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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

GUILLERMO RODRIGUEZ,

Defendant and Appellant.

G044650

(Super. Ct. No. 07NF2063)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard M. King, Judge. Affirmed.

Eric R. Larson, 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, William M. Wood and Bradley A. Weinreb, Deputy Attorneys General, for Plaintiff and Respondent.

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In October 2010, a jury convicted defendant of first degree murder (Pen. Code, § 187, subd. (a)),<sup>1</sup> making a criminal threat (§ 422), and dissuading a witness (§ 136.1, subd. (b)(1)). The court found true four serious felony prior convictions and four prior strike convictions. (§§ 667, subds. (a)(1) & (d), 1170.12, subds. (b) & (c)(2)(A)). The court sentenced defendant to prison for 110 years to life. Defendant contends the court erred by denying his request for a pinpoint instruction on voluntary manslaughter. We disagree and affirm the judgment.

## FACTS

In October 2006, defendant worked at an apartment complex as a maintenance man. His girlfriend, Deena DeRouchey, worked as a leasing agent for the same complex. Defendant and DeRouchey lived in separate apartments in the complex. The victim, Donna Dutton, also lived in an apartment at the complex with her husband and their 12-year-old daughter.

Defendant invited DeRouchey to dine with his family at his apartment on Sunday, October 15, 2006. When DeRouchey arrived at defendant's apartment that evening, Dutton and some of defendant's sons were there, including defendant's oldest son, Junior, who was then 18 years old. Defendant, DeRouchey, and Dutton drank beer before dinner. Dutton did not stay for dinner.

After dinner, defendant and DeRouchey made a trip to the liquor store to buy more beer. Later, Dutton came by the apartment periodically. Around 10:30 p.m., Dutton returned with a 12-pack of beer.

Around 1:00 a.m., police responded to a complaint of noise at the apartment and told the occupants to keep the noise down. Defendant, DeRouchey,

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<sup>1</sup> All statutory references are to the Penal Code.

Dutton, and Junior were still awake at this time. Three of defendant's other sons were asleep in the apartment's second bedroom.

After the police left, defendant and DeRouchey went out to buy more beer. When defendant and DeRouchey returned to the apartment, defendant went into the master bedroom while DeRouchey went out to the balcony. Defendant came to the balcony and told DeRouchey that Dutton and Junior were having sex. Defendant looked enraged. He told DeRouchey to "get [Dutton] out."

DeRouchey went into the master bedroom. Junior was dressed. Dutton was getting dressed. When DeRouchey told Dutton to leave, Dutton said, "Oh fuck you. I don't want to go."

DeRouchey and Dutton went to the dining room near the apartment's front door. Dutton, who was angry, called DeRouchey a "slut." Dutton pointed at defendant and then at DeRouchey, as she said, "Fuck you, and fuck you, and I'll have your job, and I'm going to have your job too."

Defendant, who was very angry, ordered DeRouchey and Junior to go into the second bedroom. Defendant said he was going to sit down and talk with Dutton. Defendant had drunk about 16 beers by this time.

DeRouchey and Junior went into the second bedroom where three of defendant's other sons were sitting on the floor. At one point, DeRouchey heard Dutton yelling for her.

DeRouchey left the bedroom and saw defendant sitting at a table and Dutton sitting on the floor. Defendant was "hovering" above Dutton, and Dutton was looking up at him. Dutton said she wanted to go home or to a hospital because she was not feeling well. Defendant ordered DeRouchey to go back in the bedroom.

After about 15 to 20 minutes, DeRouchey came out and saw Dutton lying on the floor on top of a blanket. Defendant told DeRouchey "not to say a fucking word."

Defendant wrapped Dutton's body in a blanket, pulled it into the bathroom, and shut the door. He told DeRouchev and Junior to tell people Dutton had left the apartment at 2:30 a.m. and they did not see her after that.

DeRouchev told defendant he should have let Dutton go home. Defendant said words to the effect of, "Yeah, I know, I should have. . . . She should have gone home . . . , but she was going to get between me and my boys, and nothing gets between me and my boys. I've just gotten them back."

That night, defendant told DeRouchev to bring her car over. Defendant and Junior put Dutton's body, wrapped in the blanket, in DeRouchev's trunk.

Defendant let Junior leave, but made DeRouchev stay in the car and drive. Defendant said he had "figured out a spot" near where he used to live. DeRouchev and defendant drove for a little over an hour. Defendant directed DeRouchev to a dirt road, where he had her turn off the car lights and remotely open the trunk. Defendant went behind the car; DeRouchev felt the vehicle lift up "like weight being pulled out of the car" and heard the trunk slam shut.

On October 21, 2006, quail hunters discovered a woman's body down a steep ridge.

An officer interviewed defendant the next day. Defendant claimed Dutton left his apartment at about 2:00 a.m. on October 16, 2006.

A forensic pathologist determined Dutton died from strangulation. With manual strangulation, a victim can lose consciousness within seconds, but will die only after three-to-five minutes of pressure. Junior's DNA profile was found on Dutton's fingernails. Dutton's blood tested positive for marijuana and an alcohol level of 0.14 percent.

In December 2006, defendant told his estranged wife, Christina, that he had killed Dutton. He told Christina: (1) he came back from buying beer to find Junior zipping up his pants and Dutton hiding naked in the bedroom closet; (2) when he

confronted Dutton, she threatened to call child protective services, so he strangled her with a belt so tightly that the belt broke; and (3) he threatened to kill DeRouche and Junior if they told anyone.

In March 2007, Christina was interviewed by police detectives and made a recorded telephone call to defendant that was played for the jury at trial. During the call, defendant told her, “You don’t say shit about what I told you about that night.” When she agreed she would not, defendant threatened, “You better not, for our sake and yours baby.” After the phone conversation, Christina felt scared, so she moved into a shelter with their daughters. (Previously, she and their daughters had lived with defendant in the apartment, moved out, and then moved back in with him in a different apartment.

## DISCUSSION

### *Jury Instruction on Voluntary Manslaughter*

Defendant contends the court erred by denying his request for a pinpoint instruction amplifying CALCRIM No. 570, the standard instruction on voluntary manslaughter. Under CALCRIM No. 570, (1) murder may be reduced to voluntary manslaughter if a defendant acts under the heat of passion, and (2) a defendant acts under the heat of passion if he or she reacts to provocation that “would have caused a person of average disposition to act rashly and without due deliberation.”

Before the judge charged the jury, defense counsel asked the court to instruct the jury that an average person need *not* be provoked to kill, but only to act rashly and without deliberation. Defense counsel relied on the notes to CALCRIM No. 570, whose “Authority” section states, “‘Average Person’ Need Not Have Been Provoked to Kill, Just to Act Rashly and Without Deliberation,” citing *People v. Najera* (2006) 138 Cal.App.4th 212, 223 (*Najera*). The court denied defendant’s request after reviewing *Najera* and concluding the case was not authority for giving the pinpoint instruction, *and*

after deciding the concept was already conveyed in the standard language of CALCRIM No. 570.

Accordingly, the court instructed the jury with CALCRIM No. 570, without modification, as follows: “A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of a sudden quarrel or in the heat of passion if: 1, The defendant was provoked; 2, As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; and 3, The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment. [¶] Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection. [¶] In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time. [¶] . . . It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment. [¶] If enough time passed between the provocation and the killing for an ordinary person of average disposition to cool off and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder.”

This is an accurate statement of the law. Indeed, defendant concedes CALCRIM No. 570 “is generally correct.” Voluntary manslaughter is statutorily defined as the unlawful killing of a person without malice upon a sudden quarrel or heat of passion. (§ 192, subd. (a).) “The heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively. . . . “[T]his heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances,” because “no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.” [Citation.] [Citation.] [¶] “To satisfy the objective or “reasonable person” element of this form of voluntary manslaughter, the accused’s heat of passion must be due to “sufficient provocation.””” (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1143-1144.)

But defendant argues his requested instruction “was a correct statement of the law and would have prevented any potential misinterpretation.” It is true that a “criminal defendant is entitled, on request, to instructions that pinpoint the theory of the defense case” if supported by the evidence. (*People v. Gutierrez, supra*, 28 Cal.4th at p. 1142; § 1093, subd. (f); 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 607, p. 866 [judge must give any correct instruction on defense theory of the case justified by the evidence, no matter how weak or unconvincing].) “On the other hand, a trial court may refuse to give an entirely accurate instruction if it is duplicative . . . .” (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 277; see also *People v. Bell* (2009) 179 Cal.App.4th 428, 434-435 [trial court may refuse proffered instruction if an incorrect statement of law, argumentative, duplicative, or confusing].)

Here, the court properly denied defendant's request for a pinpoint instruction on the objective "average person" standard, because the requested language was duplicative of instructions already contained in CALCRIM No. 570. CALCRIM No. 570 states: "The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment. [¶] . . . [¶] . . . In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment. [¶] If enough time passed between the provocation and the killing for an ordinary person of average disposition to 'cool off' and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis." These instructions are straightforward: the provocation must be sufficient to provoke an average person to act rashly and without due deliberation. Nothing in CALCRIM No. 570 ambiguously suggests that the provocation must be sufficient to provoke an average person to kill. We presume the jury understood CALCRIM No. 570 and did not improperly infer a requirement unsupported by the text. "Jurors are presumed to be intelligent, capable of understanding instructions and applying them to the facts of the case." (*People v. Lewis* (2001) 26 Cal.4th 334, 390.)

Nonetheless, defendant argues CALCRIM No. 570's instructions on the "average person" standard were potentially ambiguous here, as reflected in and possibly exacerbated by the prosecutor's closing argument. Defendant expressly declines to accuse the prosecutor of prosecutorial misconduct. Instead, defendant argues "the only reasonable interpretation of the record is that the prosecutor did not understand the law of voluntary manslaughter as it applied in this case and as set forth by this Court in *Najera*, and the prosecutor thought [his] argument was legally and factually correct based on the standard instructions that the court gave in this case."

In *Najera*, *supra*, 138 Cal.App.4th 212, the defendant stabbed and killed the victim about five to ten minutes after the victim called the defendant a “‘jota’ (translated as ‘faggot’).” (*Id.* at p. 216.) During closing argument, the prosecutor in *Najera* stated: “‘Heat of passion is not measured by the standard of the accused . . . . As a jury, you have to apply a reasonable, ordinary person standard . . . . *Would a reasonable person do what the defendant did? Would a reasonable person be so aroused as to kill somebody? That’s the standard.*” “During rebuttal, the prosecutor stated: ‘*[T]he reasonable, prudent person standard . . . [is] based on conduct, what a reasonable person would do in a similar circumstance. Pull out a knife and stab him? I hope that’s not a reasonable person standard.*’” (*Id.* at p. 223.) In *Najera*, we explained that the italicized portions of the prosecutor’s statements were incorrect: “An unlawful homicide is upon “a sudden quarrel or heat of passion” if the killer’s reason was obscured by a “provocation” sufficient to cause an ordinary person of average disposition to act rashly and without deliberation. [Citation.] The focus is on the provocation — the surrounding circumstances — and whether it was sufficient to cause a reasonable person to act rashly. How the killer responded to the provocation and the reasonableness of the response is not relevant to sudden quarrel or heat of passion.” (*Ibid.*) We noted that the prosecutor had “interspersed correct statements of the law with the incorrect ones. . . .” (*Id.* at p. 224.) We concluded: “The trial court correctly instructed the jury to follow the court’s instructions, not the attorneys’ description of the law, to the extent there was a conflict. We presume the jury followed that instruction.” (*Ibid.*)<sup>2</sup>

Here, the prosecutor argued in rebuttal: “[A] verdict of first degree murder or second degree murder in this case is justice. [¶] What is not justice is a voluntary

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<sup>2</sup> The Attorney General inaccurately argues that *Najera*, is inapposite because it involved a prior version of CALCRIM No. 570 which was arguably ambiguous as to the average person standard. Not so. *Najera* involved CALJIC No. 8.42, which is substantially similar to the current version of CALCRIM No. 570 on this issue.

manslaughter. The instruction talks about what a reasonable person would do, how a reasonable person would react, and as soon as we come to the conclusion that no reasonable person, when being confronted with, ‘I’ll call social services and they’ll take your kids,’ ‘Knock yourself out. I’ve done nothing wrong.’ A reasonable and rational person doesn’t send out witnesses, take off his belt, wrap it around a woman’s neck and apply pressure three to five minutes until that woman dies. . . . Ask yourself, ‘Would a reasonable person do that?’ And as soon as that answer is a resounding, ‘No,’ you know that is not a voluntary manslaughter.” The prosecutor further argued: “The provocation that the law talks about when you reduce a murder to a voluntary manslaughter is objective. What would a reasonable person do? . . . [T]he reasonable person would never do . . . what the defendant did that night. That’s why it’s not manslaughter.”

As in *Najera, supra*, 138 Cal.App.4th 212, these statements by the prosecutor were incorrect. But, also as in *Najera*, the prosecutor interspersed correct statements of the law with the incorrect ones, stating in his closing argument: “Voluntary manslaughter, how do we get there? We get there with the defendant being provoked. As a result, he acted rashly and under the influence of intense emotion that obscured his judgment, and the provocation would have caused a person of average disposition to act rashly without due deliberation that is formed from passion rather than judgment. [¶] . . . [¶] If enough time has passed between the provocation and the killing for a reasonable person to cool off, then the killing is not reduced to voluntary manslaughter. If the facts in this case were Donna telling defendant, ‘I’m calling social services and you’re going to lose your kid,’ and right then he goes for the throat, he chokes her to death and she dies, that’s a different case.” In rebuttal, the prosecutor argued: “[T]here [are] two different types of provocation that the judge is going to talk to you about. There is the provocation that drops a first degree murder to a second degree murder. . . . [¶] . . . Was he provoked to act so rashly that it takes away the

premeditation and deliberation and makes it a second degree murder, and that's for you to decide. I submit there is evidence for and against."

Furthermore, as in *Najera, supra*, 138 Cal.App.4th 212, the court's instructions cautioned the jury against being misled by an attorney's incorrect statements. The court instructed the jurors, "If you believe that the attorneys' comments on the law conflict with my instructions you must follow my instructions." The court also instructed them that, in counsel's "closing arguments, the attorneys discuss the case, but their remarks are not evidence." The court further instructed them that "[p]rovocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter."

The jury's findings reveal it was not misled by the prosecutor's incorrect statements. (*People v. Cain* (1995) 10 Cal.4th 1, 36 [appellate court considers challenged instruction, instructions as a whole, jury's findings, and counsel's closing arguments in reviewing alleged instructional error].) The jury found defendant guilty of premeditated first degree murder, not second degree murder. Thus, the jury found defendant was capable of premeditation and deliberation when he killed Dutton. Obviously then, the jury found him capable of acting with reason and judgment, rather than acting rashly and under the influence of intense emotion that obscured his reasoning or judgment.

Finally, we look at defense counsel's closing argument to determine whether the alleged instructional error "would have misled a reasonable jury . . . ." (*People v. Cain, supra*, 10 Cal.4th at pp. 36-37.) Defense counsel's closing argument correctly explained the "average person" standard for purposes of the defense of voluntary manslaughter: "[T]he law does not say that the provocation must be such that an ordinary person or average person would have killed. That's not what the law requires. All the law requires, that the provocation be such that it would move an ordinary, average person to act rashly, impulsively, violently. And so we know that custody battles, any challenges to taking away children from parents raises the most

intense, most emotional reactions in people. . . . Nothing is more personal. Nothing is more intense. Nothing is more long-lasting, and we know from the evidence of this case how important that was to [defendant]. So his reaction to this kind of provocation would have been reasonable. It would have been sufficient provocation.”

In sum, the court did not err by denying defendant’s request for a pinpoint instruction on the average standard for purposes of the defense of voluntary manslaughter.

#### DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.