

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

THANH TAN PHAN,

Defendant and Appellant.

G045029

(Super. Ct. No. 08WF0487)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed as modified.

Kevin D. Sheehy, 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 Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

\*

\*

\*

Defendant Thanh Tan Phan appeals his conviction for attempted murder (Pen. Code, §§ 187, subd. (a), 664, subd. (a))<sup>1</sup> arguing the court should have given a jury instruction on the lesser included offense of attempted voluntary manslaughter. Because we conclude the evidence did not support such an instruction, we reject defendant's argument and affirm the judgment. We do agree with both parties that defendant's custody credits were incorrectly calculated and order a correction.

## I

### FACTS

The essential facts of this case are not in dispute, and we need not recite them in great detail. We present the facts in the light most favorable to the judgment in accord with established principles of appellate review. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

On the night of March 8, 2008, UCI student Tran Vo and his girlfriend Kelly went out to dinner at Hoa An, a restaurant in Garden Grove. Shortly after they arrived, one of Kelly's friends and her boyfriend, Tuan Nguyen, arrived and joined them. During dinner, which lasted about an hour, Vo had about four bottles of beer while Nguyen had one or two.

Sometime during dinner, three men, including defendant, walked up to the table. Vo immediately sensed there was a problem between Nguyen and the three men. Nguyen looked up, and defendant looked at him, with what Vo characterized as a "very intense looking, like mad-dog looking" stare. Nguyen said nothing was wrong. The three men paused for a moment, then walked away and sat at a table. One of the men clenched his hand in a fist toward Nguyen. Vo was concerned because he did not want any trouble.

---

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

After about 15 minutes, Vo went to the cashier to pay. When he turned around, he saw “a lot of people chase [Nguyen] outside the restaurant.” Among the four or five people chasing him were the three men who had approached their table, including defendant. Nguyen was trying to escape. Vo followed outside and saw Nguyen being punched and kicked by the same four or five people, including defendant. Vo was “frightened” and stood by “helplessly.” He felt that intervening would not be wise because the men involved looked like gangsters, but he was afraid that Nguyen would be severely injured.

When the attack was over and the group of men walked away, Vo went to help Nguyen, who was not moving. After exchanging a few words, in which Vo tried to defuse the situation, defendant looked Vo up and down “and then slashed me, punched me. And then he walked away calmly like nothing happened.” Vo did not immediately realize that defendant had a “knife, razor or something.”

Police arrived on the scene. Officer John Casaccia of the Garden Grove Police Department saw that Vo was injured and needed medical attention, so he requested medics. Vo reported that he was in “extreme pain.” His injury required 20 stitches and 12 to 15 staples, and left him with a 10-inch long scar.

Casaccia also located Nguyen, who had a footprint imprinted on his head, injuries to the nose and lip, and two stab wounds to his stomach. Three suspects, including defendant, were detained at the scene and subsequently arrested. During a search of defendant, a small folding knife was recovered. Cassiccia later testified that Hoa An was a location known for gang activity.

On June 8, 2009, the Orange County District Attorney filed an amended information alleging three counts and a number of enhancements, although the only count relevant to this appeal is count one, attempted murder (§§ 187, subd. (a), 664, subd. (a)).

During trial, Detective Peter Vi testified as a gang expert. He testified that Cadi Lost Boys, or CLB, was known for vehicle theft, narcotic sales, and assaults with

deadly weapons. Vi testified that defendant was an active member on the night of the incident and had been so since 1997. He had been contacted by the Garden Grove Police Department 17 times during that period.

Vi also testified about gang culture, opining that in the gang world, respect was important. A simple look or stare could cause disrespect to a gang member, and violence could result. “Mad-dogging,” which refers to staring, between members of rival gangs could escalate from a simple fistfight all the way up to murder or attempted murder, “based just on the staring or the mad-dogging looks.”

The jury found defendant guilty on all counts and the enhancements true. On April 1, 2011, defendant was sentenced to an indeterminate term of 15 years to life, plus a determinate term of 14 years.

## II

### DISCUSSION

#### *Instruction on Attempted Involuntary Manslaughter*

Defendant argues the trial court erred by failing to instruct the jury, sua sponte, on attempted voluntary manslaughter based on sudden quarrel or heat of passion. (CALCRIM No. 603.) Before closing arguments, the trial court indicated it did not see the evidence for such an instruction, although it was open to argument. Defense counsel indicated he was “not going to argue that.” The court concluded there was no substantial evidence to support such an instruction. We conclude the court was correct.

“““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.” [Citation.] “Conversely, even on request, the court ‘has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction.’” [Citation.] This substantial evidence requirement is not satisfied by “any evidence . . . no matter how weak,” but rather by evidence from which a jury composed of reasonable persons could conclude “that the lesser offense, but not the greater, was

committed.” [Citation.] “On appeal, we review independently the question whether the trial court failed to instruct on a lesser included offense.” [Citation.]’ [Citation.]” (*People v. Verdugo* (2010) 50 Cal.4th 263, 293.)

Attempted voluntary manslaughter is, as defendant contends, a lesser included offense of attempted murder. (See, e.g., *People v. Gutierrez* (2003) 112 Cal.App.4th 704, 708 [voluntary manslaughter lesser included offense of murder].) Thus, if there is substantial evidence of attempted voluntary manslaughter, the court has a sua sponte duty to provide such an instruction to the jury. (*People v. Verdugo, supra*, 50 Cal.4th at p. 293.)

The relevant jury instruction states: “An attempted killing that would otherwise be attempted murder is reduced to attempted voluntary manslaughter if the defendant attempted to kill someone because of a sudden quarrel or in the heat of passion. [¶] The defendant attempted to kill someone because of a sudden quarrel or in the heat of passion if: [¶] 1. The defendant took at least one direct but ineffective step toward killing a person; [¶] 2. The defendant intended to kill that person; [¶] 3. The defendant attempted the killing because (he/she) was provoked; [¶] 4. 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; [¶] AND [¶] 5. The attempted killing was a rash act done under the influence of intense emotion that obscured the defendant's reasoning or judgment.” (CALCRIM No. 603.)

Even if defendant could establish the other elements of involuntary manslaughter, which we doubt, he cannot and has not established any evidence of provocation sufficient to trigger the court’s sua sponte duty to instruct the jury on this theory. “First, the provocation which incites the killer to act in the heat of passion case must be caused by the victim or reasonably believed by the accused to have been engaged in by the decedent. [Citations.] Second . . . the provocation must be such as to cause an

ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.]” (*People v. Lujan* (2001) 92 Cal.App.4th 1389, 1411-1412.)

Here, the only evidence is that defendant and his companions entered the restaurant and saw Nguyen and Vo sitting with their girlfriends. Defendant characterizes the incident thusly: “There was substantial evidence that, without any prior words or actions coming from [defendant] . . . Nguyen sparked the incident by looking up and back at appellant and his two companions as they were walking past the table and by exchanging ‘mad dog’ looks with appellant. [Nguyen’s] staring caused one of appellant’s companions to raise a clenched fist in [Nguyen’s] presence.”

Even if we accept defendant’s argument that Nguyen “sparked” the incident, which is not actually supported by the record, defendant has still failed to meet the legal standard for provocation. While provocative conduct can be either physical or verbal (*People v. Najera* (2006) 138 Cal.App.4th 212, 225), it must still be conduct that would cause “an ordinary person of average disposition to act rashly or without due deliberation and reflection.” (*People v. Lujan, supra*, 92 Cal.App.4th at pp. 1411-1412.) The standard is not subjective — it does not matter if an ordinary *gang member* would find Nguyen’s purportedly provocative behavior sufficient to act rashly or without deliberation — but an ordinary *person*. Defendant, unsurprisingly, does not cite a single case where a stare across a room has been held to be sufficient provocation for attempted murder.

Indeed, defendants have been held insufficiently provoked for far more than staring. In *People v. Najera, supra*, 138 Cal.App.4th at p. 216, the victim called the defendant a “faggot” and pushed him. The court held: “That taunt would not drive any ordinary person to act rashly or without due deliberation and reflection. “A provocation of slight and trifling character, such as words of reproach, however grievous they may be, or gestures, or an assault, or even a blow, is not recognized as sufficient to arouse, in a

reasonable man, such passion as reduces an unlawful killing with a deadly weapon to manslaughter.” [Citation.]” (*Id.* at p. 226.)

In *People v. Manriquez* (2005) 37 Cal.4th 547, the victim called the defendant a “mother f. . .” and “taunted defendant, repeatedly asserting that if defendant had a weapon, he should take it out and use it.” (*Id.* at p. 586.) The court held that such evidence was “plainly . . . insufficient to cause an average person to become so inflamed as to lose reason and judgment.” (*Ibid.*) The evidence in the instant case is even less, amounting to, at the most, a stare across a restaurant. There is simply no legal basis for finding such conduct sufficiently provocative to support an instruction for involuntary manslaughter. We therefore conclude the court did not err.

#### *Presentence Custody Credits*

Defendant contends, and respondent agrees, that he is entitled to three additional days of custody credit because the trial court awarded him 1,118 actual days and 167 conduct credit days between March 8, 2008, and April 1, 2011.

We agree. “Defendants sentenced to prison for criminal conduct are entitled to credit against their terms for all actual days of presentence . . . custody [citations] . . . .” (*People v. Cooper* (2002) 27 Cal.4th 38, 40.) This includes the day of sentencing. (*People v. Smith* (1989) 211 Cal.App.3d 523, 525-526.) Defendant was arrested on March 8, 2008, and sentenced on April 1, 2011. He is therefore entitled to 1,120 days of actual credit.

Conduct credit is computed at 15 percent of the time actually served. (§ 2933.1.) Fifteen percent of 1,120 days is 168, when rounded down to the nearest whole number. (See *People v. Ramos* (1996) 50 Cal.App.4th 810, 815-817.) Thus, when added together, defendant is entitled to 1,288 days of presentence credit. We shall order the abstract of judgment modified accordingly. (*People v. Guillen* (1994) 25 Cal.App.4th 756, 764.)

III  
DISPOSITION

The judgment is affirmed as modified. We direct the clerk of the trial court to prepare a new abstract of judgment reflecting a total of 1,288 days of custody credits as of April 1, 2011. The corrected abstract shall be sent to the Department of Corrections and Rehabilitation.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.