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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.

MICHAEL HARTWELL,

Defendant and Appellant.

E053592

(Super.Ct.No. INF10002953)

**OPINION**

APPEAL from the Superior Court of Riverside County. Arjuna T. Saraydarian, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed as modified.

Athena Shudde, 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, and Annie Featherman Fraser, Deputy Attorney General, for Plaintiff and Respondent.

A claimed eyewitness testified that during an argument, defendant Michael Hartwell beat and shot the mother of defendant's three children. Defendant testified that the shooter was not him, but his cousin, who fired only after the victim brandished a knife.

A jury found defendant guilty as follows:

Count 1: Willful, deliberate, and premeditated attempted murder (Pen. Code, § 187, subd. (a), 664, subd. (a)), with an enhancement for causing great bodily injury by personally and intentionally discharging a firearm (Pen. Code, § 12022.53, subd. (d)).

Count 2: Assault with a firearm (Pen. Code, § 245, subd. (a)(2)), with enhancements for personally using a firearm (Pen. Code, § 12022.5, subd. (a)) and personally inflicting great bodily injury (Pen. Code, § 12022.7, subd. (a)).

Count 3: Willful infliction of corporal injury on a cohabitant (Pen. Code, § 273.5, subd. (a)), with enhancements for personally using a firearm (Pen. Code, § 12022.5, subd. (a)) and personally inflicting great bodily injury (Pen. Code, § 12022.7, subd. (a)).

Count 4: Willful infliction of corporal injury on a cohabitant (Pen. Code, § 273.5, subd. (a)).

Defendant was sentenced to 25 years to life, as well as the usual fines and fees.

In this appeal, defendant contends:

1. The trial court erred by failing to instruct on the lesser included offense of attempted voluntary manslaughter.

2. Defense counsel rendered ineffective assistance by failing to request an instruction on voluntary intoxication, as relevant to premeditation and intent to kill.

We reject defendant's contentions. On our own motion, however, we hold that the trial court imposed an unauthorized sentence. We will correct the sentence accordingly.

## I

### FACTUAL BACKGROUND

Defendant lived with his girlfriend, Amanda Prock, and their three children in an apartment in Desert Hot Springs.

The only prosecution witness who claimed to have seen the shooting was LaChevette Bradford, Prock's long-time friend. Bradford lived about "two doors down" in the same apartment building. Bradford testified that she liked defendant, but after Prock said she was "tired of arguing with him and him calling her out," she told Prock to "get rid of" him.

On the night of December 14-15, 2010, a number of friends and relatives were "hanging out" at defendant's apartment. These guests included Bradford, as well as defendant's cousin, Quintaius "Left" Walton. Everyone was drinking.

Defendant and Prock got into an argument. Bradford could not hear what it was about. She testified that the argument got "heated," by which she meant that Prock's voice got loud. Hoping to break it up, she told Prock, "Come on. Let's go. Let's just go to my house." Prock handed her the youngest child's "stuff" and was about to leave, but defendant "said something," and Prock turned back to argue with him some more.

Bradford took the youngest child to her own apartment. When she got back, defendant and Prock were hitting each other. Prock was on her back in bed; defendant was straddling her and punching her. Bradford tried to pull them apart, but Walton grabbed her. She told him, “Get the fuck off me.” Defendant then stopped punching Prock, got up, and said, “[D]on’t fucking touch my cousin.”

Defendant and Prock continued to argue. Bradford still could not tell what they were arguing about. At one point, defendant said, “[I’ll] blow [your] fucking head off.” Prock said twice, “You’re going to shoot me, Mike?” Defendant then shot her.

Bradford ran home and called 911. However, when the 911 operator asked who the shooter was, she said she did not know. At trial, she explained that she “wanted them to hurry up and get there.”

Just as police arrived at the apartment, defendant ran out. He was wearing a white shirt. He had scratch marks on his face. He explained that, earlier that day, he had gotten into a fight with “some Hispanic gangbangers.” The police did not find that credible, because the scratches were fresh and bleeding.

Bradford called 911 again, anonymously, and said that “the one that they have in the white shirt is the one that shot [Prock].”

When officers entered the apartment, they found Prock lying on the floor in the entrance to the bedroom. She had a single bullet wound in the neck. She said, “I’ve been shot.” She also said that she was having trouble breathing. Her right cheek was red and swollen. By the next day, she had swelling around both eyes and bruising under her eyes.

When the police interviewed defendant, he said that Prock was drunk and had complained about having trouble breathing; he did not mention that she had been shot.

The police never found a gun. A gunshot residue test of defendant's right hand was negative. However, the test was performed an hour to an hour and a half after the 911 call, and "[a]fter an hour, most of the particles dissipate naturally." Moreover, they would have come off if defendant washed his hands.

Bradford did not talk to police at the scene, because she was scared of defendant. However, after she was transported to the police station, she identified defendant as the shooter.

Prock testified that she was drunk; she did not remember arguing with anybody or getting shot. She denied that there was a gun in the apartment. She denied being hit; when asked how her face got injured, she said "they" told her that, when she fell, she hit her face. Prock also testified that defendant was wearing a yellow shirt.

Prock's brother testified that Bradford told him that she saw the shooting from outside the apartment, through a bedroom window.<sup>1</sup> The lights in the room were out. However, she saw someone in a white shirt shoot Prock. She also said that defendant and defendant's cousin were in the room at the time.

Defendant testified on his own behalf. He denied hitting Prock. He admitted "arguing a little bit, but it wasn't nothing serious." When asked, "What [wa]s the

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<sup>1</sup> Bradford had testified that from "where [Prock] lives, you got to pass through [*sic*] her bedroom window to get to my house."

argument about?,” he said, “Really about nothing. ’Cause [Bradford] always come over there . . . and she sees that . . . we enjoying ourselves, and she just come out of the blue and tell [Prock] to come over there with her and hang out with her. [Bradford] is a real jealous person.” “I just spoke up about it, because [Bradford] is always doing that. When she see that me and [Prock] is enjoying ourself, having a good time.” He added that “. . . [Prock] d[id]n’t want to leave. [Bradford] [wa]s trying to make her leave.”

During the argument, Prock came toward defendant with a knife. Walton pulled out a revolver, cocked it, and told Prock, “Don’t come . . . by me and my cousin with that knife . . . .” Prock put the knife down. Then the gun went off (perhaps by accident). Bradford had already left to take the youngest child to her apartment; thus, she was not there when the shooting occurred.

Defendant told someone to call an ambulance. He had been wearing a yellow shirt; he put on a white shirt, then went outside to try to find Walton.

Defendant did not tell the police that it was Walton who shot Prock because he “didn’t want to be labeled as a snitch . . . .”

## II

### FAILURE TO INSTRUCT ON ATTEMPTED VOLUNTARY MANSLAUGHTER

Defendant contends that the trial court erred by failing to instruct sua sponte on the lesser included offense of attempted voluntary manslaughter on a “heat of passion” theory. Alternatively, he contends that his trial counsel rendered ineffective assistance by failing to request such an instruction.

“In criminal cases, even absent a request, a trial court must instruct on the general principles of law relevant to the issues the evidence raises. [Citation.] “That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.]” [Citation.] “[T]he existence of “any evidence, no matter how weak” will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is “substantial enough to merit consideration” by the jury. [Citations.]’ [Citation.]” (*People v. Taylor* (2010) 48 Cal.4th 574, 623.)

“Voluntary manslaughter is a lesser included offense of murder. [Citation.]” (*People v. Booker* (2011) 51 Cal.4th 141, 181.) Hence, attempted voluntary manslaughter is a lesser included offense of attempted murder. (See, e.g., *People v. Lopez* (2011) 199 Cal.App.4th 1297, 1304, fn. 35.)

“Voluntary manslaughter is ‘the unlawful killing of a human being, without malice’ ‘upon a sudden quarrel or heat of passion.’ [Citation.] An unlawful killing is voluntary manslaughter only ‘if the killer’s reason was actually obscured as the result of a strong passion aroused by a “provocation” sufficient to cause an “ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.”’ [Citations.]’ [Citation.] ‘The provocation must be such that an average, sober person would be so inflamed that he or she would lose

reason and judgment. Adequate provocation . . . must be affirmatively demonstrated.’ [Citation.]” (*People v. Thomas* (2012) 53 Cal.4th 771, 813.)

“““The 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.]’ [Citation.]” (*People v. Verdugo* (2010) 50 Cal.4th 263, 294.)

Here, there was no substantial evidence that Prock engaged in any provocation “sufficient to cause an ordinary person of average disposition to be so inflamed as to lose reason and judgment.” (*People v. Thomas, supra*, 53 Cal.4th at p. 813.) Although there was an argument between defendant and Prock, Bradford did not know who started it, and she could not say what it was about. She did not testify to any conduct by Prock prior to the shooting that was in any way provocative.

Unlike Bradford, defendant did testify about the cause of the argument. While this testimony was vague and rambling, the gist of it was that Bradford was trying to get Prock to come over to her apartment because she was jealous of defendant. He never explained, however, how this led to an argument between him and Prock, rather than between him and Bradford. He specifically stated that Prock did not want to leave.

Defendant argues that, according to Bradford, the argument was “heated.” Bradford explained, however, that she simply meant that Prock’s voice was loud. In any event, all cohabitants are liable to have arguments — even “heated” arguments — from

time to time. Such arguments do not provoke the ordinary person of average disposition to lethal violence.

Prock did ask, “Are you going to shoot me?,” which defendant describes as a “taunt or dare.” As he concedes, however, “mere verbal taunts generally are insufficient to cause an average person to lose reason and judgment under the objective component of the heat-of-passion/sudden quarrel element of attempted voluntary manslaughter . . . .” For example, in *People v. Manriquez* (2005) 37 Cal.4th 547, the victim “called [the] defendant a ‘mother fucker’ and . . . taunted [the] defendant, repeatedly asserting that if [the] defendant had a weapon, he should take it out and use it.” (*Id.* at p. 586.) “Such declarations,” the Supreme Court held, “plainly were insufficient to cause an average person to become so inflamed as to lose reason and judgment. [Citation.]” (*Ibid.*)

Finally, defendant argues that the jury could have concluded that Prock told defendant she was leaving him. Not so. Bradford testified that she tried to break up the argument by getting Prock to go to her apartment, but she meant temporarily, not permanently; in any event, Prock chose to stay. Defendant testified similarly that Bradford tried to get Prock to go to her apartment, but only to “hang out.” And defendant, too, testified that Prock did not want to leave.

We therefore conclude that there was insufficient evidence of legally adequate provocation to require an instruction on attempted voluntary manslaughter. Because defendant was not entitled to such an instruction, defense counsel did not render ineffective assistance by failing to request one.

### III

#### FAILURE TO REQUEST A VOLUNTARY INTOXICATION INSTRUCTION

Defendant contends that his trial counsel rendered ineffective assistance by failing to request an instruction that the jury could consider voluntary intoxication in deciding whether defendant acted with premeditation or an intent to kill. (E.g., CALCRIM No. 625.)

##### A. *Additional Factual Background.*

When the police arrested defendant, he smelled of alcohol. However, he was able to communicate, and his speech was not slurred.

Bradford testified that defendant was drinking beer and vodka shots. At trial, Prock remembered defendant having only one beer; she told police, however, that he was playing a drinking game involving vodka shots.

Defendant testified that between 8:00 p.m. and 4:00 a.m., he had six or seven beers and one or two vodka shots. Although he was not “sober,” he also was not “buzzed” or “drunk.” When asked if he knew what was going on, he answered, “I know everything. I see[] everything.”

##### B. *Analysis.*

“ . . . ‘In assessing claims of ineffective assistance of trial counsel, we consider whether counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the

outcome. [Citations.] A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel.

[Citations.] If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.]' [Citation.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 391.)

"[E]vidence of voluntary intoxication [is] relevant on the issue of whether the defendant actually formed any required specific intent." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1242-1243; see also Pen. Code, § 22, subd. (b).) Thus, in a homicide case, it may be relevant to the issues of premeditation and deliberation and intent to kill. (Pen. Code, § 22, subd. (b).)

"The trial court," however, "has no duty to instruct sua sponte on voluntary intoxication. [Citation.]" (*People v. Clark* (1993) 5 Cal.4th 950, 1022, disapproved on an unrelated point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Rather, "[a]n instruction on the significance of voluntary intoxication is a "pinpoint" instruction that the trial court is not required to give unless requested by the defendant.' [Citation.]" (*People v. Verdugo, supra*, 50 Cal.4th at p. 295.)

“[A] defendant is entitled to such an instruction only when there is substantial evidence of the defendant’s voluntary intoxication and the intoxication affected the defendant’s “actual formation of specific intent.” [Citation.]” (*People v. Verdugo, supra*, 50 Cal.4th at p. 295.) Substantial evidence of intoxication alone is not enough; there must also be evidence that the intoxication impaired the defendant’s ability to formulate intent. (*People v. Williams* (1997) 16 Cal.4th 635, 677-678.) Here, while there was evidence that defendant had been drinking, there was absolutely no evidence that this had any effect on his ability to formulate intent. Somewhat to the contrary, the evidence showed that he had no problem communicating with police officers. Defendant himself testified that he was fully aware and not even “buzzed.” If defense counsel had requested a voluntary intoxication instruction, the trial court could properly have refused it. Accordingly, the failure to request one was not ineffective assistance.

Separately and alternatively, we also note that, even if defendant was entitled to a voluntary intoxication instruction, defense counsel could have had a sound tactical reason for not requesting one. The defense theory of the case was that Walton was the shooter. Any argument that *defendant* was the shooter but did not premeditate or did not intend to kill would have contradicted this theory. Moreover, it would have undercut defendant’s credibility, most importantly by suggesting that he was a liar, but also by suggesting that he was too drunk to be able to perceive events accurately or to remember what he perceived. Defense counsel stated in closing argument, “[W]e heard from the officer that . . . [defendant] wasn’t slurring his speech, didn’t appear to be drunk or out of it.

What does that tell us? Well, [defendant] got up here and told us what really happened there.” Emphasizing defendant’s intoxication would have been inconsistent with this argument. (See *People v. Wader* (1993) 5 Cal.4th 610, 643 [failure to request voluntary intoxication instruction was not ineffective assistance where it would have been inconsistent with defendant’s theory of the case].)

We therefore conclude that defense counsel’s failure to request a voluntary intoxication instruction was not ineffective assistance.

#### IV

#### UNAUTHORIZED SENTENCE

On count 1 (willful, deliberate, and premeditated attempted murder), the trial court imposed a sentence of life with the possibility of parole. (Pen. Code, § 664, subd. (a).)

On the firearm enhancement to count 1 (Pen. Code, § 12022.53, subd. (d)), however, all it said was: “That’s 25 years. [¶] So as to Count 1, then, we’re talking about 25 years to life.”

It stayed the sentences on all other counts and enhancements.

According to the sentencing minute order, the sentence on the firearm enhancement was “25 years” and the total sentence was an “indeterminate sentence of 25 years 0 months to life.” (Capitalization omitted.)

Similarly, according to the abstract of judgment, the sentence on the firearm enhancement was a “concurrent” term of 25 years. (Capitalization omitted.)

It appears that the trial court erred (or perhaps it simply misspoke). On the firearm enhancement to count 1, the only statutorily authorized sentence was a *consecutive indeterminate* term of 25 years *to life*. (Pen. Code, § 12022.53, subd. (d).) Thus, once the trial court determined to stay the sentences on all other counts and enhancements, the only statutorily authorized total sentence was: (1) an indeterminate term of life in prison with the possibility of parole, plus (2) a consecutive indeterminate term of 25 years to life in prison.

Defendant's appellate counsel evidently understands this. Thus, defendant's opening brief simply asserts that this is the sentence that the trial court actually imposed. The People, on the other hand, appear somewhat confused. They assert: "[A]ppellant was sentenced to life with the possibility of parole, and a *determinate* term of twenty-five years *to life* in prison." (Italics added.) There is no such animal. In any event, neither correctly describes what the trial court actually did.

The difference between two concurrent life terms and two consecutive life terms may seem somewhat academic. However, there is a significant difference with respect to the minimum parole eligibility period. A sentence of 25 years to life has a minimum parole eligibility period of 25 years. A sentence of life with the possibility of parole has a minimum parole eligibility period of seven years. (Pen. Code, § 3046, subd. (a)(1).) Thus, a term of life and a term of 25 years to life, when run consecutively, mean a minimum parole eligibility period of 32 years. (*Id.*, subd. (a)(2).)

In our disposition, we will modify the sentence, and we will direct the trial court clerk to correct the record.

V

DISPOSITION

The judgment is modified as follows: The sentence on the firearm enhancement to count 1 (Pen. Code, § 12022.53, subd. (d)) is a consecutive indeterminate term of 25 years to life in prison. Accordingly, the total sentence is (1) an indeterminate term of life in prison with the possibility of parole, plus (2) a consecutive indeterminate term of 25 years to life in prison. As thus modified, the judgment is affirmed.

The superior court clerk is directed to prepare a new sentencing minute order and a new abstract of judgment and to forward a certified copy of the new abstract to the Department of Corrections and Rehabilitation.

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RICHLI  
J.

We concur:

RAMIREZ  
P.J.

McKINSTER  
J.