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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.

REUBEN BRACAMONTES, JR.,

Defendant and Appellant.

G049386

(Super. Ct. No. 12NF3054)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Sheila F. Hanson, Judge. Affirmed.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood and Paige B. Hazard, Deputy Attorneys General, for Plaintiff and Respondent.

Reuben Bracamontes, Jr., appeals from his conviction for attempted murder. He contends the lack of a jury instruction on the lesser included offense of attempted voluntary manslaughter requires reversal. We find no error and affirm his conviction.

## FACTS

The victim, William Bowen, testified at trial about the events leading to his being stabbed in the chest on the evening of September 19, 2012. At about 5:00 p.m., he had gone to Barbara Leon's house to help her move some furniture. Bowen had known Leon and her family, including her nephew Bracamontes, for many years.

Bowen testified that when he arrived, he saw Bracamontes and they went outside to the driveway to talk. There were other people around in the street. Several months earlier, Bowen loaned Bracamontes a tattoo gun—Bowen's "pride and joy"—along with needles and ink. Bowen told Bracamontes he wanted his "stuff" back. Bracamontes replied, "No. I'm not giving your stuff back. The only thing I have is a couple of tools." Bowen insisted Bracamontes return his property. Bracamontes said, "Fuck you, white boy. I'm not giving it back to you." Bowen responded, "Fuck you. Let's go. Let's start fighting or let's just do the alternative [i.e., return the property]."

Bowen testified that as he and Bracamontes were arguing, Bracamontes pulled out a "little tiny knife" and started using it to clean his fingernails. Bowen told him to put it away, "Let's talk like men." A couple of seconds later, Bowen was attacked from behind, he did not know by whom, and the next thing he knew, he was on the ground "getting the crap kicked out" of him. Bowen testified Bracamontes was not the attacker.

Bowen testified that when he finally got up off the ground, he went into Leon's house and started drinking because he was "really, really upset." He noticed he

had a cut on his right shin, and he got increasingly upset. He drank six or seven 24-ounce beers and became very intoxicated.

Bowen testified he eventually left Leon's house to go home. As he went up the street, Bracamontes was standing there with his shirt off and two or three other guys were with him. Bowen and Bracamontes began arguing again, and next thing Bowen knew, he was on the ground (Bowen speculated he might have tripped and fallen to the ground on his own because he was drunk), laying on his right side next to a car, and three Hispanic guys were kicking him.

Bowen testified he rolled over to the left and saw Bracamontes crouching down in between Bowen's legs with his hands together. He did not know if Bracamontes "was helping," but Bowen testified he did not see anything in Bracamontes' hands and he never saw Bracamontes put his hands on him. Bracamontes walked off and the other men ran away.

When Bowen got up, he realized he had been stabbed in the upper chest and was bleeding profusely. Bowen stumbled over to Leon's driveway, and someone called 911. Bowen had a four-to-six inch stab wound and substantial internal bleeding, requiring surgery to repair an artery.

At trial Bowen testified he never saw Bracamontes with a knife when he was stabbed, and he denied ever saying to police that Bracamontes had threatened to kill him, or that he attacked and stabbed him. Bowen testified the police reports to the contrary were "chock full of lies" and anything he said to the police on the night of the stabbing had been the result of relentless questioning while he was in the hospital emergency room severely intoxicated and delirious from his injuries.

Orange County Sheriff's Deputy Khantey Casey Char testified he was the first responder at the scene, arriving about 8:00 p.m. There were about 20 bystanders. Bowen was lying on the driveway bleeding. A couple of people were hovering above Bowen applying pressure to his chest. Bowen was angry and upset. Char asked Bowen

what happened. Bowen said Bracamontes stabbed him and he gave Char a physical description of Bracamontes. Bowen told Char that Bracamontes had about four friends with him when he was attacked, but he was not sure if any of the others had participated in the assault. Paramedics arrived, transported Bowen to the hospital, and Char followed Bowen to the hospital.

At the hospital, Char and another deputy stood outside the door of the room where Bowen was being treated. About 20 minutes after arriving at the hospital, Char again spoke to Bowen for 30 to 45 minutes and obtained further information. Char testified Bowen was coherent and he could not tell whether Bowen had any alcohol that night. Bowen did not appear intoxicated and never told police he was intoxicated.

Char testified that at the hospital Bowen said he had been at his friend Leon's house and confronted Bracamontes about a stolen tattoo gun. Bracamontes had about four friends with him. Bracamontes told Bowen, "I would kill you first before I give it back to you." Bowen said Bracamontes then put his hands behind his back, pulled out an approximately six-inch pocket knife, and said, "I'm going to kill you." Bowen told Char that he told Bracamontes, "Put that shit away!" and lunged at Bracamontes to disarm him. Bracamontes lunged back and slashed Bowen on the shin. Bowen told Char he tried to flee, but either fell or was pushed to the ground and Bracamontes stabbed him in the chest. Bowen identified Bracamontes in a photographic line-up.

Fourteen-year-old Kalolo P. witnessed the attack on Bowen and testified at trial. He was walking down the street around 8:00 p.m., and saw about four people standing in the middle of the street. Two of the people appeared to be arguing. One of the arguing men, who Kalolo later identified in a photographic line-up as Bracamontes, was holding a covered up knife behind his back. Kalolo heard the other man (i.e., Bowen) say, "Put that shit away[,]'" and saw him try to reach for the man with the knife, but he was attacked and stabbed. Bowen fell to the ground, and Bracamontes picked his

shirt up from the fence and walked away. Kalolo testified he did not actually see Bowen get stabbed because that part of his view was blocked by a car.

Bracamontes was charged with attempted murder (Pen. Code, §§ 664, subd. (a), 187, subd. (a))<sup>1</sup> (count one), and assault with a deadly weapon (§ 245, subd. (a)(1)) (count two), with allegations that as to count one he personally used a deadly weapon and as to both counts he personally inflicted great bodily injury. Two prior prison term enhancements were also alleged.

At the beginning of the jury trial, during discussions about what kind of character evidence concerning the victim might be introduced, defense counsel stated he would not be raising any self-defense claims. Following the presentation of evidence, before the jury was instructed, the court granted the prosecution's motion to dismiss count 2, in which defense counsel concurred.

In discussing jury instructions with counsel, the trial court stated neither side requested and it was not giving jury instructions on any lesser included offenses to attempted murder. The court observed there was no substantial evidence that would support a finding of either imperfect self-defense or a sudden quarrel or provocation. Defense counsel stated he agreed with the court's assessment of the state of the evidence, and agreed he was not requesting any additional instructions.

Defense counsel argued in his opening and closing statement there was no evidence to support the conclusion Bracamontes was the person who attacked and stabbed Bowen. Counsel argued there were no witnesses who specifically saw Bracamontes stab Bowen, and no other physical evidence (i.e., DNA, blood spatter, fingerprints, weapon) was presented that would demonstrate he was the stabber.

The jury found Bracamontes guilty as charged on count one and found both special allegations to be true. In a bifurcated bench trial, the court found both prior

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

conviction allegations true. The trial court sentenced Bracamontes to 11 years in prison comprised of the midterm of seven years for attempted murder, plus three years for the great bodily injury enhancement, and one year for the deadly weapon enhancement. The prior prison term enhancements were struck by the court in the interests of justice.

#### DISCUSSION

Bracamontes contends the trial court had a sua sponte duty to instruct the jury on attempted voluntary manslaughter—heat of passion—as a lesser included offense of attempted murder. We disagree.

“In criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury’s understanding of the case. [Citation.]” (*People v. Martinez* (2010) 47 Cal.4th 911, 953.) “‘To justify a lesser included offense instruction, the evidence supporting the instruction must be substantial—that is, it must be evidence from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist.’ [Citations.]” (*People v. Burney* (2009) 47 Cal.4th 203, 250.)

“Murder is the unlawful killing of a human being with malice aforethought. (See § 187, subd. (a).) A murder, however, may be reduced to voluntary manslaughter if the victim engaged in provocative conduct that would cause an ordinary person with an average disposition to act rashly or without due deliberation and reflection.” (*People v. Booker* (2011) 51 Cal.4th 141, 183, fn. 23.)

Heat of passion has both objective and subjective components. Objectively, the victim’s conduct must have been sufficiently provocative to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. (*People v. Moye* (2009) 47 Cal.4th 537, 549-550.) Subjectively, “the accused must be shown to have killed while under ‘the actual influence of a strong passion’ induced by such provocation. [Citation.] ‘Heat of passion arises when “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.”

[Citations.]’ [Citation.]” (*Id.* at p. 550.)

Here, there was no request for an attempted voluntary manslaughter instruction, and the trial court stated such an instruction was not warranted because there was no evidence to support a heat of passion finding. Defense counsel specifically agreed with the court’s assessment of the state of the evidence. Bracamontes now contends there was substantial evidence of provocation because just before Bowen was stabbed, Bracamontes and Bowen were arguing about whether Bracamontes was going to return Bowen’s tattoo gun. We agree with the trial court’s assessment there was no evidence to support a heat of passion instruction.

This court’s decision in *People v. Najera* (2006) 138 Cal.App.4th 212 (*Najera*), is instructive. In *Najera*, defendant and the victim were drinking beer and joking around in the front yard of the house where they both lived, when the victim called defendant a “faggot.” When defendant objected, the victim called defendant “a fag” and pushed him to the ground. The two men “soon were on the ground wrestling and exchanging fists” with increasingly angry name calling going back and forth. (*Id.* at p. 216.) They were separated by a neighbor; the victim stayed in the front yard and defendant went inside the house. After being inside for about five to 10 minutes, during which time he went into the bathroom, kitchen, and his bedroom, defendant returned to the front yard. He walked straight to the victim stabbing him in the stomach three times with a knife, killing him. (*Id.* at pp. 216-217.)

On appeal, this court held defendant was not prejudiced by his counsel’s failure to object to the prosecutor’s misstatements about the law concerning voluntary manslaughter because he was not entitled to an instruction on voluntary manslaughter. “[W]ords 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.]” (*Najera, supra*, 138 Cal.App.4th at p. 226.) Neither the victim’s name calling or pushing the defendant to the ground, which prompted a fight between the two men, were “sufficiently provocative under an objective standard to cause an ordinary person of average disposition to act rashly or without due deliberation.” (*Id.* at p. 226, fn. 2; see also *People v. Manriquez* (2005) 37 Cal.4th 547, 586 [victim calling defendant a “mother fucker” and taunting defendant by repeatedly saying if he had a weapon, he “should take it out and use it,” were “insufficient to cause an average person to become so inflamed as to lose reason and judgment”].)

There was more evidence of provocation in *Najera* than there was here, yet *Najera* found it insufficient to justify voluntary manslaughter instructions because the objective component of heat of passion was not supported by substantial evidence. *Najera’s* victim called him a “faggot” and a “fag,” engaged in other name calling, pushed him to ground, and wrestled with him. Here, Bowen gave two versions of the night’s events. The first was the version Bowen gave to law enforcement immediately after the stabbing (corroborated by the teenager who witnessed events). In that version, Bowen said he confronted Bracamontes about returning his tattoo gun, Bracamontes said he would “kill [Bowen] first” before he would give it back, and then Bracamontes pulled out a six-inch knife and said, “I’m going to kill you.” Bowen told Bracamontes to, “Put that shit away!” and tried to take the knife away. Bracamontes lunged at Bowen slashing him on the shin. Bowen tried to flee and fell down, and Bracamontes stabbed him.

Bowen’s trial version of the events involved two different incidents about three hours apart. The first occurred around 5:00 p.m. when Bowen told Bracamontes he wanted his tattoo gun back and Bracamontes refused. As they argued, Bracamontes pulled out a “little tiny knife” and Bowen told him to put it away so they could “talk like

men.” Someone—not Bracamontes—jumped Bowen from behind. Bowen went in Leon’s house and started drinking because he was upset and noticed he had a cut on his shin. A few hours later, Bowen left Leon’s house, and Bracamontes and his compatriots were out in the street. Bowen and Bracamontes began arguing and Bowen found himself on the ground being kicked by three men and he was stabbed. He saw Bracamontes crouching over him, but did not know if Bracamontes was participating in the beating.

Under either version of the incident, there was nothing Bowen did that a jury could find would have “cause[d] an ordinary person of average disposition to act rashly or without due deliberation.” (*Najera, supra*, 138 Cal.App.4th at p. 226, fn. 2.) There was no evidence of any name calling by Bowen and no evidence that other than possibly trying to get Bracamontes to drop his knife, that Bowen threw punches or was physically aggressive. A jury could not be permitted to speculate from the mere fact the two men engaged in an argument and that Bowen might have been intoxicated, that Bowen engaged in conduct that would have caused an ordinary person to become so inflamed that he lost reason and judgment and would have reacted from passion rather than from judgment. (*People v. Wilson* (1992) 3 Cal.4th 926, 941 [“Speculation is an insufficient basis upon which to require the giving of an instruction on a lesser offense”].)

Additionally, not only was there no evidence that would have supported the objective component of heat of passion, there was no direct evidence concerning Bracamontes’ subjective mental state. His defense, if believed, was that he was not the attacker or stabber—implying that while he and Bowen were arguing about the tattoo gun, the other men who were with Bracamontes attacked and then stabbed Bowen. Bracamontes’ own defense effectively eliminated any attempted voluntary manslaughter theory. And because we conclude Bracamontes was not entitled to an attempted voluntary manslaughter instruction, we need not consider whether his counsel invited any

error by agreeing the instruction should not be given or address Bracamontes' contention his counsel was ineffective for having filed to request such an instruction.

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

ARONSON, J.