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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

SENECA DENISE TURNER,

Defendant and Appellant.

F063948

(Super. Ct. No. F10900183)

**OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Jonathan B. Conklin, Judge.

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, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Michael A. Canzoneri, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Seneca Denise Turner killed her boyfriend, Sendy Thomas, by driving her car over him. A jury convicted her of second degree murder and drunk driving. On appeal, she contends the trial court prejudicially erred in refusing to instruct the jury on the lesser included offense of voluntary manslaughter under a heat of passion theory. We will affirm.

### **PROCEDURAL SUMMARY**

On May 5, 2010,<sup>1</sup> the Fresno County District Attorney charged defendant with murder (Pen. Code, § 187, subd. (a); count 1), driving a vehicle with a blood alcohol concentration of 0.08 percent or higher and causing injury (Veh. Code, § 23153, subd. (b); count 2), and driving a vehicle while under the influence and causing injury (Veh. Code, § 23153, subd. (a); count 3). The information further alleged that defendant personally used a dangerous or deadly weapon in the commission of the murder (Pen. Code, § 12022, subd. (b)(1)).

A jury found defendant guilty of second degree murder on count 1 and found the deadly weapon allegation not true. The jury found her guilty on counts 2 and 3.

Defendant filed a motion for a new trial, based in part on the trial court's failure to instruct on the lesser included offense of voluntary manslaughter based on heat of passion (Pen. Code, § 192, subd. (a)). The trial court denied the motion.

At the sentencing hearing, the trial court denied defendant's request to reduce the murder conviction to manslaughter and denied her request for probation. The court sentenced defendant to 15 years to life on count 1, plus two stayed two-year terms on counts 2 and 3.

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<sup>1</sup> All dates refer to 2010 unless otherwise noted.

## FACTS

### **I. Prosecution Case**

#### ***Events Surrounding the Incident***

In the early morning hours of January 9, 29-year-old defendant was with Sedy, her 48-year-old boyfriend. Bessie, who lived in the apartment next to defendant's, awoke to the repeated ringing of her doorbell. As she walked to the door, she heard defendant arguing and yelling at someone. Bessie heard defendant twice say she wanted him to get his stuff out of her place and then she was going to kill him.<sup>2</sup>

Across town, Sedy's sister, Sharon, was cleaning at her grandmother's house, where she and Mar'Rees lived, and where Sedy had also been living for several months. At about 8:20 a.m., Sedy and defendant pulled up in defendant's Buick. Sharon opened the door and heard defendant telling Sedy, "Shut the fuck up." Sharon yelled out the door to defendant, who was about 40 feet away at the curb, "Hey, we don't have that kind of talk in here." Defendant said, "Oh, I'm sorry." Sedy entered the house and went into another room to use the telephone. Defendant stayed and talked to Sharon. Defendant did most of the talking. She went on about how good Sharon looked for being 50 years old and how defendant wanted to look as good when she turned 50. Defendant said she wanted to go to church with Sharon the next day. Sharon told her she was welcome to come. Based on defendant's demeanor, body language, and continuous and fast talking, Sharon assumed she was intoxicated, even though she was having no difficulty walking or standing. Sharon did not observe any injuries to defendant's face, and defendant did not complain of any pain or injury. As they were talking about going to church, Sedy returned. Defendant said, "You going to take me to church tomorrow. We are going to church tomorrow." He said, "I don't mind taking you to the church." In Sharon's

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<sup>2</sup> Bessie had heard defendant arguing with a man in her apartment a week or so before this incident. Defendant had yelled at him to get his stuff out.

opinion, Sendy's demeanor was unusually mellow and Sharon did not understand why he did not tell defendant to shut up. He normally had a "low tolerance for nonsense," and Sharon believed nonsense was occurring because defendant was talking and "babbling, just going on and on." She was extremely talkative and Sharon would have expected Sendy to say something like, "Girl, why don't you shut up." Instead, he was surprisingly quiet. Sendy and defendant were at the house about 10 or 15 minutes, and then they left in defendant's car and drove toward Mariposa Street. Sharon did not notice who was driving.<sup>3</sup>

A few blocks away, at the intersection of Mariposa and A Streets, Alicia was leaving her house for work at 8:15 or 8:30 a.m. As she drove away from her house and down Mariposa Street, she noticed a car parked along the opposite side of Mariposa Street, more than half-way down the block. A man was standing outside the car, talking to someone in the car through the open driver's window. Alicia did not see them arguing; they were just talking. She could not see the man's face or the person inside, and she could not hear what they were saying.

After Alicia left for work, her husband, Alfonzo, went to the bank. As he drove away from the house, he heard a hit. He saw defendant's car up on the curb in front of the house across the street. A man was under the car. Defendant was yelling and holding onto the chain link fence around the front yard.

Stanley awoke to defendant's yells for help. He looked out the window and saw a car on the sidewalk in front of his house. A man was pinned under the car. The front of the car, which was angled back toward the road, was down on the road and the rear of the car was up on the grass or mow strip between the road and the sidewalk. Defendant was yelling and walking around between the car and the front yard's fence. Stanley woke his

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<sup>3</sup> Sharon testified that Sendy had been convicted of armed robbery of a bank. He had been released from prison a few years before the present incident.

son, Albert, and told him to call the police. After Albert called the police, he and his father went outside. Defendant was alone, yelling loudly for help. She was hysterical, shouting and running around aimlessly, as if she had lost her mind. She was extremely emotional during the 15 minutes Albert was with her. She used Albert's cell phone to call someone, her mother or another relative, Albert thought. Albert was just three to five feet from defendant, but he could not decipher what she was saying on the phone because she was "shouting badly."

The fire station received the call at 8:39 a.m., and the crew arrived on the scene at 8:41 a.m. The crew checked Sindy's body for signs of life and attempted to pull the body out, but the weight of the car was on it. The crew tried to jack up the car, but the car was too close to the ground. Eventually, they successfully extricated the body. Under the car was a red bag that contained Sindy's clothing and toiletries. The crew also checked defendant and determined she had no significant injuries.

Police Officer Vizcarra was the first officer to arrive on the scene at 8:43 a.m. as the firefighters were jacking the car off the body. Defendant, who was standing about five feet from the open driver's door, was hysterical and crying loudly. She was very unsteady on her feet. Her gait was unsteady and it was hard for her to remain on her feet. She kept falling on the sidewalk. Vizcarra was unsure whether she was falling because she was distraught or because she was intoxicated. She had bloodshot, watery eyes and her speech was slurred. She had an odor of alcohol on her breath, so Vizcarra concluded she was intoxicated. She was, however, able to carry on a conversation and respond to questions. She told Vizcarra the car belonged to her and she was the driver. When Vizcarra asked if the man under the car was a passenger in her car, she started to cry and did not answer. He asked her the same question two more times, and then she said, "No." She said she dropped him off. She said, "He hit me," and she showed him an injury to her lip. The cut was a fresh, minor cut about one-half inch long inside her upper right lip. It was not bleeding and he did not notice any swelling. She had to pull her lip up and out

to show him the cut inside her upper right lip. He did not see any bruising to her forehead or any blood on her clothing. She said Sindy was mad because he thought she was cheating on him with another man. She said she and Sindy had been friends for three years and they were involved in a romantic relationship. She showed Vizcarra some minor cuts on two of the fingers on her right hand and a minor cut on her right knee. She said she received the cuts when she got down on the sidewalk to help Sindy. Vizcarra did not observe any other injuries on defendant. He asked if she needed medical treatment, and she refused any treatment. While Vizcarra was talking to defendant, she fell into the fence. She had to be helped up onto her feet. Vizcarra asked her if she had consumed any alcohol and she said, "No. I drank some cheap wine at home five hours ago."

Defendant offered this explanation of the accident: She was dropping Sindy off. She did not know why he ran out in front of her car. When he did, her car hit him. At this point, defendant became very emotional and began crying uncontrollably. As she cried, she fell to the ground again. Officers helped her up and she began to walk back toward her car. The officers escorted her to a patrol vehicle. Vizcarra asked defendant her name about 10 times. She told him where she lived. She said Sindy had assaulted her. She did not explain when or where he hit her. She did not say she had been threatened and she did not express any concern for her safety. When Vizcarra learned that defendant had a child, defendant refused to provide any information about the child. Eventually, Vizcarra determined the child was in a safe place.

Officer Nelson tested defendant and determined she was intoxicated. She was extremely distraught and crying. She told him she was the driver of the car. She said, "He jumped out in front of me. It was an accident." She did not explain any other events of the morning, and she did not say anything about being afraid of Sindy. Nelson arrested defendant and took her to the hospital for a blood draw. Defendant was so distraught that she fell to her knees in the hospital and said, "I killed my boyfriend."

At about 10:00 a.m., Crime Scene Technician Burrow went to the hospital to collect clothing and photograph defendant's injuries to her hands, leg, and face. Burrow observed a bruise and scratch on defendant's forehead, swelling on her lip, and a cut on the inside of her lip. The little finger of her right hand and the knuckle of the adjacent ring finger were injured. She had some scratches on her right arm and an abrasion on her right knee. Her shirt bore blood smudges.

At 10:20 a.m., defendant's blood was drawn against her will. Nelson did not remember if he noticed the blood on defendant's shirt; Burrow pointed it out to him.

Defendant's blood was determined to contain 0.29 percent alcohol, a trace of cocaine, and the active ingredient in marijuana. Two hours earlier, around 8:30 a.m., her blood alcohol would have been around 0.33 percent, or in the range of 0.31 to 0.34 percent. People can build up a tolerance to alcohol that allows them to function much better than people who are not accustomed to high levels of alcohol. A person's ability to drive would be impaired at both 0.29 and 0.33 percent blood alcohol.

Meanwhile, Detective Hance, who was responsible for investigating fatal traffic crashes, arrived on the scene around 9:00 a.m. He observed defendant's blue 2000 Buick LeSabre on the west side of A Street with its right front tire on the roadway of A Street. Hance noticed very light tire marks, which were not skid marks, on the roadway of Mariposa Street approaching the curb on the far side of A Street, as though the driver had failed to make the right turn sharply enough onto A Street. The tire marks got more pronounced as they approached the curb, which was marked by a curb strike. Once over the curb, the tire marks traveled in an arc across the grass and sidewalk and back toward the roadway of A Street. A lot of the grass was gouged away. There was no indication that the car was ever reversed; it had simply moved forward and then stopped.

Hance examined the front of the car for damage, or at least dust disturbance, from Sendy's contact. He found none, which meant Sendy did not contact the front or top of the car. There was a smudge on the hood, but Hance did not believe it was connected to

this incident. Hance concluded that at the time the car struck the curb, Sendy was either sitting on the curb or grass, or lying on his left side or leaning to his left on the grass in an attempt to get up or move out of the way. His center of gravity was low. If he had been standing, the car would have sustained damage to the hood, grill, bumper, and probably even the windshield. Sendy's clothing was coated with grease, old oil, grass, and dirt. His jacket and right pant leg were shredded. The car had a substantial oil leak, which transferred oil from the undercarriage onto Sendy and under the car toward the left rear tire where he was found. The undercarriage of the car bore a piece of red fiber that appeared to match Sendy's torn red bag found under the car, as well as some cotton cloth similar to Sendy's clothing. Hance learned the next day that Sendy suffered no broken bones in his arms or legs. The scene and Sendy's injuries were consistent with his having been run over by a car and log-rolled under the car. There was no evidence Sendy had been struck while in the street or on the curb, where shoe and skin scuffing were absent. And Hance did not find plausible the defense scenario that Sendy was holding his hands out and running backward in the road as the car drove toward him, and then he tripped backward when he ran into the curb. Under this scenario, Sendy would have had to run backward at the speed of the car.

Burrow arrived at the crime scene at 1:00 p.m. He observed tire marks on the road and leading up to the curb, where there was an impact mark. The grass was ripped up with tire impressions on the area between the sidewalk and the road. Burrow also observed an unopened beer can, an unopened orange juice container, and one of Sendy's shoes. On the car's hood, Burrow observed a slight smudge, but no denting. The right front fender was damaged and the front bumper was scratched, although Burrow could not determine whether the damage was recent. Grass and debris were on the bumper just below the grill.

Defendant's car was processed for fingerprints. No prints were found on the front of the car, but one, which did not belong to either defendant or Sendy, was located on the center front hood. Groceries were in defendant's trunk.

### ***Defendant's Interview***

At about 1:30 p.m., Detectives Tacadena and Benson interviewed defendant at the police station. She smelled strongly of alcohol, but she was able to communicate very well. She was able to fully understand the questions and she responded appropriately.

A video recording of defendant's interview was played for the jury. Defendant explained to the detectives that she and Sendy had known each other about five years. They were really good friends and they had been sexually intimate. The prior evening, defendant picked up Sendy, stopped at her grandmother's house to drop off \$100, then went to defendant's apartment. She dropped off the money because she thought Sendy would try to take it from her. She and Sendy spent the night at her apartment on West and Shields Avenues. They drank some wine and smoked marijuana laced with cocaine. She drank less than half of a bottle of wine. Around 7:00 a.m., something happened and Sendy "started tripping with [defendant]." "[H]e started acting all crazy." He hit her a couple of times—on the mouth and the head—and he scratched her arm. She got blood on her hands. This happened at her apartment. She decided she was going to take him home. She did not want any problems. In the car, they had no further physical altercation. As they drove into Sendy's neighborhood, he was trying to say something to her, and she told him, "Just shut the fuck up, talking to me." She said, "Let me just drop you off at the house." He said, "Fuck you, bitch. Let me out right here." He showed her where he wanted to get out. She turned and said, "Okay, well, you gonna get out, whatever, right here?" He said, "Yeah." She stopped the car on A Street in the same area her car was later found. She did not let him out anywhere else. The car was still in drive and she had her foot on the brake. He got out, walked around the car (she could not remember which way), and was on the sidewalk side. When he got out, he said, "Fuck

you, bitch,” because he was already mad. She later thought she may have first popped the trunk open for him to get his things. Once she started to drive, he ran in front of the car out of the blue. He just hopped out and ran in front of the car. She thought he was trying to hit her, get her attention, or tell her something. She did not know what he was doing. She was caught off guard. When he ran out in front of her, she tried to swerve and dodge him, but she hit him. It all happened so quickly. It was just an accident. He was in the street when she hit him. She was not speeding; she was only going about 10 or 15 miles per hour. She was just trying to go home. After hitting him, she backed her car up onto the curb to see if it would help, but she stopped because she thought she might hurt him even worse. This is how her car ended up on the curb. Afterward, she got out and tried to get people to help them. She explained that she could not remember exactly what happened because she blacked out from the blow Sendy inflicted on her head.

She noted that her car already was damaged on the front right side from her parking lot.

Throughout the interview, defendant explained that Sendy got out of the car on A Street in the same area that her car and his body were found. She never stated that she dropped him off somewhere other than that place, such as on Mariposa Street. She said she parked parallel to the curb on A Street in front of Stanley’s house and let Sendy out.

After the interview, the detectives took defendant to the crime scene because she wanted to further explain what had happened. Once there, Tacadena got out of the vehicle and defendant instructed him where to stand. Defendant told him to stand in front of Stanley’s house, as she had described during the interview. She said she let Sendy out near the mailbox and then she hit him a little farther forward on that same street. Benson asked her specifically several times, but she never said she let Sendy out anywhere along Mariposa Street.

Tacadena and Benson were later surprised to learn that defendant’s blood alcohol had been 0.29 percent at the time of the interview. She had functioned well for someone

with high blood alcohol. Benson did not attribute her inconsistent answers to her blood alcohol; he believed she was not being truthful.

### ***Reconstruction of the Incident***

Detective Hance testified that he used data recorded by defendant's car to help reconstruct the incident. The sensing diagnostic module controlling the airbags in defendant's car recorded data during the period the module was attempting to determine whether to deploy the airbags following an event. The pre-impact data collected by the module gave him five seconds of information that was useful in reconstructing the crash. Hance believed that the curb strike was the event that triggered the module to store the data from the preceding five seconds. Those data established the following:

At five seconds before the curb strike, the car was going 17 miles per hour (24.9 feet per second), with 29.44 revolutions per minute and 100 percent throttle (a reflection of the accelerator's use). The brakes were off.

At four seconds before the curb strike, the speed was 16 miles per hour (23.5 feet per second), with 16.64 revolutions per minute and zero percent throttle. The brakes were on. Hance believed defendant realized she had to negotiate a turn, so she let off the throttle and hit the brakes.

At three seconds before the curb strike, the speed was 11 miles per hour (16.1 feet per second), with 12.80 revolutions per minute and zero throttle. The brakes were off.

At two seconds before the curb strike, the speed was 10 miles per hour (14.6 feet per second), with 12.16 revolutions per minute and zero percent throttle.

At one second before the curb strike, the speed was 12 miles per hour (17.6 feet per second), with 21.76 revolutions per minute and 97 percent throttle. The brakes were off. Hance believed that defendant had negotiated the turn and then applied the throttle, which was on its way to 100 percent at this time. She "floored" the accelerator before striking the curb, then she must have applied the brakes to stop the car.

These data confirmed what Hance had concluded, and they provided extra information, such as the precise vehicle speeds. There was no evidence that defendant took any measures to avoid hitting Sendy.

The system was not capable of recording information at the time of impact; the closest data it recorded was one second before. The system did, however, record the brakes starting three seconds earlier than the other data. Thus, Hance was able to determine that the brakes were off during the period of eight, seven, and six seconds before the curb strike.

On cross-examination, Hance testified that after the incident, defendant's car was still functional and drivable. He noted that the car had an exhaust leak that made the car very loud.

### ***Sendy's Autopsy***

Dr. Chambliss performed an autopsy on Sendy's body at about 9:45 a.m. on January 10. Chambliss noted that Sendy's clothing was torn and covered with black grease and dirt. He had suffered abrasions and lacerations to the back side of his body and abrasions and pressure abrasions to the front. Neither his body nor his clothing showed signs of contacting the pavement. His body did show signs of having had contact with the wheels of the car. Most of his ribs were broken and his spine was fractured in both directions. His clavicle was fractured and his larynx suffered petechial hemorrhages caused by pressure to the chest. He suffered no broken bones in his arms or legs and there was no sign that the car had hit either leg. Chambliss found nothing consistent with Sendy having been upright while being struck by the car. He was either seated or lying down when he was hit, but Chambliss had no idea how he came to be in that position. Chambliss determined that Sendy's cause of death was crushing injuries of the chest due to have been run over by a car. The crush from the car would have prevented him from breathing.

Sendy's stomach contained some alcohol, but his blood did not. This indicated he had consumed alcohol, but it had not had time to enter his bloodstream and have any effect on him. Alcohol can take between 15 minutes and several hours for complete absorption into the bloodstream. Sendy's urine was found to contain cocaine.

***Prior Incidents Between Defendant and Oscar***

At the time of the incident, defendant had a child who was about one year old. Defendant and Oscar, the father of the child, were no longer dating, although the child was in Oscar's care. At trial, Oscar and his sister, Dorcus, testified about the following prior incidents.

On April 4, 2009, when the child was about six weeks old, Oscar was with defendant at her home. Defendant went out drinking with her friends and did not come home. Around 2:00 or 3:00 a.m., Oscar packed up the child and took her to Dorcus's house, where he was living.

At about 5:00 a.m., defendant showed up at Dorcus's house. Dorcus told Oscar to stay inside. Dorcus spoke to defendant through the metal screen door and refused to open the door. Defendant was intoxicated and Oscar told her she needed to sober up. He told her she needed to go home and come back in the morning. When Dorcus asked her if she was driving, defendant said she was not, but Dorcus later watched her drive away. Defendant was trying to handle the situation and she turned and walked away. But around 6:00 or 7:00 a.m., she returned, hollering and banging on the door. She yelled profanities at Oscar, telling him to come out. She was hysterical. This time, Oscar told Dorcus to stay inside with the baby, and he went out to see defendant. Oscar told her she needed to sober up so they could discuss their situation. Dorcus came out and got between them. She hugged defendant and told her to calm down. She said to her, "Right now, he can't give you the baby even if he wanted to because you are not in any condition to take the baby right now." Defendant smelled heavily of alcohol. Dorcus told her to go home, sleep it off, then come back. Dorcus said she was not going to give

her the baby and she should not be driving. Defendant told Dorcus to mind her own business; that was her baby. Defendant then directed her anger at Oscar and he had to hold her by the hands. Oscar told her he was taking the baby because of her drinking. She struggled against him, swung at him, and hit him on the chest. Defendant would not leave until Dorcus threatened to call the police. When she left, she yelled profanities at Dorcus. She yelled, "This is not over. I will be back. That's my baby. You are going to have to give her to me. This is not over." Dorcus told her to come back when she was not under the influence. After Dorcus closed the door, she heard something hit the door outside. Dorcus and Oscar called the police. When the police came, they encouraged Oscar to get a restraining order to keep defendant from coming to the house. They took a photograph of an injury on Oscar's face. Oscar obtained a restraining order against defendant and sought custody of the baby.

Dorcus never felt threatened by defendant because she was "an agreeable, easy person to get along with. It [was] only her drinking problem." When defendant drank, she would get mad if she did not get her way. Dorcus did not think defendant had a character for violence, except when she was drinking. Dorcus explained, "If she is drinking, then, yes. That is when I see a different [defendant], but the rest of the time, she is fine."

Oscar explained that there was physical contact back and forth during his relationship with defendant. When defendant was intoxicated, defendant became outspoken and could be provoked to violence if she did not get her own way. Oscar believed defendant was an excellent mother who loved her child; his only problem was with her drinking. Oscar had allowed defendant to have visits with the child as often as she liked, which was three to four times per week.

Then, in November 2009, at a Thanksgiving gathering, a family member told Dorcus there was a problem outside and she needed to come. When she went outside, she found Oscar holding defendant by the hands. Defendant was "really irate [and]

hollering at him.” As she struggled to get loose, she hit Oscar on his glasses, cutting his nose. Dorcus thought it appeared to be unintentional. Dorcus told Oscar to go inside so she could help him. Defendant was still upset outside. Oscar told Dorcus to call the police to come take defendant home.

### ***Prior Incident Between Defendant and Sendy***

In November 2009, an incident also occurred between defendant and Sendy. Mar’rees had seen defendant at the house, although Sendy never called her his girlfriend. One morning at about 1:30 or 2:00 a.m., Mar’rees heard the front door slamming and “a whole bunch of ruckus.” “[I]t ... sounded like people were pushing back and forth and trying to get out and move around.” Mar’rees heard defendant saying, “Give me back my stuff. Give me back my stuff.” Sendy responded, “What stuff? I gave you everything. I gave you everything. Go home. Just go home.” Sendy told defendant to leave because she was waking everyone up. Mar’rees heard defendant banging on the door and saying, “Let me in. Let me in. Let me in.” Sendy said, “No. I am not going to let you in. Go home. I gave you your stuff. Go home.” Mar’rees heard more banging on the door, then a window breaking. Defendant was screaming, “Let me in.” Sendy said, “What stuff? I gave you everything. Nothing in here belong[s] to you.” The window defendant broke was the large window in the middle of the living room. Mar’rees did not know if Sendy and defendant had been drinking that night. This type of disturbance happened more than once.

## **II. Defense Case**

### ***Events Surrounding the Incident***

On the night of January 8, defendant called her great-grandmother, Virginia, and said she was going to drop off some money for Virginia to keep for her because “he was coming after the money.” Defendant said she could not keep money at her apartment because if she went to sleep, she would have no money. Defendant brought the money over. This was the first time she had done this. Defendant called Virginia a second time

and came by again to get some of the money back. She told Virginia to just bring the money to the door. When Virginia came to the door, the porch light was on, but she did not take a look at defendant. Several hours later, Virginia got a third call from defendant. This time she was upset and crying. Virginia heard a man's voice, saying "GG," which was Virginia's nickname. Virginia thought the voice was defendant's boyfriend, but she had heard his voice only once. Virginia could not understand what defendant was saying. She was crying and calling her name. Then the phone went dead.

Luis was Alfonzo and Alicia's son. After both of his parents had left that morning, he heard tires screeching. The noise was not like brakes, but rather like traction from accelerating. About a minute later, he heard a woman yelling in a panic. The woman was very loud and emotional, yelling, "Oh, my God. Why did this happen? God damn it." Luis saw the car up on the curb. Several times, the woman, who was alone, looked under the car, sat down, then stood up.

### ***Reconstruction of the Incident***

Mark Whelchel was a consulting engineer who worked in the field of accident reconstruction. When he looked at photographs taken after the incident, he believed the markings on the curb near the left front tire were consistent with the driver having attempted to back up; there was a black rubber mark on the curb face that could only have been caused by the car being in reverse. The mark would not have occurred when the car went forward and off the curb.

Whelchel explained that there can be a 1.0 or 1.5 second delay on the recording or pre-impact data. He thought Sendy may have been walking across the street, then he may have approached the car from the right front side as the car was turning right. He might have put his hands on the front of the car, making the marks on the car. Defendant might have swerved to the left to avoid him approaching the car on the right. She might have intercepted him somewhere along the right front fender where a smudge was seen. As he was applying his hands to the front of the car, he might have been "backpedaling

somewhere to the area of the curb.” He could have done so at 10 miles per hour. At the curb, he might have tripped backward and ended up lying on the ground. The sporadic braking pattern suggested defendant might have been driving with two feet; the pattern was not consistent with using the same foot for both the gas and brake. When the car struck the curb, defendant’s foot might have accidentally hit the accelerator or applied it more heavily. Whelchel believed that the timing of the throttle was at the curb or beyond. He also thought 10 miles per hour was a slow speed to intentionally try to hit someone.

Whelchel and a private investigator attempted to reenact parts of the incident, driving a vehicle to duplicate the path and speed of defendant’s car as determined by Whelchel. They set up a video camera to record the experiment.

Whelchel and the investigator also observed defendant’s car. When the engine was turned on, the car was very loud. It sounded as though something was wrong with the muffler. A person would know the car was approaching.

### ***Battered Person Syndrome***

Erick Hickey, an expert witness on Battered Woman’s Syndrome and other issues of violence, explained that women who stay in abusive relationships experience a learned sense of helplessness where they lose their sense of empowerment and become captive. They are intimidated and feel they lack options. Healthy people are not interested in controlling another person, but abusive people are. Batterers sometimes escalate their violence because they need more control, for example, if the battered person is not compliant with their demands. Batterers are often insecure and anxious. Sometimes both people in a relationship are violent. The abuse is always about control.

Hickey explained that in a hypothetical relationship between a 29-year-old woman and a 48-year-old man with a history of armed bank robbery, violence in a prior relationship, and physical abuse against the current woman, the man would be the dominant batterer. He would be a father figure and his violent past would make control

easy to maintain. He would likely be violent if the woman did not comply. She would likely fear being killed if she called the police, and this fear would be realistic.

According to Hickey, a batterer may feel invincible and have no reason to fear the person he has been dominating. He may place himself in front of a car, feeling that the person would stop and could not hurt him. He may engage in irrational behavior based on this belief.

### ***Sendy's Prior Acts***

On November 4, 1986, Sendy committed armed bank robbery, in which he used a pistol, commanded everyone to lie on the floor, and stole over \$11,000. He pled guilty to the crime on March 17, 1987. Cynthia worked at the bank at the time of the robbery. She saw Sendy enter the bank wearing a mask, put his gun to the head of the security guard, and shove him to the floor. Cynthia immediately pressed the silent alarm button. Sendy jumped over the counter and ran up to the teller. Cynthia and her customer got under her desk. Cynthia could hear Sendy yelling at people to do things. He made Cynthia get up and find Lorene, who could open the vault. Sendy pressed his gun to the back of Lorene's head and made her open the vault. He did not ever fire the weapon. Lauri, who was also at her desk, immediately recognized Sendy's voice because he had robbed the bank the prior month. He had used a gun during that robbery as well. Another employee also recognized Sendy's voice from the prior robbery.

Pamela grew up with Sendy and was romantically involved with him in April 2007. He was living at her house. Sendy got upset because he thought Pamela was going back to her ex-husband. Sendy and Pamela got into an argument that became physical. Sendy said, "I can't take this. I will kill." He said, "I'm certifiable. You know, I'm crazy." She tried to call the police, but he grabbed the telephone and threw it against the wall. She tried to use her cell phone, but he grabbed her purse and repeatedly told her he was going to kill her. He pinned her against the couch with his right arm and told her, "I will kill you." Then he choked her with both hands for about five minutes.

Pamela feared for her life so she told him she was pregnant and she pretended to fall unconscious. She was afraid of him because she had never seen him like that. Pamela's throat and neck were extremely sore. She locked herself in her room and went to sleep. She called the police the next day. She and Sendy worked out their difficulties and continued to date. She had no further problems with him. Although he often said he was crazy or certifiable, he rarely spoke out of anger.

### ***Defendant's Prior Acts***

Several of defendant's relatives testified that they saw defendant regularly at family gatherings, where she never drank to excess. They had never seen her intoxicated or violent. At their family gatherings, people did not get intoxicated. Defendant was a quiet, peaceful person who stayed mostly to herself. She would leave if disagreements arose. She always baked and helped out in the kitchen. She was a good mother who provided well for her baby. Most of the relatives admitted, however, that they did not socialize with defendant outside of family events, had never seen her with Sendy, and did not realize she did not have custody of her child. Some stated they were surprised to learn that the current case involved drunk driving. One relative told an officer that defendant and Sendy had been dating on and off for four or five years and they were always fighting.

### **III. Rebuttal Evidence**

#### ***Events Surrounding the Incident***

Virginia, defendant's great-grandmother, told Detective Benson that defendant visited her on January 9, around 1:00 a.m. Defendant told Virginia she wanted to drop off some money for bills so she would not lose it.

Around 3:00 or 4:00 a.m., defendant and Sendy arrived at the apartment of Sendy's friend, William. Defendant and Sendy had been drinking before they arrived, but they did not drink at William's apartment. William had known Sendy for about 35

years, and he knew defendant through Sindy. William had seen defendant intoxicated. She and Sindy would argue when she was drunk.

At about 5:00 a.m., defendant returned to Virginia's house, wanting \$40 of the money back. Virginia did not mention to Detective Benson a call from defendant in which she was crying and unintelligible.

After the incident, at about 8:40 a.m., Officer Frausto interviewed Alfonzo in Spanish. Alfonzo explained that at about 8:30 a.m., he backed out of his driveway and drove eastbound on Mariposa Street. He saw a blue car traveling toward him at a high rate of speed. He could not say if he saw anyone inside or outside of the car. When he returned from the bank, he saw the same car up on the sidewalk, as though it had been involved in an accident. At that time, a black female and three Asian males were standing by the car.

Frausto also interviewed Luis. Luis said he saw a woman next to the blue car screaming, "Oh, my God. Why did this happen? God, damn it." Another witness also heard defendant yelling for help.

### ***Reconstruction of the Incident***

Detective Hance explained that it was possible defendant put her car into reverse momentarily, but there was no evidence the car actually went up and over the curb backwards.

### ***Defendant's Prior Acts***

Gerald Laney had known Sindy most of his life, and had known defendant for about three years. He saw them together often. Every time he saw them, defendant was drinking. He called her drinking "functional." She could be drunk, but she still knew how to function. She usually became quiet when she drank. She would try to be proper, but she was not normal and he could tell something was wrong. He never stayed around long enough to see how much she consumed. Once, defendant and Sindy got into an argument in Gerald's presence.

### ***Prior Incident Between Defendant and Oscar***

On April 4, 2009, Officer McQuay was dispatched to speak to Oscar and Dorcus. Oscar explained that a prior incident of domestic violence had occurred during Thanksgiving 2008 when defendant broke his nose. Oscar showed McQuay the scar. Dorcus said she was present when defendant “struck [Oscar] in the nose, breaking his nose.”

Oscar told McQuay that on the evening of April 3, 2009, he was with defendant in her apartment. Around 12:30 a.m., defendant left the apartment. She was extremely intoxicated. Oscar and the baby stayed home. She returned, but left again at 1:15 a.m. At some point, Oscar left with the baby. He explained to McQuay that he did not feel comfortable staying there with the baby, “especially under these circumstances, considering that [defendant] was intoxicated.” He said defendant later showed up at his house extremely intoxicated and upset. When she left, he heard something hit the screen door. She returned around 6:30 a.m. He went outside to speak with her and calm her down, but she began assaulting him. He tried to control her, but she was able to hit him several times on the head and body. He had visible swelling over his left eye from one of her punches.

### **DISCUSSION**

Defendant contends the trial court erred by refusing to instruct the jury on the lesser included offense of voluntary manslaughter based on heat of passion and provocation. We disagree.

“The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request. [Citations.] That obligation encompasses instructions on lesser included offenses if there is evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser. [Citations.]” (*People v. Blair* (2005) 36 Cal.4th 686, 744-745.) “[I]n a murder prosecution, this includes the

obligation to instruct on every supportable theory of the lesser included offense of voluntary manslaughter, not merely the theory or theories which have the strongest evidentiary support, or on which the defendant has openly relied.” (*People v. Breverman* (1998) 19 Cal.4th 142, 149.)

The trial court is required to instruct on a defense only if it is supported by substantial evidence. (*People v. Watson* (2000) 22 Cal.4th 220, 222.) Substantial evidence is that which is reasonable, credible, and of solid value. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) “[S]peculation is an insufficient basis upon which to require the giving of an instruction on a lesser included offense.” [Citations.] “[T]he existence of “any evidence, no matter how weak” will not justify instructions on a lesser included offense ....’ [Citation.] Rather, substantial evidence must exist to allow a reasonable jury to find that the defendant is guilty of a lesser but not the greater offense. [Citation.] “Substantial evidence is evidence sufficient to “deserve consideration by the jury,” that is, evidence that a reasonable jury could find persuasive.” [Citation.]” (*People v. Valdez* (2004) 32 Cal.4th 73, 116, fn. omitted.) “[I]t must be evidence from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist. [Citations.]” (*People v. Blair, supra*, 36 Cal.4th at p. 745.) Whether substantial evidence supports the instruction is determined without reference to the credibility of that evidence (*People v. Marshall* (1996) 13 Cal.4th 799, 847), and the testimony of one witness, including the defendant, can constitute sufficient evidence to require the court to instruct on its own initiative (*People v. Lewis* (2001) 25 Cal.4th 610, 646). Doubts as to the sufficiency of the evidence to warrant an instruction are resolved in favor of the defendant. (*People v. Tufunga* (1999) 21 Cal.4th 935, 944.) On appeal, we independently review the trial court’s failure to instruct on a lesser included offense. (*People v. Cook* (2006) 39 Cal.4th 566, 596; *People v. Manriquez* (2005) 37 Cal.4th 547, 584.)

“Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.’ [Citation.] Malice aforethought may be express or implied. [Citation.] ‘Express malice is an intent to kill.... Malice is implied when a person willfully does an act, the natural and probable consequences of which are dangerous to human life, and the person knowingly acts with conscious disregard for the danger to life that the act poses.’ [Citation.] A killing with express malice formed willfully, deliberately, and with premeditation constitutes first degree murder. [Citation.] ‘Second degree murder is the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder.’ [Citation.]

“Manslaughter is a lesser included offense of murder. [Citations.] The mens rea element required for murder is a state of mind constituting either express or implied malice. A person who kills without malice does not commit murder. Heat of passion is a mental state that precludes the formation of malice and reduces an unlawful killing from murder to manslaughter. Heat of passion arises if, “at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.” [Citation.] Heat of passion, then, is a state of mind caused by legally sufficient provocation that causes a person to act, not out of rational thought but out of unconsidered reaction to the provocation. While some measure of thought is required to form either an intent to kill or a conscious disregard for human life, a person who acts without reflection in response to adequate provocation does not act with malice.” (*People v. Beltran* (2013) 56 Cal.4th 935, 941-942, fn. omitted.)

“[H]eat of passion [is] a circumstance which *mitigates* culpability for a killing but does not *justify* it. [S]ociety expects the average person not to kill, even when provoked. [W]e punish a person who kills in the heat of passion or upon provocation because ‘[h]e

did not control himself as much as he *should* have, or as much as common experience tells us he *could* have, nor as much as the ordinarily law-abiding person *would* have.’ [Citation.] However, if one *does* kill in this state, his punishment is mitigated. Such a killing is not justified but *understandable* in light of ‘the frailty of human nature.’ [Citation.] The killing reaction therefore is the *extraordinary* reaction, the unusual exception to the general expectation that the ordinary person will not kill even when provoked.” (*People v. Beltran, supra*, 56 Cal.4th at p. 949.)

What distinguishes the “heat of passion” form of voluntary manslaughter from murder is provocation. (*People v. Lee* (1999) 20 Cal.4th 47, 59.) Although the provocation that “incites the defendant to homicidal conduct in the heat of passion” must be caused by the victim or be conduct reasonably believed by the defendant to have been engaged in by the victim (*ibid.*), it may be physical or verbal (*ibid.*) and can arise from a series of events over a period of time (*People v. Kanawyer* (2003) 113 Cal.App.4th 1233, 1245). The passion aroused need not be rage or anger, but can be any intense, high-wrought, violent, or enthusiastic emotion other than revenge. (*People v. Breverman, supra*, 19 Cal.4th at p. 163; *People v. Berry* (1976) 18 Cal.3d 509, 515.) Fear and panic are such emotions. (See *People v. Breverman, supra*, at pp. 163-164.)

“The heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.]” (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.) To satisfy the subjective component, “[t]he defendant must actually, subjectively, kill under the heat of passion. [Citation.]” (*Ibid.*) To satisfy the objective, reasonable person component, the defendant’s heat of passion must be due to sufficient provocation. (*People v. Manriquez, supra*, 37 Cal.4th at p. 584.) Sufficient provocation is the type that would cause “an average, sober person [to] be so inflamed that he or she would lose reason and judgment.” (*People v. Lee, supra*, 20 Cal.4th at p. 60.) This is so “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.]” (*People v. Steele, supra*, at pp. 1252-1253.) Because the test of the provocation’s sufficiency is objective—based on a reasonable person standard—the fact the defendant “has particular susceptibilities to events is irrelevant in determining whether the claimed provocation was sufficient. [Citation.]” (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 83.)

Here, defendant argues that the trial court erred in finding there was no substantial evidence of provocation because the jury could reasonably have inferred that defendant “drove at [Sentry] either out of fear or in anger in reaction to his conduct earlier that morning at her home *and then in and outside of the car just before she ran over him.*” (Italics added.) She explains that the evidence supported a finding that Sentry’s conduct provoked her because he continued to hit her just prior to the killing and that she killed Sentry intentionally but in the heat of passion. She argues that she was apparently lacking noticeable injuries when she and Sentry spoke with Sentry’s sister, and the photographs taken after the crime showed swelling and bruising to her lip and forehead, a scratch on her arm, and blood on her shirt. She says the court was required to instruct on provocation “even though she did not expressly state she was angry or fearful and even though she claimed [the killing] was an accident.”

The People correctly respond that this argument hinges entirely on the speculation that she harbored subjective anger or rash judgment while in the car prior to dropping off Sentry and that some sort of provocation occurred in the car moments before the killing that would compel a reasonable person to act in the heat of passion without time to cool off.

Defendant’s version of the events was a tragic accident. She repeatedly explained that she hit Sentry accidentally. When she dropped him off, he got out of the car and inexplicably ran in front of her as she started driving. She was just going to drive home since he wanted to be let out. She never suggested that she was acting under any type of

strong emotion or passion (other than what she experienced *after* running over Sedy). She said she and Sedy exchanged some profanities because he was still mad, and after she dropped him off, he approached the car and she thought he might hit her again. While this may have supported a self-defense theory (upon which the court instructed), it did not support a heat of passion theory. The only evidence of adequate provocation—with any prospect of causing an average, sober person to be so inflamed that she would lose reason and judgment, or of causing an ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment—had occurred across town at defendant’s apartment when Sedy hit her. But this occurred before they got in the car, drove across town, stopped for an uneventful 10- to 15-minute conversation with Sharon, got back in the car, and started driving again. Their exchange of profanities, such as “Shut the fuck up” and “Fuck you, bitch,” did not amount to legally sufficient provocation, and there was no evidence that it actually provoked defendant anyway.

Defendant argues that the evidence supported the inference that Sedy hit her in the car just before she killed him, arousing her passions. This scenario, however, is pure speculation. There was absolutely no evidence that Sedy hit defendant again after they left her apartment. In fact, defendant herself stated more than once that he did not hit her after they left the apartment. They exchanged words, but no physical violence occurred after their departure. Nonetheless, defendant points to Sharon’s failure to notice any injuries on defendant as evidence that she was not yet injured, and therefore must have been injured after that visit and right before the incident. But Sharon’s failure to notice was unremarkable in light of Officer Vizcarra’s identical failure to notice any injuries or blood marks after defendant alleges they occurred. The cut inside defendant’s lip was visible only when she pulled her lip up and out, and the swelling was apparently not obvious, at least not at that time. The photographic evidence demonstrates that the blood marks on her shirt appeared to be smudges rather than dark stains. In sum, there was no

evidence that defendant actually and subjectively killed in the heat of passion caused by legally sufficient provocation. The trial court did not err by refusing to instruct on the heat of passion theory of voluntary manslaughter.

**DISPOSITION**

The judgment is affirmed.

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Kane, J.

WE CONCUR:

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Gomes, Acting P.J.

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Detjen, J.