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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.

FRANK MENDOZA GONZALES,

Defendant and Appellant.

E054749

(Super.Ct.No. FBA1000545)

**OPINION**

APPEAL from the Superior Court of San Bernardino County. R. Glenn Yabuno, Judge. Affirmed as modified.

Ellen M. Matsumoto, 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, Senior Assistant Attorney General, and Scott Taylor and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

At a time when defendant Frank Mendoza Gonzales was admittedly using methamphetamine daily, he shot a neighbor twice, killing him.

Prosecution witnesses testified that before the shooting defendant was looking for the victim. He asked his stepson to tell him if the victim came outside. Meanwhile, the victim and the victim's girlfriend got into an argument; she left the house, and the victim followed her out. The stepson duly notified defendant, who took a rifle, went over to the victim's house, said, "I got you now, motherfucker," and shot him.

Defendant testified (and had also told police) that the victim had been creeping around his house, peeking inside, and trying to break in. On the night of the shooting, defendant either saw or thought he saw the victim looking in his window; he went outside, saw the victim running away, and shot him.

After a jury trial, defendant was found guilty of first degree murder (Pen. Code, §§ 187, subd. (a), 189), with an enhancement for personally and intentionally discharging a firearm, causing death (Pen. Code, § 12022.53, subd. (d)).

In a bifurcated proceeding, the trial court found true one "strike" prior (Pen. Code, §§ 667, subds. (b)-(i)), one 3-year prior prison term enhancement (Pen. Code, § 667.5, subd. (a)), and two 1-year prior prison term enhancements (*id.*, subd. (b)).

Defendant was sentenced to a total of 79 years to life in prison, plus the usual fines and fees.

Defendant now contends:

1. The instruction that provocation can reduce the degree of the murder was erroneous because it failed to state that the provocation need not be reasonable.

2. The trial court erroneously failed to award defendant any presentence custody credit.

We will conclude that the challenged instruction was legally correct; defendant forfeited any claim that it was incomplete by failing to request amplifying or clarifying language. The People concede, however, that the trial court erroneously failed to award presentence custody credit. We will order the trial court to modify the judgment accordingly.

## I

### FAILURE TO INSTRUCT THAT PROVOCATION CAN REDUCE THE DEGREE OF THE MURDER EVEN IF IT IS UNREASONABLE

Defendant contends that the instruction that provocation can reduce the degree of the murder was erroneous because it failed to state that the provocation need not be reasonable.

#### A. *Additional Factual and Procedural Background.*

The trial court gave CALCRIM No. 522 (Provocation: Effect on Degree of Murder), as follows:

“Provocation may reduce a murder from first degree to second degree. The weight and significant [*sic*] of the provocation, if any, are for you to decide.

“If you conclude that the defendant committed murder but was provoked, consider the provocation in whether [*sic*<sup>1</sup>] the crime was first or second degree murder.”

B. *Analysis.*

“When a word or phrase “is commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law, the court is not required to give an instruction as to its meaning in the absence of a request.”

[Citations.] [Citation.] It is only when a word or phrase has a ‘technical, legal meaning’ that differs from its ‘nonlegal meaning’ that the trial court has a duty to clarify it for the jury. [Citation.]” (*People v. Jennings* (2010) 50 Cal.4th 616, 670.)

As used in CALCRIM No. 522, which states that provocation can reduce first degree murder to second degree murder, provocation has its ordinary, nonlegal meaning. (*People v. Cole* (2004) 33 Cal.4th 1158, 1217-1218 [former CALJIC No. 8.73].) That meaning does not particularly connote either reasonableness or unreasonableness. For example, the most relevant definitions in the Oxford English Dictionary are (1) “The action of provoking or exciting anger, resentment, or irritation, esp. deliberately; action, speech, etc., that provokes strong emotion; an instance of this,” and (2) “A cause of irritation, anger, or resentment.” (Oxford English Dict. Online (3d ed. 2007; online version Sept. 2012) <<http://www.oed.com/view/Entry/153509>>, as of Nov. 2, 2012.)

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<sup>1</sup> This should have been “in deciding whether.” Defendant does not raise any issue involving the trial court’s minor misreadings of the instruction.

By contrast, when provocation is used to reduce murder to voluntary manslaughter, the law requires that the provocation must be reasonable, in the sense that it would provoke a reasonable person. ““The provocation must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment. . . .’ [Citation.]” (*People v. Thomas* (2012) 53 Cal.4th 771, 813.) Thus, CALCRIM No. 570, regarding voluntary manslaughter, requires not only provocation, in the ordinary sense of the word, but also that “[t]he provocation would have caused a person of average disposition to act rashly and without due deliberation . . . .” It further provides that “slight or remote provocation is not sufficient.”

We recognize that, when provocation is used to reduce the degree of the murder, there is no similar requirement that the provocation must be reasonable. (See *People v. Carasi* (2008) 44 Cal.4th 1263, 1306.) However, CALCRIM No. 522 contains no similar language to CALCRIM No. 570. The trial court did not give CALCRIM No. 570 or any other instructions on provocation. Hence, the jury could not have misunderstood CALCRIM No. 522 as requiring that the provocation must be reasonable.

This case is therefore governed by the principle that ““[g]enerally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.” [Citation.]’ [Citation.]” (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1348.) Defense counsel could have requested an instruction explicitly stating that

even unreasonable provocation could reduce the degree of the murder, but did not. As a result, defendant's present contention has been forfeited.

## II

### PRESENTENCE CUSTODY CREDIT

Defendant contends that the trial court erroneously failed to award him 432 days of presentence custody credit. The People concede that the trial court failed to award presentence custody credit, but they contend that the correct amount of credit is 430 days.

Actually, the correct amount of credit is 431 days.

Defendant was arrested on August 13, 2010, and sentenced on October 17, 2011. He was entitled to credit for the entire first and last day. (*People v. King* (1992) 3 Cal.App.4th 882, 886.) Thus, he is entitled to a total of 431 days of credit. (Pen. Code, § 2900.5, subd. (a).)

Defendant makes the mistake of assuming that he was arrested on August 12, 2010, the day of the shooting; actually, he was arrested in the wee hours of the next day. The People, on the other hand, make the mistake of not including both the first and the last day.

We will modify the judgment accordingly.

## III

### DISPOSITION

The trial court is directed to modify the judgment by awarding defendant 431 days of presentence custody credit. The judgment as thus modified 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 amended abstract to the Director of the Department of Corrections and Rehabilitation. (Pen. Code, §§ 1213, 1216.)

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RICHLI  
J.

We concur:

HOLLENHORST  
Acting P. J.

McKINSTER  
J.