explanation for everything. He explained the pooling of blood at O was "cast-off" blood from the wound. He stated it was possible that the gun pushed her head back, causing blood to fly. He surmised a full cup of blood flew from her head from the exit wound occurring at the top of the bed to the foot of the bed and pooled in O and P. He then guessed that "one swoop" of her head could have caused M, N, O, and P. He admitted there was not an arc of blood leading to O and P as he would expect. There were no studies of the movement of a head with a bullet; his statements were based on common sense.

Dr. Wong did not examine defendant's clothing and could not explain how all of the bloodstains got on his clothing. He believed that there was no movement of Patricia's body due to the lack of blood trails from each spot of pooling blood.

Defendant testified on his own behalf. He and Patricia had been together for 12 years. He believed that Patricia was physically stronger than he. Patricia was having

drinking problems. She had thrown up in a restaurant while they were out with friends a month prior to her death. The .22-caliber gun was always in the bedroom because they had problems with raccoons getting in the house. Defendant had made a complaint to sheriff's deputies about the neighbor threatening him. He put the .44 Magnum in the bedroom due to the threats.

For the first time at trial, defendant claimed that Patricia left work early that day. She was crying and upset. She said something to him about her boss lying. Defendant did not know why he failed to disclose this to Sergeant Harbottle. There were no other reasons she would be sad.

Defendant reiterated that Patricia went to the refrigerator to look for barbecue sauce and then went to the master bedroom. He heard the gunshot "quick[ly]" after she went into the bedroom. He smelled the gunpowder when he went to the bedroom. Defendant did not recall seeing the flash described by Lloyd. The lights were off in the bedroom, and Patricia was lying on the bed.

Defendant grabbed at her feet and moved them. There was no response. He yelled her name, but she did not respond. He then leaned over from the foot of the bed and touched her chest to see if she was breathing. He did not recall touching Patricia's bicep, and he did not recall telling Sergeant Harbottle that he touched her bicep. He realized he had a lot of blood on his hands and washed them. He then called 911. At that point, he did not know how he knew that she had been shot in the head, but he guessed

that she had because she had died instantly. He did not see the gun. Defendant probably wiped his hands on his pants. He also pushed up his sleeves.

Defendant did not normally call Patricia “lady” or “girl”; he did not know why he called her that during the interview. He never used the flashlight that was on the dinner table and did not know why there was blood on it.

The jury was played the 911 tape. On the tape, defendant first said, “Oh shit,” and then “Oh Christ, oh my God.” He was crying and sobbing loudly. He then said that his wife had shot herself. The dispatcher asked if his wife was breathing, and defendant responded no. He said that she shot herself with a big gun. He kept crying and repeating that his wife was gone. The dispatcher tried to get defendant to calm down. He said he could not calm down because he had just lost his wife. Defendant said, “I don’t know if I can make it. I can’t believe this. Holy Christ. What in the hell possessed her? Oh my God.” The dispatcher asked where Patricia had been shot and he said she had been shot in the head. He then hung up.

III

SUFFICIENT EVIDENCE OF SECOND DEGREE MURDER

Defendant claims that the evidence was insufficient to support his conviction of second degree murder and the attendant weapon-use allegation. He claims the scientific evidence, his testimony, and the other anecdotal evidence points to a determination that Patricia committed suicide and that he did not shoot her. His conviction is predicated on conjecture and guesswork and must be reversed.

“In reviewing a claim [regarding the] sufficiency of the evidence, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime or special circumstance beyond a reasonable doubt. We review the entire record in the light most favorable to the judgment below to determine whether it discloses sufficient evidence — that is, evidence that is reasonable, credible, and of solid value — supporting the decision, and not whether the evidence proves guilt beyond a reasonable doubt. [Citation.] We neither reweigh the evidence nor reevaluate the credibility of witnesses. [Citation.] We presume in support of the judgment the existence of every fact the jury reasonably could deduce from the evidence. [Citation.] If the circumstances reasonably justify the findings made by the trier of fact, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.]” (*People v. Jennings* (2010) 50 Cal.4th 616, 638–639.)

“Because ‘we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence . . .’ [citation], the effect is that on appeal ‘a defendant challenging the sufficiency of the evidence to support her conviction “bears a heavy burden,” [citation] . . .’ [citation] of showing insufficiency of the evidence and must do so in accordance with well-established standards [citation].” (*People v. Powell* (2011) 194 Cal.App.4th 1268, 1287.)

Defendant was convicted of second degree murder. Second degree murder requires the “unlawful killing of a human being . . . with malice aforethought.” (§ 187, subd. (a).)

Here, there was reasonable and credible evidence that established Patricia’s death was as a result of homicide. Initially, defendant called 911 and reported that Patricia had shot herself in the head with a big gun and that she was not breathing. When Deputy Kovich arrived, defendant told her that he entered the room but did not see a gun. He said he pulled on her feet to see if she would respond. At trial, he stated he smelled gunpowder, so he just assumed it was a gun. This did not explain how he knew it was a “big” gun. Clearly, his statements at the scene and at trial contradicted the 911 call. These contradictions continued throughout his statements.

In his statement at the police station, defendant said that he only touched Patricia on her bicep and feet. Evidence was presented at trial that there was not much blood on her bicep or her pants. When defendant testified at trial, he stated that he reached across her and touched her chest. Moreover, in statements to Sergeant Harbottle prior to the trial, defendant denied that Patricia had any reason to commit suicide. At the time of trial, defendant presented evidence that Patricia was having trouble at work and had left work early that day because she was upset. The jury could question defendant’s credibility and his claims that Patricia committed suicide based on the inconsistencies between his trial testimony and his statements.

Additionally, defendant was confronted about gunshot residue on his hand during the interview. Defendant denied that he had shot Patricia. When Sergeant Harbottle left the interview room, defendant smelled his hands. The jury could reasonably interpret this evidence as his consciousness of guilt of the shooting. Moreover, the evidence of gunshot residue on defendant's hand, combined with the fact he washed his hands before calling 911, was especially damning evidence that defendant was somehow in contact with the gun at the time it was fired.

The blood spatter evidence was somewhat contradictory. However, the strongest evidence was the fact that there was pooling blood at both bloodstain M and bloodstain O that was not contradicted by defense experts. Dr. Wong had no explanation but that the blood source, i.e. Patricia's head, had to have been at the spot. The People's expert explained that Patricia's head would have to been at the spot for several seconds. Further, bloodstain O was explained by the fact she was also moved to that location. Based on the severe injury to her brain, it was inconceivable Patricia could have moved herself to these locations. The People's evidence established a reasonable explanation that Patricia was at the location and defendant moved her. The People admitted that they could not establish how defendant moved Patricia or explain the smear on some of the stains, including the ceiling stains. However, it was clear that she had been moved. The fact that Patricia had been moved is indicative of tampering and staging on the crime in the room.

Dr. Wong could also not explain how a stain got onto the bottom of Patricia's slipper. Again, the People's evidence supported that defendant had moved Patricia onto the bed and then placed the slippers, albeit on the wrong feet, on her feet.

One other piece of evidence not particularly relied upon by the People but which certainly contradicts defendant's suicide theory was the toilet paper with blood on it in the bathroom. The obvious inference is that defendant placed the bloody tissue in the trashcan after murdering his wife; no contrary explanation was suggested.

Additionally, the blood evidence on Patricia and defendant was not indicative that she killed herself. On defendant's clothes, it could not be adequately explained by coming in contact with Patricia or wiping his hands on his pants. The blood on his pants was described as a spraying type blood stain, and there were no smear marks. The blood on his sleeves was consistent with his pushing up the sleeves when he had blood on his hands, impact spatter, or a contact stain. Additionally, Patricia did not have a significant amount of blood on her right hand, which was inconsistent with her pulling the trigger with her right hand. Defendant did not dispute that she pulled the trigger with her right hand. As such, the evidence on both defendant and Patricia supported this was a homicide.

Finally, the location of the gun shot wound was not commonly found in suicides. The entry wound was behind the hairline on the top of her head. Most suicides happen by either being shot in the temple or mouth. Certainly, this evidence alone could not

establish this was a homicide. However, when combined with the remainder of the evidence, it certainly supports the jury's verdict.

Based on the foregoing, after viewing the evidence in the light most favorable to the prosecution, we conclude a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. As such, the evidence supports defendant's convictions.

IV

DOMESTIC VIOLENCE EVIDENCE

Defendant claims that the trial court erred by allowing the "highly prejudicial" opinion testimony by Sergeant Harbottle regarding prior acts of domestic violence committed by defendant.

A. *Additional Factual Background*

During pretrial hearings, the parties discussed some photographs that were found during a search of the Stuarts' house that apparently depicted injuries received by Patricia prior to her death. The trial court ruled, "The court is going to exclude those photographs under [Evidence Code section] 352. There is apparently no other evidence of issues or reports of domestic violence. There is no way to establish when the photographs were taken. And the only evidence, according to the preliminary hearing transcript and the moving papers, as to what the photographs depicted was that it was a work-related injury, rather than injuries from domestic violence. It seems that they would not be probative,

would cause the jury to speculate, and under 352 I'm going to go ahead and exclude reference or use those photographs.”

During Sergeant Harbottle's testimony regarding his interview with defendant, he noted that defendant made a strange statement. While discussing the events that night, defendant spontaneously made the statement, “[F]or some girl to do that to herself” Sergeant Harbottle thought it was a strange way to reference his wife.

Sergeant Harbottle said that defendant's terminology caught his attention. When asked why by the People, he stated, “It's been my experience and I've seen in some of my training oftentimes in statement analysis, which is where you take a suspect's words and you start to parse it down and look at the phras[e]ology, the words they use, when somebody says something to the effect of that person or that woman, especially as it relates to domestic violence situations, it's almost an attempt to dehumanize the person. In other words, they are no longer my wife or my girlfriend or the person by name, which is a very intimate thing. But they're now that person. And that was one point that was brought up to me in a training on statement analysis that I had taken.”

Defendant's counsel objected, “Make a motion to object, motion to strike. Beyond his expertise, lack of foundation.” The trial court responded, “Well, the court will let it in only for the reason that he put it in quotes, but not for the analysis that was given to it based on the training and experience.”

Later, the People asked Sergeant Harbottle about a second statement that caught his attention. Defendant's counsel objected on the grounds, “Same objection, same

grounds. Can we have an offer of proof?” The trial court responded, “Well, he can say what the statement is. He doesn’t need to give us the reason for the quotes.” Sergeant Harbottle stated, “[T]he discussion was about his washing his hands before he made the telephone call. While I was questioning about that he made a statement to me, quote, I did not kill that lady, . . . end quote.” The People then addressed defendant washing his hands.

During the defense case, Gerald Reid, a friend of defendant’s, testified. Reid was asked by defendant’s counsel if he had ever heard anything about defendant’s reputation for violence in the community. Reid responded, “I’ve heard rumors, but nothing substantial. And I’ve never experienced that.” Defendant’s counsel asked, “Have you ever seen him do anything violent?” Reid responded, “Never.” Defendant’s counsel then asked, “What rumors did you hear?” Reid testified, “I basically heard that in one of his previous relationships that there were some problems with . . . one of his ex-wife’s [*sic*] or ex-girlfriend or something like that.” Defendant was never arrested, and Reid said that defendant was never violent in his presence.

On cross-examination, Reid explained that he had heard rumors after Patricia’s death. Reid heard that defendant had gotten into an altercation with one of his “exes.” Reid never asked defendant about the rumors. He did not believe the rumors.

B. *Analysis*

Defendant insists that Sergeant Harbottle’s testimony was irrelevant because there was no link between his words and an inference of prior acts of domestic violence. He

claims that the testimony by Sergeant Harbottle suggested that defendant killed his wife based on a history of domestic violence. Defendant claims that Sergeant Harbottle testified as a presumably expert police officer regarding the history of domestic violence and its significance in this case.

We disagree with defendant's interpretation of Sergeant Harbottle's testimony. Sergeant Harbottle testified regarding statements made by defendant during the interview. "[T]he testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter." (Evid. Code, § 702, subd. (a).) Defendant's statements during the interview were proper evidence of which Sergeant Harbottle clearly had personal knowledge. When Sergeant Harbottle referenced "domestic violence" it was clear he was referring to the instant shooting and not prior incidents. There is not even an inference that there were prior incidents of domestic violence.

The only "opinion" made by Sergeant Harbottle was his testimony regarding his experience that those who commit domestic violence tend to dehumanize the victim. At that point, defendant objected. The trial court immediately advised the jurors that they were to consider only defendant's statements and not any opinion made by Sergeant Harbottle. When the People asked about the second statements made by defendant, the trial court again admonished the jurors they were to consider only the statements and not any opinion by Sergeant Harbottle. At the end of trial, the jury was also instructed that "[d]uring the trial certain evidence was admitted for a limited purpose. You may

consider that evidence only for that purpose and no other.” We presume the jury followed the trial court’s admonition to disregard Sergeant Harbottle’s opinion. (*People v. Hinton* (2006) 37 Cal.4th 839, 871; *People v. Valdez* (2011) 201 Cal.App.4th 1429, 1437 [“our jury system rests on the assumption jurors are intelligent and capable persons, and we therefore presume the jury adhered to the court’s instructions”].)⁹

Even if the trial court erred by failing to strike Sergeant Harbottle’s entire response, any such error was harmless. “[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial fundamentally unfair.” (*People v. Partida* (2005) 37 Cal.4th 428, 439, italics omitted.) Thus, absent federal constitutional error, the standard of prejudice for the erroneous exclusion of evidence is the *People v. Watson* (1956) 46 Cal.2d 818, 836 harmless error test: The reviewing court must “ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error. [Citations.]” (*Partida*, at p. 439.)

Here, there was no error in admitting the statements that defendant made in his interview. Even to lay jurors, the fact that defendant called Patricia, who he claimed was the love of his life, that “girl” or “lady” certainly in their own minds would be strange. They did not need Sergeant Harbottle’s interpretation of the statements to understand this was unusual. Moreover, as stated, *ante*, under no interpretation of the evidence could it

⁹ Defendant complains that trial counsel failed to object until after the testimony by Sergeant Harbottle. We have considered the merits of the issue raised by defendant and have not found it waived, and therefore, counsel’s actions need not be discussed.

be concluded that Sergeant Harbottle was referencing prior incidents of domestic violence.

Moreover, as set forth extensively above, even if there was error in failing to strike Sergeant Harbottle's additional comments, the evidence strongly established that defendant killed Patricia and tried to cover it up as a suicide. The fact that the jury may have surmised that there was some sort of domestic violence between the two had no significant impact on this case. As such, even had the trial court struck the testimony of Sergeant Harbottle, it would have not have changed the result in this case. Defendant's trial was not rendered fundamentally unfair due to the admission of the evidence.

V

VOLUNTARY MANSLAUGHTER INSTRUCTION

Defendant claims that the trial court in this case had a sua sponte duty to instruct the jury regarding voluntary manslaughter. He did not request such an instruction in the lower court, and the jury was only instructed on second degree murder.

“The Penal Code defines manslaughter as “the unlawful killing of a human being without malice.” [Citation.]” (*People v. Manriquez* (2005) 37 Cal.4th 547, 583.) A defendant may lack malice and be guilty of voluntary manslaughter when the defendant acts in the heat of passion or upon a sudden quarrel. (§ 192, subd. (a)); *People v. Blakeley* (2000) 23 Cal.4th 82, 87-88.)

“[I]n a murder trial, the court, on its own motion, must fully instruct on every theory of a lesser included offense, such as voluntary manslaughter, that is supported by

the evidence. [Citation.] Hence, where the evidence warrants, a murder jury must hear that provocation or imperfect self-defense negates the malice necessary for murder and reduces the offense to voluntary manslaughter. By the same token, a murder defendant is not *entitled* to instructions on the lesser included offense of voluntary manslaughter if evidence of provocation or imperfect self-defense, which would support a finding ‘that the offense was less than that charged,’ is lacking. [Citations.]” (*People v. Rios* (2000) 23 Cal.4th 450, 463, fn. 10.)

For heat of passion to operate as a defense, ““[t]he provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim.”” [Citation.]” (*People v. Butler* (2009) 46 Cal.4th 847, 868-869.)

Additionally, “[t]he heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively. As we explained long ago in interpreting the same language of section 192, “this heat of passion must be such a 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.]” (*People v. Manriquez, supra*, 37 Cal.4th at p. 584.)

The trial court did not err by refusing to instruct the jury on voluntary manslaughter in this case. Defendant’s theory supporting the voluntary manslaughter instruction is wildly speculative. Further, such evidence was contradicted by defendant himself.

There simply is no evidence that there was an argument or scuffle prior to Patricia’s death. Defendant’s own witnesses testified that they were a loving couple with no problems between them. Josh was at the house just prior to Patricia’s death. Patricia was in a happy mood, and defendant did not seem upset.

Defendant presented evidence in his defense that Patricia was having trouble at work and that she was upset over work the day she died. Defendant maintained prior to trial to police and at trial that Patricia committed suicide. Even in the closing argument, defense counsel stated that there was no evidence of a fight between defendant and Patricia. Absolutely no evidence in the record supports that this was voluntary manslaughter.

Defendant appears to contend that since there was no motive presented for the shooting, and since the People did not provide one, the trial court had to provide some explanation for the homicide. However, motive is not synonymous with intent, willfulness, or other mental states that constitute the mens rea of a crime. (See *People v.*

Hillhouse (2002) 27 Cal.4th 469, 503-504.) Motive “describes the reason a person chooses to commit a crime” but is not required to be proven by the prosecution. (*Ibid.*)

Although the reasons that defendant killed Patricia remain a mystery, a voluntary manslaughter instruction was not warranted in this case. There was no evidence from which the jury could conclude that defendant killed Patricia in a heat of passion or sudden quarrel. Nothing in the record supports the instruction and, as previously set forth, the evidence was strong that defendant committed second degree murder.

VI

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

HOLLENHORST
Acting P. J.

KING
J.