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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.

JOHN RICHARD SANCHEZ,

Defendant and Appellant.

E054832

(Super.Ct.No. FVA700749)

OPINION

APPEAL from the Superior Court of San Bernardino County. Ingrid Adamson Uhler, Judge. Affirmed with directions.

Patricia L. Brisbois, 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, Barry Carlton, and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant John Richard Sanchez appeals his conviction on one count of second degree murder. He contends that his conviction must be reduced to voluntary manslaughter because the prosecution failed to prove that he did not act either in a heat of passion or because of an unreasonable belief in the need for self-defense. He contends that the prosecution's failure of proof violated his federal constitutional due process right to have proof of every fact necessary to constitute the crime with which he was charged. As we explain, however, the jury was instructed on both theories of voluntary manslaughter and rejected them, finding instead that defendant acted with malice. Consequently, defendant's due process rights were not violated. Accordingly, we will affirm the conviction.

#### PROCEDURAL HISTORY

Defendant was charged with one count of murder. (Pen. Code, § 187, subd. (a).)<sup>1</sup> In his first trial, a mistrial was declared because of a medical emergency, with defendant's consent. Before his second trial commenced, defendant changed his plea to not guilty by reason of insanity. In the second trial, the jury convicted defendant of second degree murder. The court then found that defendant was legally sane at the time of the offense. The court denied a motion for new trial and imposed the mandatory sentence of 15 years to life. Defendant filed a timely notice of appeal.

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

## FACTS

On May 3, 2007, Balam Alcaez was found dead inside the converted garage apartment he shared with defendant. He was found by firefighters responding to a fire at that location. A clear electrical wire, apparently from a speaker, and a black electrical cord were tightly wrapped around his neck, and his legs and lower torso were burned. Efforts to resuscitate him were unsuccessful, and he was pronounced dead at the hospital. There was no sign of a struggle inside the apartment. An arson investigator determined that the fire appeared to have been deliberately caused.

In the days following Alcaez's death, defendant admitted to several friends that he had killed Alcaez. On the afternoon of May 3, he told Katherine Yearwood that he had had a fight with Alcaez. He told her that Alcaez had attacked him and tried to choke him, and that he then choked Alcaez in self-defense. However, he said that Alcaez was fine when defendant left the apartment.<sup>2</sup> Yearwood also testified that Alcaez might have been upset that day because she had texted a picture of herself kissing her boyfriend to a phone that Alcaez shared with defendant. Alcaez was bisexual and had a crush on her. Yearwood believed that defendant and Alcaez were in a romantic relationship.

On May 4, 2007, defendant told Ann Anderson that he had gotten into a fight with his roommate and that his roommate had tried to choke him with an electrical cord. He

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<sup>2</sup> At the preliminary hearing, Yearwood testified that she thought defendant had said that when he left the apartment, Alcaez was lying unconscious on the floor.

said he had then choked his roommate in self-defense. (Anderson did not know the roommate's name.) He told her that when he choked the roommate, the roommate had defecated.<sup>3</sup> He believed that his roommate was dead, so he fled because he was scared. Defendant was upset and crying when he spoke to Anderson the first time. A few days later, defendant asked Anderson, who worked at a storage facility, if he could sleep in a storage locker.

On May 7, 2007, defendant told Laurie Moskus that he choked Alcaarez during a game of fisticuffs. He said that things had gotten "a little out of control," and that he choked Alcaarez and Alcaarez was dead. Moskus "guessed" that fisticuffs is a fighting game in which you choke the other person and let go right before the person takes their last breath.

On May 7, defendant told Kathryn Gould that he had "killed" Alcaarez. He told her that the two of them were playing a sexual game called "fisticuffs," and that he had choked Alcaarez until he became unconscious. Defendant thought Alcaarez was dead, so he set fire to the apartment and fled. Gould later found out that fisticuffs is an "intense sexual game" involving choking. Defendant told Gould he wanted to turn himself in and claim self-defense. He also told Gould that he was mad at Alcaarez. Defendant and Alcaarez were often upset with each other—Alcaarez because the apartment was dirty or messy, and defendant because Alcaarez would spend hours in the bathroom "touching

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<sup>3</sup> A "relatively large" amount of feces was present in the pants Alcaarez was wearing at the time of his death.

himself.” Gould understood from defendant that he and Alcaarez were lovers, or had been.

Defendant’s defense at trial was that he and Alcaarez engaged in a consensual act of erotic asphyxiation, and that Alcaarez’s death was unintentional, a “tragic accident.”

Dr. Frank Sheridan, a forensic pathologist, testified that Alcaarez died of strangulation from the ligature before the fire started. He did not see any evidence that Alcaarez had been involved in an act of erotic asphyxiation. He described prior cases of such deaths he had seen. He testified that a person engaged in such an act will typically use a soft material as the ligature or place a scarf or some other softer material between the ligature and the skin to prevent marking of the neck and for comfort. There is also normally an escape mechanism in place to allow a quick release of the ligature before unconsciousness sets in. Neither was present in this case.

Alcaarez had bruises and abrasions on his neck and hemorrhaging in his neck muscles, which was consistent with heavy pressure placed on the ligature. Moreover, Alcaarez had suffered severe blunt force trauma to his abdomen before being strangled, resulting in internal hemorrhaging. The amount of force necessary to produce such an injury is equivalent to the force involved in a traffic accident. Left untreated, the abdominal injury itself could have been fatal. Dr. Sheridan believed that the abdominal injury occurred before the strangulation. Alcaarez’s blood alcohol was 0.15 percent, and there was also marijuana in his system.

Testifying for the defense, forensic pathologist Dr. Harry Bonnell stated that in his opinion, the circumstances were consistent both with an intentional strangulation and with an accidental death, primarily because it appeared that the ligature could easily be loosened and it was not tightly knotted. Also, there was no indication that Alcarez attempted to pull the ligature off.

### LEGAL ANALYSIS

1.

THE JURY WAS PROPERLY INSTRUCTED ON VOLUNTARY MANSLAUGHTER AND IMPLICITLY FOUND THAT THE PROSECUTION MET ITS BURDEN TO DISPROVE HEAT OF PASSION AND IMPERFECT SELF-DEFENSE

A defendant who commits an intentional unlawful killing which would otherwise be murder is guilty only of voluntary manslaughter if he acted out of provocation, i.e., in a sudden quarrel or heat of passion, or in the unreasonable but good-faith belief in having to act in self-defense, sometimes referred to as imperfect self-defense. Both provocation/heat of passion and imperfect self-defense involve mental states which negate malice, an essential element of murder. (*People v. Rios* (2000) 23 Cal.4th 450, 460-461.)

Defendant contends that his conviction must be reduced to voluntary manslaughter because the prosecution failed to meet its burden to disprove the existence of those mental states. He bases this contention on the existence of what he deems “substantial evidence of provocation showing the killing occurred during a sudden quarrel and in the

heat of passion,” i.e., the testimony that defendant told friends that Alcaarez choked him during a fight and that he responded by choking Alcaarez. He contends that “[s]ince provocation and heat of passion were affirmatively shown by the evidence, malice was negated.”

Defendant is correct that if the issue of provocation or imperfect self-defense is “properly presented” in a murder case, the prosecution is required to disprove the existence of either mental state in order to obtain a conviction of murder rather than voluntary manslaughter. (*People v. Rios, supra*, 23 Cal.4th at pp. 454, 460-462.)<sup>4</sup> It does not follow, however, that the existence of evidence suggesting that the defendant acted in a heat of passion or in imperfect self-defense means that the prosecution failed to meet its burden of negating provocation or imperfect self-defense. On the contrary, it is up to the jury to decide whether the prosecution met its burden of proving malice and disproving the existence of evidence which might negate it.

There is no right to have the jury decide the issues in the defendant’s favor, no matter how strong the evidence in his or her favor may be.<sup>5</sup> But that is what defendant’s

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<sup>4</sup> In *Rios*, the court cited *Mullaney v. Wilbur* (1975) 421 U.S. 684. In that case, the United States Supreme Court held that in a murder trial, where the evidence suggests heat of passion, the due process clause of the federal Constitution requires that the prosecution bear the burden of disproving provocation and prohibits a state from shifting the burden to the defendant to prove that he or she acted under provocation sufficient to negate malice. (*Mullaney v. Wilbur, supra*, at pp. 701-704.) As we discuss below, the burden was not shifted in this case.

<sup>5</sup> We express no opinion on the sufficiency of the evidence in this case to support a voluntary manslaughter verdict.

argument implies. However, as long as the jury has been instructed on heat of passion and/or imperfect self-defense and is given the opportunity to find the defendant guilty of voluntary manslaughter, the defendant's state constitutional due process right to have the jury decide every material issue in the case has been satisfied. (See *People v. Breverman* (1998) 19 Cal.4th 142, 165-169 [noncapital defendant has due process right under state Constitution but not federal Constitution to have jury instructed on lesser included offenses].) And, as long as the jury is instructed that the prosecution bears the burden of proving that the defendant did not act in a heat of passion or in imperfect self-defense, the defendant's federal due process rights are satisfied as well. (*Mullaney v. Wilbur, supra*, 421 U.S. at pp. 701-704.)

Here, the jury was instructed on heat of passion and imperfect self-defense and was given verdict forms for voluntary manslaughter. The voluntary manslaughter instructions stated that the prosecution had the burden of proving beyond a reasonable doubt that defendant did not kill as the result of a sudden quarrel or in the heat of passion or that he was not acting in imperfect self-defense, and that if the prosecution did not meet that burden, the jury must find defendant not guilty of murder. By finding defendant guilty of second degree murder, the jury implicitly found that the prosecution *did* meet its burden of proof with respect to malice, heat of passion and imperfect self-defense. Consequently, defendant's state and federal constitutional due process rights were satisfied.

2.

THE JUDGMENT MUST BE CORRECTED TO REFLECT IMPOSITION OF  
MANDATORY FEES

With some exceptions not pertinent here, Government Code section 70373 provides for a \$30 criminal conviction assessment on each misdemeanor or felony conviction. (Gov. Code, § 70373, subd. (a)(1).) Penal Code section 1465.8, subdivision (a)(1) mandates imposition of a court security fee of \$40 per count of conviction. At sentencing in this case, the trial court stated that it would impose “the mandatory CSC fee in the amount of \$70.” The abstract of judgment, however, reflects that the court imposed a \$70 court security fee and a \$70 criminal conviction assessment.

The parties agree that the \$70 the court referred to was intended to be the aggregate of the criminal conviction assessment and the court security fee. They agree that the abstract of judgment can be amended to correct what they deem a clerical error. It is clear that the duplication of the \$70 fee or assessment is a clerical error, and because both the \$30 criminal conviction assessment and the \$40 court security fee are mandatory, we will assume that the parties are correct that the trial court merely misspoke and did indeed aggregate the two. We will direct the trial court to amend the sentencing minutes and the abstract of judgment to correctly reflect the mandatory fee and assessment.

DISPOSITION

The judgment is affirmed. The cause is remanded for the limited purpose of correcting the sentencing minutes and the abstract of judgment to reflect imposition of a \$30 criminal conviction assessment pursuant to Government Code section 70373, subdivision (a)(1) and a \$40 court security fee pursuant to Penal Code section 1465.8, subdivision (a)(1). Within 30 days after finality of this opinion, the superior court shall issue an amended abstract of judgment and amended sentencing minutes as stated above and shall provide a copy of both to defendant and to the Department of Corrections and Rehabilitation.

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MCKINSTER  
J.

We concur:

RAMIREZ  
P. J.

MILLER  
J.