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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. TARE NICHOLAS BELTRAN, Defendant and Appellant.	Case No. SUPREME COURT FILED MAY - 6 2011 Frederick K. Ohlrich Clerk Deputy

First Appellate District, Division Four, Case No. A124392
San Francisco County Superior Court, Case Nos. 175503, 203443
The Honorable Robert L. Dondero, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

Issues Presented 1
Statement of the Case and Facts 1
A. Prosecution case 1
1. Domestic violence evidence 1
2. Events surrounding the murder 2
B. Defense case 5
C. Voluntary manslaughter instruction and jury argument 6
D. Response to jury inquiry 7
E. The verdict 8
F. The Court of Appeal's ruling 8
Reasons for Granting Review 9
I. Conflict in the law regarding the proper standard for heat-of-passion manslaughter 10
II. Review is required to resolve whether the instructions set out a prejudicially misleading standard for voluntary manslaughter 18
Conclusion 21

TABLE OF AUTHORITIES

Page

CASES

Andersen v. United States
(1898) 170 U.S. 481 17

Estelle v. McGuire
(1991) 502 U.S. 62 18

Maher v. People
(1862) 10 Mich. 212 .... 15, 16

People v. Avila
(2009) 46 Cal.4th 680 14

People v. Breverman
(1998) 19 Cal.4th 142 .... 12, 13

People v. Carasi
(2008) 44 Cal.4th 1263 14

People v. Dixon
(1995) 32 Cal.App.4th 1547 14

People v. Fenenbock
(1996) 46 Cal.App.4th 1688 .... 11, 12, 14

People v. Freel
(1874) 48 Cal. 436 17

People v. Golsh
(1923) 63 Cal.App. 609 14

People v. Hurtado
(1883) 63 Cal. 288 13

People v. Kanawyer
(2003) 113 Cal.App.4th 1233 14

TABLE OF AUTHORITIES
(continued)

Page

People v. Kelly
(1992) 1 Cal.4th 495 18

People v. Koontz
(2002) 27 Cal.4th 1041 14

People v. Lee
(1999) 20 Cal.4th 47 .... 1, 10, 13

People v. Logan
(1917) 175 Cal. 45 13

People v. Manriquez
(2005) 37 Cal.4th 547 .... 10, 13

People v. Najera
(2006) 138 Cal.App.4th 212 .... passim

People v. Pride
(1992) 3 Cal.4th 195 13

People v. Steele
(2002) 27 Cal.4th 1230 13

People v. Superior Court (*Henderson*)
(1986) 178 Cal.App.3d 516. .... 11, 12, 14

People v. Watson
(1956) 46 Cal.2d 818 .... 9, 19

State v. Ferguson
(S.C.Ct.App. 1835) 183 2 Hill (S.C.) 619 15

State v. Watkins
(Iowa 1910) 126 N.W. 691 15

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

Penal Code
- § 187 8
- § 192, subdivision (a) 15
- § 195, subdivision 1 15

COURT RULES

California Rules of Court
- rule 8.500(b)(1) 9
- rule 8.500(e) 1

OTHER AUTHORITIES

Dressler, Understanding Criminal Law (1987) § 31.08, p. 475 17

Judicial Council of California, Criminal Jury Instructions
- No. 570 .... passim

Respondent petitions for review of the decision of the Court of Appeal for the First Appellate District, Division Four, which reversed appellant's second degree murder conviction. The decision, which is attached as Exhibit A, is unpublished. The Court of Appeal filed its decision on March 30, 2011. No rehearing was sought. This petition is timely. (Cal. Rules of Court, rule 8.500(e).)

ISSUES PRESENTED

1. Is provocation adequate to reduce murder to manslaughter by engendering passion that causes an ordinarily reasonable person to "act rashly" in general or, instead, must provocation engender a loss of reason and judgment regarding human life and potentially induce deadly passion? (See *People v. Lee* (1999) 20 Cal.4th 47, 59-60.)

2. Assuming adequate provocation consists of causing reasonable persons to "act rashly," does CALCRIM No. 570 constitute prejudicial error?

STATEMENT OF THE CASE AND FACTS

A. Prosecution Case

Claire Joyce Tempongko, a 28-year-old single mother, lived in an apartment in San Francisco with her 10-year-old son J.N., and her 5-year-old daughter. (6 RT 439, 446-447; 9 RT 919, 10 RT 982-984.) She began dating appellant in November 1998, and he moved into her apartment in early 1999. (10 RT 1041; 12 RT 1295, 1307; 13 RT 1511-1512.) The couple's turbulent relationship thereafter was marked by domestic violence inflicted by appellant on Ms. Tempongko before he killed her.

1. Domestic violence evidence

On April 28, 1999, appellant demanded entry to the apartment. He broke the back window and gained entry. He yelled at Ms. Tempongko, threw her to the floor, dragged her by her hair down a long hallway, and

then left. The police were summoned and took a report. (11 RT 1195-1204.)

The night of May 17, 1999, after an evening of drinking, appellant grabbed Ms. Tempongko by the arms and legs and tried to forcibly drag her, kicking and screaming, from a friend's apartment. (12 RT 1398-1416.) The police were summoned. They detained appellant and took photographs of the bruises and injuries appellant inflicted on the victim. (11 RT 1228-1237; 12 RT 1279-1288.)

On November 18, 1999, police were summoned to Ms. Tempongko's apartment by her parents. Appellant had been arguing with her on their anniversary. He grabbed her hair, forcibly pulled her head back and held her in that position. (12 RT 1307-1308.) When appellant finally released her, she called her parents. (12 RT 1308.) When they arrived and argued with appellant, he grabbed Ms. Tempongko by the shoulders and forced her backward into the bedroom. He kept her locked in the bedroom against her will until the police arrived and convinced him to release her. (12 RT 1301-1309.)

On September 7, 2000, at 11:34 p.m., the police were again dispatched to the apartment. (12 RT 1423-1425.) They spotted appellant lurking in a corner by the garage door, attempting to conceal himself in the shadows. (12 RT 1425-1427.) Ms. Tempongko provided the officers with an emergency protective order she had obtained requiring appellant to stay 100 yards away from her apartment. (12 RT 1431; 13 RT 1601-1602.)

2. Events surrounding the murder

In January 2000, Ms. Tempongko met Michael Houtz, who worked for Federal Express and made daily deliveries to a business where she worked as a receptionist. (11 RT 1114-1115, 1117.) In April 2000, Ms. Tempongko began referring to appellant as her ex-boyfriend. (11 RT 1118-1120.) Mr. Houtz took Ms. Tempongko out to dinner once, and they went

to Macy's together a couple of times on work breaks. (11 RT 1121.) She told Mr. Houtz that she had tried to break up with appellant, but he would not let her go. Appellant had said it would be "over his dead body, over her dead body." (11 RT 1142.) In early October 2000, Ms. Tempongko had appellant leave for good. (8 RT 710-711; 11 RT 1140.) She began dating Mr. Houtz. (11 RT 1120, 1140.) In October, appellant realized his relationship with Ms. Tempongko was completely over. (11 RT 1141.)

On Sunday, October 22nd, Mr. Houtz took her and her children on an outing to Sacramento. (11 RT 1122, 1125-1133.) During their outing, appellant called Ms. Tempongko on her cell phone and yelled at her. (11 RT 1131-1133.) Mr. Houtz drove the family back to San Francisco that evening. (11 RT 1144-1145.) Around 7:00 p.m., they approached Ms. Tempongko's apartment, and she spotted a man at the wheel of a car parked near her door. She told Mr. Houtz to drive around the block without stopping. (11 RT 1150-1151.) Mr. Houtz did so. As they again approached her apartment, Ms. Tempongko began frantically scanning the street, clearly very upset and frightened. (11 RT 1152-1153.) Ms. Tempongko turned her body away from the other car still parked by her building, and directed Mr. Houtz to circle the block again. (11 RT 1155.) She was now frantic. (11 RT 1155.) The other car was gone when they drove up again, but Ms. Tempongko directed Mr. Houtz to drive around one more time, this time in a bigger circle. (11 RT 1155.) After he completed that circuit, she had Mr. Houtz pull into the driveway, and she ran with the children from the car into her apartment building without saying goodbye. (11 RT 1158-1159.)

Around 8:15 or 8:30 p.m., Ms. Tempongko answered her cell phone. (10 RT 1024.) Her son heard her arguing with the caller and frantically repeating, "Please don't come to the house." (10 RT 1029.)

About 9:00 p.m., appellant burst into the apartment. (10 RT 1031.) He immediately began yelling at Ms. Tempongko. (10 RT 1033-1034.) He demanded to know where she went and who she was with. (10 RT 1037-1039.) She did not answer but was not confrontational with appellant. She did not yell at, push, or strike him. (10 RT 1039-1040.) During appellant's diatribe, he yanked the phone cord from the wall with such force that the phone jack came out as well. (6 RT 464, 471, 510-511, 514-515, 533, 535; 7 RT 572, 578; 12 RT 1348-1349, 1353-1355.) He also took away Ms. Tempongko's cell phone. (6 RT 543-544; 13 RT 1528.)

After yelling at her for five to ten minutes, appellant retrieved a six-inch carving knife from her kitchen. (6 RT 432; 7 RT 609; 9 RT 942-943; 10 RT 1043-1045.) Appellant returned and began stabbing Ms. Tempongko with the knife. (10 RT 1049-1050.) The force of appellant's attack drove her backward onto the couch. (10 RT 1049-1051, 1073.) He continued stabbing her as she tried to ward off the blows. (10 RT 1052-1053.) When he finished his attack, he fled the apartment. (10 RT 1073.)

A neighbor in the top unit of the building heard the sounds of the fight. The witness heard furniture being knocked over, a person being thrown against the wall, the muffled sound of a male voice yelling, and the children screaming frantically, but not the victim's voice. (6 RT 455-457.) The witness called 911 and went downstairs. (6 RT 458.)

The neighbor from the middle unit was returning home with friends when he encountered the victim's son in the hallway, very distraught and frantic, saying that appellant had stabbed his mother. (6 RT 505-506; 7 RT 568-569, 594.) The neighbors found Ms. Tempongko slumped in a pool of blood in the corner of her apartment. (6 RT 508-511; 7 RT 670-573.) An autopsy established that she had 17 stab wounds and four blunt force injuries. She died from massive blood loss. (9 RT 908-919, 960.)

Appellant fled to Mexico and remained at large for nearly six years. (8 RT 785-787; 12 RT 1438.)

B. Defense Case

Appellant testified that his relationship with Ms. Tempongko had "ups and downs." (13 RT 1548.) He moved out of her apartment a month before the homicide. According to defendant, they had agreed to "take a timeout" and to "reevaluate" the relationship. However, they still stayed in touch afterward, according to him. (13 RT 1518.)

The night Ms. Tempongko died, she had called appellant and told him to come over to the apartment. (13 RT 1524.) He took the bus and arrived about 8:40 p.m. (13 RT 1524-1525.) He let himself in using his key. (13 RT 1525.) Ms. Tempongko ignored him, then demanded to know why he was so late getting to her place. (13 RT 1526.) Appellant had no concerns about her earlier outing that day. (13 RT 1528.) He told her that he was going to be starting a new job as a dishwasher on Monday morning. (13 RT 1528.) Hearing this, "she went off." (13 RT 1528.) She demeaned the job and insulted appellant for taking it. (13 RT 1528.) Appellant responded heatedly that he was making more money than her, and the two began arguing about money. (13 RT 1528-1529.) She insulted appellant and his family. (13 RT 1530-1531.) Appellant said he was leaving, and she became even more upset. (13 RT 1530-1532.) She told him she knew he would walk out on her someday. According to appellant, Ms. Tempongko shouted, "That's why I killed your bastard. I got an abortion." (13 RT 1531.)

This statement shocked appellant so much he had no recollection of what happened next. The next thing he knew, he was holding a bloody knife and had blood on his hands, and he ran out of the room. (13 RT 1532.)

C. Voluntary Manslaughter Instruction and Jury Argument

The trial court instructed the jury with former CALCRIM No. 570, modified slightly at appellant's request.

> 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 killed another human being either with an intent to kill, or with conscious disregard for human life.
>
> 2. The defendant was provoked;
>
> 3. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment;
>
> AND
>
> 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.
>
> 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. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked *and how such a*

person would react in the same situation and knowing the same facts.

> 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.

(5 CT 1455, italics added; 14 RT 1668-1669.)

The prosecutor argued in closing:

> And the provocation has to be such that a person of average disposition to act with passion rather than judgment. We would have probably millions more homicides a year if everyone could use words that may be – although . . . I don't agree that this is what happened. It's an illogical interpretation of the facts. You stub your toe. You're angry, might cuss a few words. You don't go out and kill someone.
>
> We've all gotten cut off in traffic. We say a few choice words, "Oh, my God." We don't gun the pedal and start trying to hit the car in front of us to try to kill the person who cut us off. Can you imagine if that was permissible, "Oh, my God, I acted without judgment and rash. I got so angry. I was insulted." That's not the standard. It's a reasonable person, and you're all reasonable people and you know that it's illogical that even these words were uttered.
>
> The evidence does not support it. Being jealous is not enough. You can't take – by his own account he's not jealous and he doesn't know what abuse is. He needed that defined. "He" the defendant.
>
> He was always jealous, possessive and controlling. The reasonable reaction – murder is unreasonable.

(14 RT 1698-1699.)

D. Response to Jury Inquiry

During deliberations, the jury sent a note to the court asking:

In Instruction 570: "In deciding whether the provocation was sufficient, consider whether a person of average disposition

would have been provoked and how such a person would react in the same situation knowing the same facts."

Does this mean to commit the same crime -(Hom[i]cide) or can it be other, less severe, rash acts"

(5 CT 1502.)

The court responded as follows:

> The provocation involved must be such as to cause a person of average disposition in the same situation and knowing the same facts to do an act rashly and under the influence of such intense emotion that his judgment or reasoning process was obscured. This is an objective test and not a subjective test.

(5 CT 1503.)

E. The Verdict

The jury convicted appellant of second degree murder and found that he used a deadly weapon in the commission of the killing (Pen. Code, §§ 187, 12022, subd. (b)(1)). (2 CT 578.)

F. The Court of Appeal's Ruling

Relying on *People v. Najera* (2006) 138 Cal.App.4th 212, 223, a divided panel of the First District Court of Appeal held that the above-italicized portion of the 2006 version of CALCRIM No. 570—directing the jury to consider in its assessment of the sufficiency of the provocation "how [an ordinary person of average disposition] would react in the same situation knowing the same facts"—was fatally ambiguous. The court reasoned that by inviting consideration of the killer's actions in evaluating the sufficiency of the provocation, the instruction implicitly suggests that the jury could not find heat of passion unless a person of average disposition would have killed under the same circumstances. (Maj. Opn. at pp. 15-20.) The court viewed any suggestion that heat of passion requires provocation substantial enough to cause a reasonable person to harbor homicidal rage as overly restrictive and erroneous. It held that "whether an

average person would be provoked to kill is not a proper consideration in determining whether provocation was sufficient." (Maj. Opn. at p. 19.)

Disapproving the prosecutor's contrasting of adequate provocation with "examples of stubbing a toe, getting cut off in traffic, or being jealous to argue that minor provocation is not sufficient to cause a reasonable person to kill someone," the Court of Appeal found the argument "serve[d] to reinforce the problem with the jury instruction on provocation, because it encouraged the jury to resolve any ambiguity in the instruction's language in the manner rejected by *Najera, supra*, 138 Cal.App.4th 212." (Maj. Opn. at p. 20.) The court found the instructional error prejudicial under *People v. Watson* (1956) 46 Cal.2d 818, 836 and reversed the judgment.

Justice Reardon dissented. The dissent found the court's analysis of the alleged defect in the instruction unnecessary because any error was nonprejudicial on the facts of this case: "In my view, any alleged ambiguity in the instruction on provocation and voluntary manslaughter was harmless and the jury's verdict of second degree murder is well supported by the law and the evidence." (Dis. Opn. at p. 1.)

REASONS FOR GRANTING REVIEW

Review is necessary to resolve a fundamental and longstanding conflict in the proper standard for provocation in heat-of-passion manslaughter and to establish the proper scope of permissible argument by the prosecution in inviting the jury to consider an ordinary person's potential reaction to the provocation. (Cal. Rules of Court, rule 8.500(b)(1).

Review is also necessary to decide if a reasonable likelihood exists that the jury prejudicially misconstrued CALCRIM No. 570, causing it to reject a verdict of manslaughter by misapprehending adequate provocation.

I. CONFLICT IN THE LAW REGARDING THE PROPER STANDARD FOR HEAT-OF-PASSION MANSLAUGHTER

This Court has stated that "the test of adequate provocation is an objective one," that "[t]he provocation must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment," and that "[a]dequate provocation and heat of passion must be affirmatively demonstrated." (*People v. Lee* (1999) 20 Cal.4th 47, 60; see also *id.* at p. 59 [examining record for evidence that the victim's conduct was sufficiently provocative as could "cause an average person to react with deadly passion"].)

The Court of Appeal, in finding instructional error, departed from *Lee*'s approach. It focused on what reaction was necessary for an affirmative demonstration of the objective component of provocation, an issue of law that it recognized "has not yet been addressed by the California Supreme Court." (Maj. opn. at p. 15.) It resolved the issue by concluding that when a homicide victim engenders in the defendant a passion that causes an otherwise ordinary, reasonable person to "act rashly," the killing can be deemed manslaughter.

To deduce its standard of adequate provocation, the court pointed to CALCRIM No. 570. That instruction provides the requisite provocation is that which "'would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.'" (Maj. opn. at p. 9, quoting CALCRIM No. 570; see also *People v. Manriquez* (2005) 37 Cal.4th 547, 583-584 [same].) The court then elaborated on the qualitative standard of the requisite degree of "passion." It concluded that the passion need not be sufficient to

> trigger a certain heightened level of reactive *conduct*, specifically lethal force, in order to reduce murder to manslaughter. Such a notion is erroneous. What negates malice is simply *a state of mind obscured by passion.* (*People v.*

> *Carasi*, *supra*, 44 Cal.4th at p. 1306.) That state of mind can be induced by any violent, intense, or enthusiastic emotion, except revenge, including anger, rage, and fear of death or bodily harm. (*People v. Lasko* (2000) 23 Cal.4th 101, 108.) Thus, in the context of voluntary manslaughter, provocation is sufficient if it would trigger such a *state of mind* in a reasonable person. It need not further cause a particular *level of conduct*, let alone cause a reasonable person to react with lethal violence.

(Maj. Opn. at p. 19.)

Under that holding, any activity of the victim igniting a passion that results in any degree of rashness in an ordinary person is adequate provocation, even if the passion would be wholly insufficient to trigger a lethal or violent response by that person. In reaching that conclusion, the majority relied on *People v. Najera* (2006) 138 Cal.App.4th 212. That decision states, in relevant part, "The focus [of a heat of passion defense] is on the provocation—the surrounding circumstances—and whether it was sufficient to cause a reasonable person *to act rashly*." (*Id.* at p. 223, emphasis added; Maj. opn. at p. 16.)

In embracing *Najera*'s formulation, the Court of Appeal rejected two other decisions, *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, and *People v. Superior Court (Henderson)* (1986) 178 Cal.App.3d 516. (Maj. opn. at pp. 17-18.) *Fenenbock* found no error in a murder case where the trial court failed to instruct on heat-of-passion voluntary manslaughter. The omission was not error because there was "no evidence . . . from which the jury could have found provocation so serious that it would produce a *lethal response* in a reasonable person." (*People v. Fenenbock, supra*, 46 Cal.App.4th at p. 1705, emphasis added.) *Henderson* similarly stated, "The concept of 'heat of passion' allows a defendant to reduce a killing from murder to manslaughter only in those situations where the provocation would trigger a *homicidal reaction* in the mind of an ordinary reasonable person under the given facts and circumstances." (*People v. Superior*

Court (*Henderson*), *supra*, 178 Cal.App.3d at p. 524, fn. 4, emphasis added.) The court below rejected the standard identified in these cases as dictum. But *Najera*'s discussion of the qualitative nature of the passion was itself dictum. *Najera* addressed a claim of ineffective assistance of counsel for failure to object to alleged misconduct in the prosecutor's argument to the jury about the heat of passion instruction. (*Najera, supra*, 138 Cal.App.4th at pp. 223-226.) *Najera* ultimately rejected the ineffectiveness claim because the evidence was insufficient to warrant any instruction on heat of passion as a matter of law. (*Id.* at p. 226.)[1]

The tension between *Najera* and the instant case on the one hand, and *Fenenbock* and *Henderson* on the other, mirrors a similar conflict in this Court's articulations of the applicable standard. For example, this Court observed in *People v. Breverman* (1998) 19 Cal.4th 142, 163:

> An intentional, unlawful homicide is "upon a sudden quarrel or heat of passion" (§ 192(a)), and is thus voluntary manslaughter

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[1] That *Najera*'s dictum was later incorporated into a CALCRIM instruction does not alter the fact that the standard of adequate provocation remains a matter of dispute among the Courts of Appeal and requires a definitive resolution. The Court of Appeal's reliance on the fact that the Advisory Committee on Criminal Jury Instructions subsequently amended CALCRIM No. 570 in response to *Najera* is wholly misplaced. (Maj. Opn. at pp. 16-17.) The Advisory Committee is not charged with evaluating the correctness of appellate court decisions interpreting the law or an instruction. Its duty is to implement such decisions, revising instructions in compliance with judicial determinations. Pointing to the Advisory Committee's changes to an instruction based on an appellate decision improperly elevates the committee's act to the level of a judicial determination. Pointing to the mere act of amendment in compliance with a judicial decision as demonstrating the correctness of the judicial decision has the potential to lock in erroneous instructions, making them less subject to judicial review. The amendment to CALCRIM No. 570 represents just such an example. With the deletion of the phrase that the *Najera* court erroneously condemned, the revised CALCRIM instruction now appears to ratify an incorrect standard for voluntary manslaughter.

> (*ibid.*), if the killer's reason was actually obscured as the result of a strong passion aroused by a "provocation" sufficient to cause an "'ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.'" [Citations.] "'[N]o specific type of provocation [is] required . . . .'" [Citations.] Moreover, the passion aroused need not be anger or rage, but can be any "'"[v]iolent, intense, high-wrought or enthusiastic emotion"'" [citations] other than revenge [citation].

However, in describing the *type* of passion aroused, *Breverman* did not take the next step of articulating the qualitative *degree* of required passion, i.e., just how "intense," or "high-wrought" the passion engendered in a reasonable person must be. Other opinions by this Court have used similar language, also without further elaboration. (See, e.g., *People v. Steele* (2002) 27 Cal.4th 1230, 1252-1253 ["'[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 . . . .'"]; *People v. Manriquez*, *supra*, 37 Cal.4th at pp. 583-584 [conduct "sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection"]; *People v. Logan* (1917) 175 Cal. 45, 49 [provocation "sufficient to arouse the passions of the ordinarily reasonable man"]; *People v. Hurtado* (1883) 63 Cal. 288, 292 ["provocation sufficient to excite an irresistible passion in a reasonable person"].)

By contrast, another line of cases by this Court indicates that the degree of passion engendered by adequate provocation is not satisfied if it causes a reasonable person merely to "act rashly." (See, e.g., *People v. Lee* (1999) 20 Cal.4th 47, 59 ["There was no direct evidence that [the victim] did or said anything sufficiently provocative that her conduct would cause an average person to *react with deadly passion.*" (Emphasis added)]; *People v. Pride* (1992) 3 Cal.4th 195, 250 ["To the extent defendant relies

solely on criticism he received about his work performance three days before the crimes, such evidence is insufficient as a matter of law to arouse feelings of *homicidal rage or passion* in an ordinarily reasonable person." (Emphasis added)]; *People v. Avila* (2009) 46 Cal.4th 680, 706 [finding no substantial evidence of provocation, observing, "Reasonable people do not become *homicidally enraged* when hearing the term 'Carmelos,' even if it is understood as a fleeting gang reference or challenge," emphasis added]; *People v. Carasi* (2008) 44 Cal.4th 1263, 1307 [referring to "homicidal rage or passion"]; *People v. Koontz* (2002) 27 Cal.4th 1041, 1086 [same].) The Courts of Appeal have followed this line of authority as well. (See *People v. Dixon* (1995) 32 Cal.App.4th 1547, 1556 ["would a reasonable person develop homicidal rage"]; *People v. Kanawyer* (2003) 113 Cal.App.4th 1233, 1236 [same]; *People v. Fenenbock* , *supra*, 46 Cal.App.4th 1688; *People v. Superior Court* (*Henderson*), *supra*, 178 Cal.App.3d 516; accord, *People v. Golsh* (1923) 63 Cal.App. 609, 614 ["The provocation which will stir in the heart of the slayer that heat of passion which reduces the homicide from murder to manslaughter must be such as would have a like effect upon the mind and emotions of the average man—the man of ordinary self-control."].)

This Court should resolve the conflict in decisional law. The Court of Appeal's standard—passion that causes a reasonable person to "act rashly"— severely and improperly discounts the legal concept of adequate provocation. The "react rashly and without due deliberation" formulation invites a reduction of murder to manslaughter, even if the specific provocation claimed by the defendant *never* incites ordinary persons to react with violence. The degree of passion reflected when a reasonable person acts "rashly" is simply too far divorced from the homicidal act to mitigate what would otherwise be malice murder.

Indeed, that standard appears inconsistent with the common law basis for the heat of passion doctrine, the foundation for California's manslaughter statute. (See Pen. Code, §§ 192, subd. (a), 195, subd. 1.) Historically, equivalence was drawn between the traditional articulation of an ordinary person "acting rashly" and the potentiality for an ordinary person responding with violence to like provocation. One line of California authority respects this equivalence and the other ignores it. The Court of Appeal below followed the latter. We suggest the former is right. As the Iowa Supreme Court noted,

> Reasonableness is the test. The law contemplates the case of a reasonable man—an ordinary reasonable man—and requires that the provocation shall be such as *might naturally induce such a man*, in the anger of the moment, *to commit the deed*. The rule is that reason should at the time of the act be disturbed by passion to an extent which might render ordinary men, of fair, average disposition, liable *to act rashly* and without reflection, and from passion rather than judgment.

(*State v. Watkins* (Iowa 1910) 126 N.W. 691, 692, italics added, quoting Clark & Marshall, The Law of Crimes, p. 355; see also *State v. Ferguson* (S.C.Ct.App. 1835) 183 2 Hill (S.C.) 619 ["The line which distinguishes between those provocations which will and will not extenuate the offence, is not, nor can it be, certainly defined. Those provocations which are in themselves calculated to provoke a high degree of resentment, and which ordinarily superinduce a great degree of violence, when compared with those that are slight and trivial, and from which a great degree of violence does not usually follow, may serve as a general outline to mark the distinction, and when applied with judgement and discretion, will usually lead to correct results."]; see generally *Maher v. People* (1862) 10 Mich. 212.)

The ultimate error in the Court of Appeal's analysis is that it disassociates the objective mental state from the objective potential for

responsive conduct. It holds any reference to provocation "trigger[ing] a certain heightened level of reactive *conduct*, specifically lethal force," would "distort[]" the "qualitative standard" of provocation. (Maj. Opn. at p. 19.) "[P]rovocation is sufficient if it would trigger such a *state of mind* in a reasonable person. It need not further cause a particular *level of conduct*, let alone cause a reasonable person to react with lethal violence." (*Ibid.*) This approach eviscerates any notion that the objective standard measures the potential impact of provocation on an ordinary person's *actions*. It is dissonant even with the mere "rashness" standard, which focuses, after all, on whether an asserted provoking circumstance was likely to cause an ordinary person to *act* rashly, not simply to harbor rash thoughts. Provocation reasonably sufficient to mitigate murder must, at least, be an objective circumstance sufficient to induce passion not just indicative of evil thought, but potentially manifested in the actual deed of ordinary persons of average disposition.

The core rationale for this view is a legal acknowledgement of human weakness in the face of strong provocation from another person. Some provocation is sufficiently severe that even the ordinary person of average disposition, when confronted with it, could be moved to respond with lethal violence under its influence. Of course, most ordinary individuals are capable of restraining their conduct or finding nonlethal outlets. For this reason, the law imposes a duty of restraint and criminalizes the failure of such restraint.

As Professor Dressler observes,

> [Manslaughter] represents a concession to human weakness, that the provoked killer's conduct does not arise from a "bad or corrupt heart, but from infirmity of passion to which even good men are subject." The more serious the provocation the more likely it is that the average person would have succumbed to passion and, therefore, the less basis there is for jurors to differentiate the character of the killer from their own. In

> essence, the provoked killer has fewer character flaws than the usual killer. The provoked killer acts due to anger, not evilness. She acts much like other humans would act in the same situation.

(Dressler, Understanding Criminal Law (1987) § 31.08, p. 475, footnotes omitted; accord, *People v. Freel* (1874) 48 Cal. 436, 437 ["But when the mortal blow is struck in the heat of passion, excited by a quarrel, sudden, and of sufficient violence to amount to adequate provocation, the law, out of forbearance for the weakness of human nature, will disregard the actual intent and will reduce the offense to manslaughter."]; see generally *Andersen v. United States* (1898) 170 U.S. 481, 510 ["The law in recognition of the frailty of human nature, regards a homicide committed under the influence of sudden passion, or in hot blood, produced by adequate cause, and before a reasonable time has elapsed for the blood to cool, as an offense of a less heinous character than murder."].) Professor Dressler elaborates that one who succumbs to such human weakness and kills is properly punished for manslaughter because, "although we believe that we *might* act as [the killer] did in the same situation, we concede that this is a character flaw in [the killer] and us. After all, not all persons who are provoked kill their provoker." (Dressler, Understanding Criminal Law, *supra*, § 31.08, p. 475, fn. 16.)

The standard articulated by the Court of Appeal erroneously fails to identify the requisite degree of rashness as one that can incite reasonable persons to lethal violence. Its holding ignores foundational principles for the mitigation of homicide by a heat of passion on adequate provocation. The Legislature could not have intended so low an objective threshold for invoking this doctrine in cases of murder. Review is necessary to resolve the conflicting authority on the proper standard for the degree of passion that must be aroused in an ordinary person to mitigate murder to voluntary manslaughter based on heat of passion.

II. REVIEW IS REQUIRED TO RESOLVE WHETHER THE INSTRUCTIONS SET OUT A PREJUDICIALLY MISLEADING STANDARD FOR VOLUNTARY MANSLAUGHTER

This Court should grant review to decide whether this provision in CALCRIM No. 570 is erroneously misleading: "In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked and how such a person would react in the same situation and knowing the same facts." Even if the legal standard for manslaughter requires only that a reasonable person "act rashly," without regard to whether the person might have been provoked to homicide, the Court of Appeal erred in finding the jury could view the instruction as requiring more than rash action. Viewed in the context of the instructions as a whole and the court's answer to the jury's question, there is no reasonable likelihood the jury applied a different legal standard for voluntary manslaughter. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *People v. Kelly* (1992) 1 Cal.4th 495, 526-527.)

CALCRIM No. 570 initially informs the jury of both the subjective and objective components of heat-of-passion manslaughter, describing the latter component as requiring that "[t]he provocation would have caused a person of average disposition to act rashly and without due deliberation." (5 CT 1455.) The instruction then adds the above-quoted clause. (5 CT 1455.) When that clause is viewed in light of the whole instruction, it becomes apparent that it merely reminds the jury of the objective component and advises how to conduct the applicable inquiry. The instruction invites the jury to consider, in deciding whether the provocation was objectively sufficient: 1) whether the average person would have been provoked and 2) how the average person, standing in the defendant's shoes, would have reacted, namely, would the average person have reacted by *acting rashly* under the influence of passion.

The instruction, read in its entirety, does not misstate the *Najera* line of authority. It does not imply that passion must cause a reasonable person to react the way the defendant did in order for provocation to be considered adequate. To the contrary, it informs the jury that a reasonable person must be provoked and must, as a consequence of that provocation, act rashly without judgment. The challenged clause refers specifically to that objective component (i.e., the person of average disposition), and parallels the requirements set out earlier in the instruction.

Any possible confusion was eliminated by the trial court's response to the jury's question on this precise topic. The court's response reaffirmed that the inquiry is not whether an average person would kill, but rather whether a reasonable person would commit some rash act, under passion and emotion rather than judgment. The Court of Appeal summarily dismissed the significance of that response, stating that "this answer did not really focus on the jury's question, and did not really clarify the aspect of the instruction at issue." (Maj. Opn. at p. 20.) That conclusion is incorrect. The trial court's response specifically directed the jury to focus on whether a reasonable person would commit a "rash" act, not a "homicidal" act. Accordingly, there is no reasonable likelihood the jury would misunderstand this instruction as setting out a legal standard conflicting with *Najera*.

Finally, as Justice Reardon's dissent observes, any error was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836. (Dis. Opn. at pp. 1-2.) Appellant's testimony served as the sole basis for the claim of provocation. It was wholly lacking in credibility and overwhelmingly refuted by the evidence. Appellant's claims that the victim called him up and asked him to come over, then spontaneously began berating and provoking him (13 RT 1524-1526), was belied by unrefuted evidence of the victim's terrified state in the hours preceding the crime and her son's testimony that she

begged him not to come (10 RT 1029; 11 RT 1138-1139, 1152-1153, 1155). Appellant's claim that she bemoaned his leaving her (13 RT 1531) approaches the absurd, as she had not only ended her relationship with appellant, she was dating Mr. Houtz. Appellant's claim that he did not touch the phone cord was refuted by the testimony and photographs reflecting that the phone jack itself was yanked from the wall. (Compare 6 RT 464, 471, 510-511, 514-515, 533, 535; 7 RT 572, 578; 12 RT 1348-1349, 1353-1355, with 13 RT 1531.) And his claim that he did not flee to Mexico but merely accompanied a friend visiting family was belied by the fact that appellant went to significant lengths to say goodbye to his sister before his departure and then remained at large in Mexico for six years. (8 RT 781-785; 12 RT 1438; 13 RT 1534.) "In short, given the overwhelming evidence of second degree murder, it is not reasonably probable that the jury would have returned a more favorable verdict in favor of appellant had the above language been deleted from the instruction." (Dis. Opn. at p. 2.)

Accordingly, review is necessary to resolve whether the challenged instruction on provocation in this case was prejudicial error.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that review be granted.

Dated: May 6, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 6,212 words.

Dated: May 6, 2011

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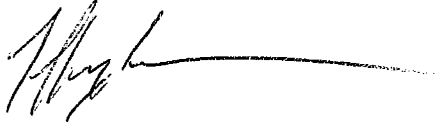

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EXHIBIT A

Filed 3/30/11 P. v. Beltran CA1/4

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

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

TARE NICHOLAS BELTRAN,

Defendant and Appellant.

A124392

(San Francisco City & County Super. Ct. Nos. 175503, 203443)

After a two-year relationship marred by repeated incidents of domestic violence, appellant stabbed his estranged girlfriend to death in front of her children. He fled to Mexico, but was later located, brought to trial, and convicted of second degree murder.

On appeal, appellant argues that the prosecutor's closing argument, the jury instructions, and the trial court's response to a question from the jury all reflected the same error of law regarding the degree of provocation necessary to negate malice and reduce the degree of homicide to voluntary manslaughter. Specifically, appellant contends that this error permitted the jury to reject appellant's claim of voluntary manslaughter, and reach a verdict of second degree murder, if it found that the victim's provocation of appellant would have caused a reasonable person to act rashly, but was not sufficient to cause such a person to kill. We agree with appellant that the relevant jury instruction was at least ambiguous, if not misleading, and that under the circumstances of this case, the error was prejudicial. Accordingly, we must reverse appellant's conviction.

This conclusion moots many of appellant's other contentions. For the guidance of the trial court in the event of a retrial, however, we will address appellant's arguments that the trial court erred in admitting hearsay statements by the victim to police and to a lay witness, as well as evidence of appellant's prior acts of domestic violence.

FACTS AND PROCEDURAL BACKGROUND

A. Appellant's Relationship with the Victim

In November 1998, appellant met a woman named Claire Joyce Tempongko at a bar. About a month later, they began dating. In mid-January 1999, appellant moved into the apartment that Tempongko shared with her school-age son, J.N.,[1] and toddler daughter. Appellant sometimes referred to Tempongko as his wife, and J.N. addressed and referred to appellant as "dad," even though appellant was not his father. According to appellant, he and Tempongko discussed the possibility of having a child of their own. She told him she was somewhat hesitant, because she was afraid he would abandon her as the fathers of her existing children had done, but he denied that she ever told him that she did not want to have a child with him because he was abusive. Eventually, according to appellant, they agreed that she would try to become pregnant, but she never told him that she had succeeded.

Appellant's relationship with Tempongko was "off and on again," had "ups and down[s]," and was marred by domestic violence almost from the start. In June 1999, appellant was convicted of felony domestic violence and put on probation. At appellant's trial, over the objection of his counsel, and subject to limiting instructions by the court, the prosecution introduced evidence of three domestic violence incidents between appellant and Tempongko, and of appellant's subsequent violation of a protective order.

1. The April 28, 1999 Incident. On April 28, 1999, Tempongko called the police from a pay phone half a block from her apartment. When San Francisco police officer Laxman Dharmani arrived, Tempongko and J.N. appeared to be frightened. Tempongko

[1] To protect the privacy of Tempongko's son, an innocent bystander who was a minor at the time of the crime, we will refer to him by his initials.

told Dharmani that appellant had come to her apartment demanding to be let in, and that when she refused, because she was afraid of him, he made a commotion and broke a rear window.[2] Tempongko explained to Dharmani that she had then let appellant into the apartment, because she was embarrassed by the scene he was making, but once he was inside, she told him he was no longer welcome there. He began gathering his belongings, but then suddenly grabbed her and threw her to the ground. When Tempongko got up, appellant grabbed her by the hair and pulled her along a hallway, but then let her go and drove away in the couple's pickup truck.[3] Shortly after that, appellant left Tempongko a voicemail message saying that he would be back. Tempongko then called the police. She told Dharmani that she was afraid of appellant, but when Dharmani suggested that she go to a friend's or relative's house, she declined to leave home.

2. The May 17, 1999 Incident. About three weeks later, during the late evening on May 17, 1999, Tempongko and appellant, riding in a limousine they had rented, picked up a friend of appellant's named Teofilo Miranda and took him to a nightclub. The two men drank alcohol in the limousine, and then had two or three beers at the club. After they had been at the club for a while, several men at an adjacent table commented about how Tempongko loved to dance. Appellant appeared to Miranda to become jealous, and got into an argument with the men. The club's security guard then told appellant, Tempongko, and Miranda to leave. They did so, and headed for Miranda's house. On the way, a truck came close to hitting them as they were crossing the street, and appellant got angry and threw a beer bottle at it.

After that, according to Miranda, appellant got into a bad mood. After the group had sat talking for a little while at Miranda's apartment, appellant asked Miranda to call a taxi so that he could go home, and told Tempongko she was to come with him.

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[2] Appellant testified that the window was already cracked, and that he was only knocking on it when it broke.

[3] In appellant's own testimony, he admitted grabbing Tempongko by the arm or shoulder, but did not recall ever pulling her by the hair. J.N., however, remembered seeing appellant drag his mother down a hallway by her hair on this occasion.

Tempongko told Miranda that she did not want to go in the taxi with appellant because she was afraid he would hit her, and asked him several times not to let appellant take her away. When the taxi arrived, Tempongko threw herself onto the floor, crying. Appellant took hold of her and tried to pick her up and remove her from Miranda's apartment, but was not able to do so. Miranda tried to persuade appellant to let Tempongko go, and then called the police. The tape recording of Miranda's 911 call was played for the jury; in the background, Tempongko could be heard calling out for help. When the police arrived, Tempongko was "shaking, crying, [and] hysterical," and told them she did not want to be left alone with appellant. Appellant was detained.

The following afternoon, the police photographed Tempongko's arms and legs, which were bruised where appellant had grabbed her. At trial, appellant admitted causing the bruises on Tempongko's arm, but did not recall grabbing her by the leg. He contended he was trying to pick Tempongko up off the floor, even though she did not want him to do so, because the taxi was waiting for them. He remembered her asking for help, but did not recall her telling Miranda that she was afraid he would beat her.

3. The November 18, 1999 Incident. On November 18, 1999, the police, including officer John Tack, were called to Tempongko's apartment by Tempongko's mother, who told them that her daughter had gotten into a fight with her boyfriend, and he had beaten her.[4] When they arrived, they found the bedroom door closed, and either locked or blocked shut. After repeated requests, appellant opened it a few inches, enabling the police to force it open and pull appellant out of the room. He smelled of alcohol. Tempongko was inside the bedroom, distraught. The police saw many empty beer cans or bottles scattered about in the living room.

Tempongko told the police that she and appellant had been drinking to celebrate their one-year anniversary, and had gotten into an argument, during which appellant grabbed Tempongko by the hair and held her with her head pulled back for several

[4] The jury was instructed that Tempongko's mother's statement was introduced only to explain why the police entered the apartment, and not for its truth.

seconds. After appellant released Tempongko, she left to get her mother and stepfather, who came back to the apartment with her. Appellant argued with them and yelled at them, and Tempongko's mother left, saying she was going to call the police. Appellant then forced Tempongko into the bedroom and locked her in along with him for about five minutes.[5] Tempongko did not appear to be injured.

4. The Protective Order Violation. At some point prior to September 7, 2000, Tempongko obtained an emergency protective order requiring appellant to stay at least 100 yards away from her apartment. However, he still had a key.

On September 7, 2000, the police were dispatched to Tempongko's apartment building. When they arrived, they saw appellant on the street, lurking in the shadows near the door of the building. The police detained him, and observed that he was slightly disheveled, had bloodshot eyes and slurred speech, and smelled of alcohol. He was arrested because he appeared to be so intoxicated as to pose a danger to himself or others. The police knocked on Tempongko's door, and she told them about the emergency protective order. She appeared to be frightened, and "became almost panic stricken" when the police told her that they had detained a man outside the building.

According to appellant, he had come to Tempongko's apartment, uninvited and unannounced, because he wanted to see the children, and Tempongko called the police when he rang the buzzer and called her name. He did not use his key because Tempongko was not expecting him. He admitted knowing at the time that there was a protective order prohibiting him from coming within 100 yards of Tempongko's apartment.

B. The Homicide

In early October 2000, appellant started living "off and on" in a room in an apartment in another neighborhood, which he rented from a man named Oscar Sanchez, whom he knew through a mutual friend. Sanchez testified that appellant told Sanchez

[5] Appellant acknowledged grabbing Tempongko and taking her into the bedroom with him, but denied locking the door.

only he had been "thrown out" of his prior residence; appellant did not explain further. According to appellant, Tempongko never told him that she wanted to end their relationship; rather, he moved out because he and Tempongko "mutually decided to take a timeout to kind of reevaluate our relationship." In an employment application that appellant filled out on October 13 or 15, 2000, he gave Tempongko's address and telephone number as his own.

Around the same time that appellant moved out of Tempongko's apartment, she started dating a man named Michael Houtz, whom she had known as a friend since January 2000. Shortly before they started dating, Tempongko told Houtz that she had finally gotten appellant to break up with her, as she had wanted to do since January 2000. Tempongko told Houtz that appellant had told her the relationship would end only "over his dead body [or] over her dead body."

During the morning of October 22, 2000, which was a Sunday, Houtz picked up Tempongko and her children (then aged 10 and 5) for a planned excursion to Sacramento to get Halloween costumes for the children. Meanwhile, according to Sanchez, appellant's roommate, appellant spent most of that morning drinking; he and Sanchez consumed 24 to 36 cans of beer between the two of them. Appellant testified that he thought he drank nine cans of beer, but he was not positive.

As both Sanchez and appellant recalled, Tempongko called around noon on October 22, 2000, and when Sanchez answered the telephone, she asked for appellant. Sanchez gave appellant the phone, and a 10-minute conversation ensued, during which Sanchez testified that appellant was calm and did not use any profanity. According to appellant, Tempongko called him that day because they were supposed to have lunch. Instead, she told him that some female friends were taking her and the children to buy Halloween costumes, but she said she would still see him later in the day, and asked him to call her in the afternoon to find out when she would be home. After the call, appellant showered, dressed, and left the apartment.

After stopping at Houtz's house in Vallejo, Houtz, Tempongko, and her children arrived in Sacramento at about 2:45 p.m. As they were getting out of the car,

Tempongko's cell phone rang. According to Houtz, Tempongko's son, J.N., took the phone out of her purse, answered it, and then handed it to Tempongko, saying, "Dad is mad." Houtz could hear a male voice on the other end of the call, speaking extremely loudly to Tempongko. Houtz could not understand what Tempongko was saying to the caller, because she was not speaking in English. After a minute or two, she yelled into the phone and hung up. J.N. remembered his mother getting what he considered an unusual number of calls on her cell phone during the Sacramento outing. However, he did not recall answering the phone himself, or knowing the identity of any of the callers.

Both Houtz and J.N. recalled that after receiving the telephone call, Tempongko's mood changed; she had been acting happy and carefree earlier, but after the call, she appeared to J.N. to be nervous, and to Houtz to be apprehensive and upset, or at least embarrassed. Nonetheless, Houtz, Tempongko, and the children went on with their excursion. Shortly after the call, Tempongko told Houtz that the call had come from "him," which Houtz understood to mean Tempongko's boyfriend or former boyfriend. Tempongko complained that he was "bothering" her.

Appellant testified that he called Tempongko around 3:00 p.m. that day from a pay phone. His recollection was that it was not J.N., but Tempongko herself, who answered the call. Appellant acknowledged that he might have spoken loudly, due to the background noise near the pay phone, but averred that he was not upset and did not yell, nor was he angry or upset at Tempongko for changing their plans. She told him she would call him later. Appellant testified that he did not tell her to be home by 7:00 p.m., and that they did not agree she would be home by any specific time. He also denied knowing anything about her having met a new male friend, or started dating another man.

When Tempongko and Houtz planned their shopping excursion, she had told Houtz that she would need to be home by 7:00 p.m. During the trip back, Tempongko received a few more calls on her cell phone, during which she spoke to the caller or callers in Tagalog, and sent at least one other call directly to voicemail. She appeared to Houtz to be "fidgety" and concerned about the time, but she told him not to worry. When they neared her apartment at about 6:45 p.m., Tempongko appeared to Houtz to become

alarmed by the sight of a green Honda parked near the door of her building, with a man who looked Caucasian or Hispanic sitting slumped down in the driver's seat.[6] Tempongko told Houtz not to stop, and to drive around the block. As they did so, Tempongko scanned the area carefully. When they returned to her street, the car was still there, and Tempongko became very frightened, and told Houtz to drive around again, this time in a larger circle.

After they circled the block a third time, the green Honda was gone, but Tempongko remained tense, and asked Houtz to circle around one more time. At the end of this fourth circuit, Houtz pulled into a driveway next to Tempongko's building. Tempongko and the children got out of the car quickly, without saying goodbye; ran into the building, and shut the door. Shortly after that, Houtz tried to call Tempongko from his cell phone, both at her home telephone number and on her cell phone. According to Houtz, J.N. answered the home phone, said his mother was not home, and hung up. The cell phone rang straight through to voicemail. Houtz then drove by the apartment to check on them, and noticed a man sprinting away from the side of the street on which Tempongko lived.[7] Everything appeared all right when Houtz checked the front door, however, so he headed home. While driving home, and soon after he arrived, Houtz tried several more times to reach Tempongko on her cell phone, but was only able to reach her voicemail.

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[6] The prosecution argued that the man in the car was appellant. Appellant denied having a car at that time, and testified that he traveled to Tempongko's that evening by bus, and had not been in a car waiting for Temponko to arrive. Christina Maldonado, who lived on the top floor of the three-unit building in which Tempongko had the basement apartment, recalled that appellant had a car, but was not certain of the make or model. In an interview with the police on October 24, 2000, Houtz told the police that the car was a green four-door Honda Civic, and that Tempongko said she had also seen the same car in front of her house a month earlier.

[7] According to the notes the police took of their interview with Houtz on October 24, 2000, he did not mention that Tempongko told him to circle the block several times when they came back to her apartment, nor did he mention seeing a man run away from the vicinity. He merely told them that he had dropped her off at 6:45 p.m.

In contrast to Houtz's testimony, appellant introduced the testimony of Flor Yee. Yee lived a block away from Tempongko, and her daughter was a school friend of Tempongko's daughter. Yee testified that Tempongko and her children stopped by to see her for about 10 minutes between 4:00 p.m. and 6:00 p.m. on October 22, 2000. Yee said that Tempongko and the children seemed happy at the time, and said they had been to Vallejo that day. Later the same evening, around 8:00 or 9:00 p.m., J.N. came over to Yee's house terrified and crying because his mother had just been killed. He was there for about 20 minutes, and then the police came.

J.N., who was 18 years old by the time of appellant's trial, testified about what happened inside Tempongko's apartment that evening. He said that his mother's cell phone rang several times, but he did not hear the conversations, except that at around 8:15 or 8:30 p.m., he heard his mother arguing with the caller, sounding frantic or at least upset, and urging the caller not to come to the house.[8]

Some 30 to 45 minutes later, appellant opened the apartment door with a bang, entered the apartment without being let in by Tempongko or her children, and began yelling loudly at Tempongko, angrily asking her where she had been, and with whom. Tempongko did not answer him. According to J.N., she did not push or strike appellant, and J.N. did not remember her swearing at him. After appellant yelled at Tempongko and they argued for about five or ten minutes, something appeared to J.N. to "trigger" appellant. Appellant walked very quickly into the kitchen area and grabbed a large kitchen knife with a six-inch blade. When appellant came back to the living room, he angrily approached Tempongko and began stabbing her repeatedly. She retreated, fell back onto the couch, put up her arms to try to push appellant away, and tried to grab the knife, but appellant kept stabbing her. After Tempongko slid to the floor, appellant stabbed her a few more times, and then ran out of the apartment, still carrying the knife.

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[8] In an interview recorded in 2007, J.N. said he was not sure whether his mother told the caller to come to the house, or not to do so.

Appellant's version of these events differed in several respects from J.N.'s. Appellant testified that he arrived at about 8:40 p.m., and let himself in with the key he still had. He did not knock, because they were expecting him. He denied being angry when he arrived, or banging the door. Appellant maintained that Tempongko was upset with him for coming over so late, but he acknowledged that she never physically assaulted him during their argument. Appellant said Tempongko also criticized him for taking a job washing dishes, at which point they began to argue about money and exchange angry insults. Tempongko called appellant an "illegal" and a "nobody," and said she could "do better" than him.

According to appellant, he then said he was leaving, and this only made Tempongko even more angry. Finally, she yelled, " 'Fuck you. I was right. I knew you were going to walk away someday. That's why I killed your bastard. I got an abortion.' "[9] Appellant testified that he had not known Tempongko was pregnant or that she had an abortion, and that learning this shocked him so much that he had no recollection of what happened next, until he found himself holding a bloody knife, with blood on his hands. Still in shock, he looked at the children, and then ran out of the apartment, holding the knife, which he threw away.[10] He admitted taking Tempongko's

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[9] This aspect of appellant's version of the events was corroborated by portions of Tempongko's medical records introduced into evidence by the defense, which established that she had an abortion on July 13, 2000.

[10] Later that evening, the police found a knife, with Tempongko's blood on it, on the sidewalk at a street corner near her apartment building. A passerby had earlier seen a Hispanic man near that location, running very fast in the middle of the street, cursing and muttering to himself in English and Spanish, and carrying a knife with a five-inch to seven-inch blade. The passerby was not able to identify appellant as that man, however.

cell phone, explaining that she handed to him while they were arguing, urging him to call her friend if he did not believe her about where she had been.[11]

Maldonado, Tempongko's neighbor on the top floor, testified that during the evening on October 22, 2000, she heard sounds of a struggle coming from Tempongko's basement apartment, with what sounded like furniture being knocked over or someone being thrown against a wall. She heard a muffled male voice, but did not hear a female voice. She also heard the children screaming, and calling frantically to their mother that they loved her.

After listening for a couple of minutes, Maldonado looked down the inside stairwell of the building and saw J.N. running out of the apartment toward the sidewalk. At that point, she left her apartment by the front door with her cordless phone in her hand. As she did so, she saw the occupant of the apartment on the middle floor of the building, Frederick Keagy, standing outside the door with J.N. Keagy had just been driven home by two friends, and encountered J.N. at the street door of the passage leading to Tempongko's apartment. J.N. was crying hysterically, and called to Keagy that his mother was hurt, their phone was not working because the cord had been cut or "messed up," and he needed to call for help. J.N. told Keagy, "He stabbed my mom," and "he ran away." Keagy did not ask J.N. who "he" was, but J.N. told Keagy's friend Gregory Stork that it was J.N.'s "dad," his mother's boyfriend. Keagy started up the stairs to get to a phone, but on the way, he encountered Maldonado. He told her to call 911, which she did.

Meanwhile, Keagy and Stork went into Tempongko's apartment and saw her propped up in the corner by the couch, surrounded by blood, and barely breathing. Furniture had been knocked over, and according to Keagy and Stork, the telephone had

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[11] The prosecution introduced business records showing that eight calls were made from Tempongko's cell phone starting at 9:13 p.m. on October 22, 2000, which was several minutes after the police arrived at Tempongko's apartment in response to Maldonado's 911 call. Appellant admitted using the phone to make several calls, including one to his sister in San Rafael. Some of the calls went to the phone number of appellant's acquaintance Chili Bowles.

been detached from the wall and was on the floor. Keagy recalled the telephone cord being next to Tempongko; Stork testified that it was "sort of all over" her. Maldonado also went into Tempongko's apartment after placing the 911 call, and saw the phone jack still on the wall, but with no telephone connected to it. She did not recall seeing the cord on Tempongko's body.

Appellant denied pulling any telephone cord out of the wall, or at least did not remember doing so, and testified that he did not recall there being any telephone in the apartment other than the cordless telephone in the bedroom.[12] The statements that Keagy, Stork, and Maldonado wrote out for the police on the night Tempongko was killed did not include any information regarding the telephone or the telephone cord. These witnesses testified at trial, however, that their statements were not necessarily a complete account of everything they saw. J.N. and Maldonado also both testified that the apartment had a land line telephone, with a cord, mounted on the wall near the front door, although Maldonado did not recall when she had last seen it. J.N. did not recall appellant doing anything to the wall-mounted telephone on the night Tempongko was killed, but he did remember that he tried to use it to call for help after the stabbing, and it was not working.

The police report and the investigating officers' chronology did not mention anything about a telephone or a telephone cord at the scene of the homicide. However, crime scene photographs taken at the time showed a telephone cord on the floor, as well as the telephone jack in the wall. The officer who took the photographs opined that it looked as though the cord had been pulled out of the wall jack.

Dr. Boyd Stephens, who was the chief medical examiner for San Francisco at the time of the homicide, performed an autopsy on Tempongko on October 23, 2000. Stephens died in the spring of 2005, shortly after his retirement. In his stead, the prosecution called Dr. Amy Hart, Stephens's successor. Based on the autopsy report,

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[12] The crime scene photographs taken after Tempongko was killed showed a cordless phone base in one of the bedrooms, and a matching telephone handset on the bed.

which was admitted into evidence as a business record, and on her review of Stephens's notes, Hart testified that Tempongko received 17 "sharp force injuries" that were consistent with wounds that could be inflicted by the knife found near Tempongko's apartment, as well as 4 blunt force injuries. Some of the sharp force injuries were wounds on Tempongko's hands that Hart characterized as "defensive," that is, as injuries that could have been sustained by someone trying to ward off an assault with a sharp weapon. Hart testified that in her opinion, based on the records that she reviewed, Tempongko died of hypovolemic shock, which is the medical term for what happens when someone bleeds to death.

C. Appellant's Actions After the Homicide

Sometime after 9:00 p.m. on the night Tempongko was killed, appellant showed up at a bar in the Tenderloin where he was a regular patron. According to appellant, he flagged down a taxi in Tempongko's neighborhood, and had it take him to the bar so he could look for his only close friend, Ezequiel Perez. While appellant was in the taxi, he realized that he had taken Tempongko's cell phone with him, because it rang. He turned it off without answering it,[13] though he turned it back on later to make outgoing calls.

When appellant arrived at the bar, both the owner and the bartender noticed that appellant had blood and scratches on his hand, and blood on his shirt. Appellant appeared nervous, and told them he had gotten into a fight outside the bar. Appellant went to the bar's restroom, where he cleaned up; he also asked if the bar owner had an extra shirt he could put on, and after the owner found one, he changed into it. Appellant told the bar owner that the police were looking for him, and obtained permission to use the bar's phone so he could call a friend.

Shortly thereafter, appellant's friend Perez met him at the bar. They went outside the bar and called Bowles, who was a close friend of Perez's, to ask him for a ride; they then left the immediate area of the bar. Bowles picked up appellant and Perez, and took

[13] This testimony was consistent with Houtz's statement that he tried to call Tempongko's cell phone some time after he dropped her off, but only reached her voicemail.

them to his apartment in San Bruno, where they spent the night. At about 2:00 a.m. on October 23, 2000, appellant called his roommate, Sanchez, and told Sanchez in Spanish that he had done something wrong.

The following evening, Bowles drove appellant to a convenience store or laundromat somewhere north of the Golden Gate Bridge. At the store, appellant met briefly with his sister, spoke with her for a few minutes, embraced her, and then left with Bowles. Appellant testified that he met with his sister to say goodbye to her, and to ask her, when she found out what he had done, to explain it to their mother. Later that evening, appellant asked Bowles to take him to the Greyhound bus station in San Francisco, where appellant caught a bus to Los Angeles, telling Bowles that he was heading for Mexico. According to appellant, he went to Mexico at Perez's suggestion, because he was afraid. Appellant remained in Mexico until he was apprehended in June 2006, and returned to San Francisco in 2007.

D. Procedural History

The San Francisco District Attorney filed an information on November 21, 2007, charging appellant with the willful, deliberate, premeditated murder of Tempongko (Pen. Code, § 187, subd. (a)[14]), and alleging that he used a deadly weapon, a knife, in the commission of the crime (§ 12022, subd. (b)(1)). The presentation of evidence at appellant's trial began on September 8, 2008. On September 30, 2008, the jury acquitted him of first degree murder, but found him guilty of second degree murder, and found the weapon use allegation true. On December 12, 2008, the trial court sentenced appellant to 15 years to life in prison, with an added one-year term for the use of the knife. Appellant's notice of appeal was filed the same day.

DISCUSSION

A. Jury Instruction on Provocation and Voluntary Manslaughter

At appellant's trial, he did not deny that he killed Tempongko. The only real issue presented for the jury was the type and degree of homicide of which appellant was guilty.

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[14] All further statutory references are to the Penal Code unless otherwise noted.

The prosecution argued that the killing was intentional, premeditated, and deliberate, and that appellant should therefore be convicted of first degree murder. Appellant argued that because of provocation by Tempongko, appellant was guilty only of voluntary manslaughter. As already noted, the jury opted for a middle ground, finding appellant guilty of second degree murder. Appellant contends that this verdict must be reversed, because the jury was improperly instructed on the law regarding voluntary manslaughter.

Voluntary manslaughter is an unlawful killing, committed either with the intent to kill or with conscious disregard for life, but without malice. (See *People v. Breverman* (1998) 19 Cal.4th 142, 153.) Malice may be negated either by imperfect self-defense (not an issue in this case) or by provocation resulting in a "sudden quarrel or heat of passion." (§ 192, subd. (a).) The provocation must meet both a subjective test—that is, the defendant must actually have been provoked (not an issue for purposes of the present appeal)—and an objective test of sufficiency; that is, it must be of such a nature as to induce a reasonable person of average disposition and self-control to act out of strong emotion, rather than rationally. (See generally 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 217, pp. 828-829.)

The foregoing legal principles have long been settled. The question appellant raises on this appeal, however, has not yet been addressed by the California Supreme Court. Appellant argues that in order for a homicide to constitute voluntary manslaughter, the provocation need not be such as to induce a reasonable person to *kill*; rather, all that is required is that the provocation be sufficient to induce a reasonable person to act from emotion rather than reason. Appellant further contends that his conviction must be reversed because the jury instructions given in this case did not make this clear, and the trial judge denied his trial counsel's request for clarification on this point.

As support for this argument, appellant relies on *People v. Najera* (2006) 138 Cal.App.4th 212 (*Najera*). In *Najera*, the prosecutor argued that the defendant's offense would be voluntary manslaughter only if " 'a reasonable person [would] do what the defendant did' " in response to the particular provocation shown. (*Id.* at p. 223, italics

omitted.) The defendant's trial counsel failed to object to this, and on appeal, the defendant argued that this omission constituted ineffective assistance of counsel. The *Najera* court agreed that the prosecutor's argument was improper. As the court explained, "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." (*Id.* at p. 223, italics added.)

The jury instruction on provocation given in this case was as follows: "In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked *and how such a person would react* in the same situation knowing the same facts." (Italics added.) On the authority of *Najera, supra,* 138 Cal.App.4th 212, appellant argues that this instruction was incorrect. Appellant contends that the instruction permitted the jury to reject his voluntary manslaughter theory if it did not believe that a reasonable person would have been provoked to *kill* by Tempongko's remarks, even if it found that those remarks would have caused a reasonable person to act rashly rather than rationally.

Concededly, the aspect of *Najera, supra,* 138 Cal.App.4th 212 on which appellant relies was dictum. The asserted provocation in that case was that the victim called the defendant a "faggot" and pushed him. The court concluded that this was not sufficient provocation to entitle the defendant to a voluntary manslaughter instruction. Thus, the defendant's trial counsel's failure to object to the prosecutor's incorrect statement of the law on voluntary manslaughter was not ineffective assistance of counsel, because the defendant was not prejudiced by it. (*Id.* at pp. 225-226.) For the same reason, the court declined to consider whether the voluntary manslaughter instruction given in that case (i.e., CALJIC No. 8.42) was defective on the same issue, because it was "ambiguous as to whether the reasonable person test is the standard for becoming aroused or the standard for acting after becoming aroused." (*Id.* at p. 226.)

In the present case, the provocation instruction, which we have quoted *ante*, was based on CALCRIM No. 570, as it existed at the time of appellant's trial. Significantly,

this CALCRIM instruction was modified a few months later, in December 2008, on the precise issue raised by appellant here. The revision made the following changes to the pertinent paragraph (indicated by underlining for additions and ~~strikeout type~~ for deletions): "It is not enough that the defendant simply was provoked. The defendant is not allowed to set up (his/her) own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition ~~would have been provoked and how such a person would react,~~ in the same situation and knowing the same facts, would have reacted from passion rather than from judgment." (Cal. Official Reports, Advance Sheet No. 5 (Feb. 19, 2009), Amendments to Criminal Jury Instructions, pt. 8, pp. 12-17.) A report to the Judicial Council of California from the Advisory Committee on Criminal Jury Instructions dated October 10, 2008, recommended this change "because of concern that the original draft [of CALCRIM No. 570] could raise doubt in a juror's mind about whether the state of mind required for voluntary manslaughter was that an average person similarly situated would have been provoked to kill, or whether provocation resulting in passion rather than judgment was sufficient." The revision "clarified that the latter is required." The December 2008 revision of CALCRIM No. 570 also added a citation to *Najera, supra*, 138 Cal.App.4th 212, to the commentary accompanying the instruction. (<http://www.courtinfo.ca.gov/jc/documents/reports/120908item5.pdf> [as of Mar. 29, 2011].)

Notwithstanding the revision of CALCRIM No. 570, respondent argues that the dictum in *Najera, supra*, 138 Cal.App.4th 212 was wrong, and conflicts with two other cases, *People v. Fenenbock* (1996) 46 Cal.App.4th 1688 (*Fenenbock*), and *People v. Superior Court (Henderson)* (1986) 178 Cal.App.3d 516 (*Henderson*). In our view, neither of these cases supports such a proposition. The defendant in *Fenenbock* killed his victim allegedly in response to a report that the victim had molested a child, but the defendant and the child had no personal bond. The court concluded that "there [was] no evidence here from which the jury could have found provocation so serious that it would

produce a lethal response in a reasonable person." (*Fenenbock*, at p. 1705.) Similarly, the *Henderson* court stated in a footnote that "[t]he concept of 'heat of passion' allows a defendant to reduce a killing from murder to manslaughter only in those situations where the provocation would trigger a homicidal reaction in the mind of an ordinarily reasonable person under the given facts and circumstances. [Citation.]" (*Henderson*, at p. 524, fn. 4.) Neither decision considered whether it is *necessary* for the response or reaction to be lethal or homicidal, or purported to add a "reasonable conduct" requirement to the law of voluntary manslaughter.

Respondent also relies on language in other cases referring to the mental state needed for voluntary manslaughter as "homicidal rage," or using similar terms.[15] This language, however, addresses the necessary *degree of arousal* in the defendant's mental state, not the nature of his conduct. None of these cases holds provocation is sufficient *only* if it would cause an ordinary person of average disposition to react with deadly force. To the extent their language suggests otherwise, it was not the result of the court's consideration and analysis of an argument actually raised in the case, and thus is not a precedential holding. (See *People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10 ["cases are not authority for propositions not considered"].)

On the other hand, the analysis in *Najera*, *supra*, 138 Cal.App.4th 212, though dictum due to the court's ultimate conclusion that the defendant was not prejudiced, was arrived at after consideration of an issue actually raised in the case. Moreover, it is consistent with the longstanding qualitative standard for provocation; i.e., that it be

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[15] (See, e.g., *People v. Avila* (2009) 46 Cal.4th 680, 706 ["[r]easonable people do not become homicidally enraged"]; *People v. Carasi* (2008) 44 Cal.4th 1263, 1307 [" 'homicidal rage or passion' "]; *People v. Koontz* (2002) 27 Cal.4th 1041, 1086 [same]; *People v. Kanawyer* (2003) 113 Cal.App.4th 1233, 1236 [same]; *People v. Lee* (1999) 20 Cal.4th 47, 59 ["deadly passion"]; *People v. Dixon* (1995) 32 Cal.App.4th 1547, 1556, disapproved on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 90-91 ["homicidal rage"]; *People v. Pride* (1992) 3 Cal.4th 195, 250 ["homicidal rage or passion"]; see also *People v. Golsh* (1923) 63 Cal.App. 609, 614 [to be adequate, provocation must be "such as would have a like effect upon the mind and emotions of the average man"].)

sufficient to cause an ordinarily reasonable person to act from passion rather than judgment. (See *People v. Logan* (1917) 175 Cal. 45, 49 [provocation sufficient to arouse the passions of the ordinarily reasonable man]; *People v. Manriquez* (2005) 37 Cal.4th 547, 583-584 [conduct sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection].) More importantly, the *Najera* analysis protects the qualitative standard from being distorted by the quantitative notion that provocation must reasonably trigger a certain heightened level of reactive *conduct*, specifically lethal force, in order to reduce murder to manslaughter. Such a notion is erroneous. What negates malice is simply *a state of mind obscured by passion*. (*People v. Carasi*, *supra*, 44 Cal.4th at p. 1306.) That state of mind can be induced by any violent, intense, or enthusiastic emotion, except revenge, including anger, rage, and fear of death or bodily harm. (*People v. Lasko* (2000) 23 Cal.4th 101, 108.) Thus, in the context of voluntary manslaughter, provocation is sufficient if it would trigger such a *state of mind* in a reasonable person. It need not further cause a particular *level of conduct*, let alone cause a reasonable person to react with lethal violence.

We agree with appellant that the provocation instruction given in this case did not expressly limit the jurors' focus to whether the provocation would have caused an average person to act out of passion rather than judgment. Instead, the challenged language invited the jurors to consider what would and would not be a reasonable *response* to the provocation. More specifically, it allowed, and perhaps even encouraged, jurors to consider whether the provocation would cause an average person to do what the defendant did; i.e., commit a homicide. As we have explained, however, whether an average person would be provoked to kill is not a proper consideration in determining whether provocation was sufficient. Thus, insofar as the instructional language permits a jury to decide a crucial issue based on proper and improper considerations, it is ambiguous.

As appellant points out, the existence of the ambiguity, and its effect on this case, is highlighted by the fact that the jury asked a question during deliberations on precisely the relevant issue—i.e., whether the provocation must be sufficient to induce a reasonable

person to commit homicide, or other, less severe rash acts. The trial judge's response was that the provocation "must be such as to cause a person of average disposition in the same situation and knowing the same facts to do an act rashly and under the influence of such intense emotion that his judgment or reasoning process was obscured." As appellant's trial counsel unsuccessfully argued below, this answer did not really focus on the jury's question, and did not really clarify the aspect of the instruction at issue.

In a related argument, appellant contends that the prosecutor committed misconduct during closing argument by misstating the law regarding the standard for determining whether Tempongko's conduct was sufficiently provocative to negate the malice element for murder. Specifically, appellant points to a passage from the closing argument in which the prosecutor used the examples of stubbing a toe, getting cut off in traffic, or being jealous to argue that minor provocation is not sufficient to cause a reasonable person to kill someone. This argument may not have risen to the level of misconduct, but it did serve to reinforce the problem with the jury instruction on provocation, because it encouraged the jury to resolve any ambiguity in the instruction's language in the manner rejected by *Najera*, *supra*, 138 Cal.App.4th 212. (See *People v. Dieguez* (2001) 89 Cal.App.4th 266, 276 [when defendant contends jury instruction was unclear, issue is whether there is reasonable likelihood jury misconstrued or misapplied law in light of instructions, trial record, and arguments of counsel].)

Respondent argues, and the dissent here concludes, that even if there was error in this regard, it was harmless. In assessing whether the error was prejudicial, we apply the *Watson* test (*People v. Watson* (1956) 46 Cal.2d 818, 836), and consider whether it is reasonably probable that appellant would have obtained a more favorable result in the absence of the error. (See *People v. Breverman*, *supra*, 19 Cal.4th at pp. 164-179 [error in instructions on lesser included offense is assessed under *Watson* test].) Here, the jury acquitted appellant of first degree murder, thus rejecting the prosecution's argument that his killing of Tempongko was premeditated. Moreover, the jury's question to the court, discussed *ante*, shows that the jury was confused by CALCRIM No. 5.70, and that it actively considered whether the provocation evidence was sufficient to negate malice.

That confusion was certainly exacerbated by the prosecutor's closing argument, as we note above. Therefore, we agree with appellant that under all of these circumstances, the error in the jury instructions cannot be characterized as harmless. As a result, appellant's conviction must be reversed. Having reached this conclusion, we consider appellant's other arguments only to the extent that it is appropriate to do so in order to assist the trial court in the event of a retrial.

B. Admission of Hearsay re Tempongko's Statements to Police

While appellant was still at large after Tempongko's killing, the United States Supreme Court held in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) that the admission of testimonial out-of-court statements, even if authorized by an exception to the hearsay rule, violates the confrontation clause. In ruling on the prosecution's proffer of Tempongko's out-of-court statements to police in the wake of appellant's acts of domestic violence, the trial court correctly understood that it was bound by *Crawford*'s holding. Nonetheless, appellant now argues that the trial court erred in applying that holding to the present case. We address these arguments for the benefit of the trial court in the event appellant is retried on remand.

In *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*), the court clarified the term "testimonial," as used in this context, as follows: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Id.* at p. 822, fn. omitted.) At the same time, the court noted that it was not "attempting to produce an exhaustive classification of all conceivable statements" as testimonial or nontestimonial. (*Ibid.*)

Davis, *supra*, 547 U.S. 813, was decided together with a consolidated companion case, *Hammon v. Indiana* (2006) 547 U.S. 813 (*Hammon*). In *Davis*, the Supreme Court held nontestimonial, and therefore admissible, tape recorded statements made by a

domestic violence victim during a 911 call, in which the victim responded to the 911 operator's questions by identifying her assailant as the defendant, and describing what he was doing to her as the call progressed. (*Davis*, *supra*, 547 U.S. at pp. 817, 828-829.) In *Hammon*, police officers responding to a domestic violence call encountered the victim alone on the front porch of her home, appearing frightened, but denying that anything was wrong. After the officers entered the home, one of them questioned the victim outside the defendant's presence, asking her what had happened. She responded that the defendant had thrown her down onto broken glass and punched her in the chest. The Supreme Court held that because there was no ongoing emergency at the time, and no continuing immediate threat to the victim, the statements were obtained for the purpose of investigating a past crime, rather than to guide police who were intervening in an ongoing emergency. Thus, the statements were testimonial, and their admission was barred by the confrontation clause. (*Hammon*, *supra*, 547 U.S. at pp. 820-821, 830.)

In analyzing application of *Davis*, *supra*, 547 U.S. 813, and *Hammon*, *supra*, 547 U.S. 813, to the facts of the present case, we must be guided by our own Supreme Court's interpretation of *Davis* in *People v. Cage* (2007) 40 Cal.4th 965. In that case, the court noted that in order for an unsworn statement to be testimonial, "it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony." (*Id.* at p. 984, fn. omitted.) The statement also "must have been given and taken *primarily* for the *purpose* . . . [of] establish[ing] or prov[ing] some past fact for possible use in a criminal trial," an issue that is "to be determined 'objectively,' considering all the circumstances that might reasonably bear on the intent of the participants." (*Ibid.*, original italics.) Consistent with these principles, responding to questions from police "in a nonemergency situation, . . . where deliberate falsehoods might be criminal offenses," is testimonial; however, "statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial." (*Ibid.*)

In the present case, appellant contends that the trial court erred in concluding that some of the statements Tempongko made to the police who came in response to her calls about appellant's domestic violence were not testimonial as that term was clarified in *Davis, supra*, 547 U.S. 813. Specifically, appellant argues that the following evidence should have been excluded: (1) police officer Dharmani's testimony that after he responded to Tempongko's 911 call on April 28, 1999, she told him that appellant had broken a window in her apartment after she refused to let him in; that when she finally let him in, he threw her to the ground, pulled her by her hair, and then left; and that he later left a telephone message threatening to return; and (2) police officer Tack's testimony that when he responded to Tempongko's mother's call to the police on November 18, 1999, and forced open the door to Tempongko's bedroom, Tempongko told him that appellant had grabbed her by the hair and pulled her head back, causing her to leave the apartment to get her mother and stepfather, and that when she returned with them, appellant forced her into the bedroom and locked the door. Appellant argues that because there was no ongoing emergency at the time these statements were made, and the statements concerned past events rather than a currently developing situation, the statements were testimonial in nature.

Respondent counters by arguing that the facts of this case are more similar to those in *Davis, supra*, 547 U.S. 813, than to those in *Hammon, supra*, 547 U.S. 813, and by citing two post-*Davis* California Court of Appeal cases involving similar facts. In one, *People v. Saracoglu* (2007) 152 Cal.App.4th 1584 (*Saracoglu*), a woman and her child came to a police station and spoke to two officers there. The woman was nervous, crying, upset, and scared, and had visible cuts and bruises. She told the police that about 30 minutes earlier, the defendant had choked, pushed, hit, and threatened her, and told her he would shoot her if she went to the police. She explained that she had come to the police station because she was afraid of the defendant, and accepted the officers' offer to get her an emergency protective order. The officers then went to her home and arrested the defendant.

The woman failed to appear to testify at the defendant's trial, so the trial court permitted one of the police officers to testify at trial about what the woman told him at the police station. (*Saracoglu*, *supra*, 152 Cal.App.4th at p. 1587.) The Court of Appeal upheld the trial court's ruling. In so doing, the court rejected not only the defendant's contention, but also the Attorney General's concession that the woman's statements were testimonial because they described events that had already occurred. (*Id.* at pp. 1596, 1598.) Rather, the court concluded that "[o]bjectively viewed, the primary purpose of [the woman]'s initial interrogation by [the officer] was 'to deal with a contemporaneous emergency, rather than to produce evidence about past events . . . .' [Citation.]" (*Id.* at p. 1597.) The court noted that the woman told the police that the defendant had threatened to kill her if she went to them. This implied that she could not return home without facing that threat; thus, her visit to the police station constituted part of an ongoing emergency situation. (*Ibid.*) In short, the woman's "primary purpose for making her initial statements to [the officer] was to gain police protection," rather than to report a past crime. (*Id.* at p. 1598.)

The second case on which respondent relies, *People v. Banos* (2009) 178 Cal.App.4th 483 (*Banos*), involved a defendant who was accused of killing his ex-girlfriend after a history of domestic violence. The prosecution offered evidence of statements that the victim made to police on five occasions: (1) during a meeting with a police officer in the victim's apartment, in which she related that the defendant had punched and threatened her earlier that day, and then called while she was waiting for the police to arrive and threatened to kill her; (2) during another meeting with the same police officer later the same day, in which the victim told the officer that the defendant had come back to her apartment after the officer left, and had hit her and threatened her again; (4) during a 911 call in March 2004, in which the victim told the dispatcher that the defendant was inside the victim's apartment, in violation of a restraining order, and that she was afraid he would attack her; and (5) during a conversation with the officer who responded to the same 911 call, in which the victim reiterated what she had told the dispatcher. (*Id.* at pp. 491-492.)

The *Banos* court held that the victim's statements during the March 2004 call to 911, and her statements to the officer who responded to the call, were admissible as non-testimonial because the victim's "primary purpose for making the statements to the 911 dispatch officer was to gain police protection" in the context of an "ongoing emergency." (*Banos*, *supra*, 178 Cal.App.4th at p. 497.) The court held that the other three statements were testimonial for confrontation clause purposes, however, because on each occasion, the victim was reporting past events at a time when there was no ongoing emergency. On the first occasion, the victim was home, the defendant was not present, and the victim was upset, but not distraught. On the other two occasions, the defendant had already been detained by the police when the victim gave them her version of the events. (*Id.* at pp. 497-498.)[16]

Applying the principles set forth in the cases discussed above to the facts of the present case, we conclude that Tempongko's statements to Tack on November 18, 1999, were properly admitted. The police arrived to intervene in what they were told was an ongoing episode of domestic violence, and had to force open the door to Tempongko's bedroom. Tempongko's statements to them were made moments after the police arrived, and while appellant was still present in Tempongko's apartment. When the police spoke with Tempongko, they were in the process of determining what action they needed to take in order to protect her from possible harm. Accordingly, objectively viewed, Tempongko's statements were made primarily to inform the police in their efforts to deal with an ongoing emergency, and thus were not testimonial.

In contrast, Tempongko's statements to Dharmani on April 28, 1999, were made after appellant's assault on Tempongko had already concluded, and he had left her apartment. Tempongko was standing on a public street when she spoke to Dharmani, and presumably was free to go from there to any place of safety she chose, but told Dharmani she would be more comfortable going back to her apartment. Thus, Tempongko's

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[16] The court held that the statements were nonetheless admissible under the forfeiture by wrongdoing exception to the confrontation clause. (*Id.* at pp. 498-504.) That issue is not presented in this case.

statements were not made primarily to obtain police assistance in a present, ongoing emergency, but rather to report an earlier, already completed assault. Accordingly, the statements were testimonial in nature, and are not admissible under *Crawford*, *supra*, 541 U.S. 36, and its progeny.

C. Admission of Evidence of Prior Domestic Violence

Appellant contends that the trial judge erred in admitting evidence of what appellant characterizes as "four alleged incidents of domestic violence" between himself and Tempongko, under the authority of Evidence Code section 1109. The evidence at issue actually consisted of three incidents of domestic violence and one violation of a protective order against domestic violence, all of which we will refer to collectively as the prior domestic violence evidence. Appellant's position is that the risk of undue prejudice from the prior domestic violence evidence outweighed its probative value, so that it should have been excluded under Evidence Code section 352 (section 352). For the benefit of the trial court on remand, we consider whether the admission of this evidence constituted an abuse of the trial court's discretion under section 352. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060; *People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119-1120.)

Appellant contends that the prior domestic violence evidence lacked any probative value because it was irrelevant to how Tempongko died. This argument ignores the relevance of this evidence to appellant's defense, which was that Tempongko asked him to come to her apartment that night, and provoked him by telling him that she had aborted her pregnancy in the belief he would eventually leave her. This defense placed at issue the state of mind of both appellant and Tempongko, and the prior domestic violence evidence had probative value on both. As respondent points out, by showing that appellant had a propensity for domestic violence, as permitted by Evidence Code section 1109, the prior domestic violence evidence tended to undercut appellant's contention that he stabbed Tempongko only because her provocation triggered in him a mental state negating malice.

Similarly, Tempongko's state of mind regarding appellant and her relationship with him was directly relevant to the plausibility of appellant's version of the facts. In this respect, this case is similar to *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1092, 1102-1104 (*Escobar*), in which the defendant argued that his killing of his wife was voluntary manslaughter because she provoked him by revealing her infidelity, insulting him, and kicking him. In that case, this court concluded that the wife's prior statement to a friend that she wanted to leave the defendant, but was afraid he would kill her, was admissible to rebut the defendant's claim of provocation by showing the wife's fear of him, making it unlikely that she would provoke him in the manner he described. Here, the prior domestic violence evidence showed that Tempongko wanted to end her relationship with appellant, and was afraid of him, thereby making it less likely that she would invite him over to her apartment, much less make highly provocative comments to him once he arrived. Thus, here as in *Escobar*, the challenged evidence had probative value in tending to rebut appellant's defense. Assuming the basis for appellant's defense remains the same in future proceedings, the evidence will remain probative for the same reasons.

Appellant further argues that the prior domestic violence evidence was unduly prejudicial, because it tended to evoke an emotional bias against him on the part of the jury. In view of the undisputed fact that appellant stabbed Tempongko to death in front of her two young children, it is highly unlikely that the jury was unfairly or unduly influenced by hearing evidence that appellant had previously committed acts against Tempongko of a non-lethal nature. Accordingly, we find no abuse of discretion in the trial court's decision that the probative value of the prior domestic violence evidence outweighed its prejudicial effect. (See *Escobar*, *supra*, 82 Cal.App.4th at p. 1097 [prior incident of domestic abuse unlikely to have significant impact on jury in context of undisputed evidence of defendant's "extraordinarily violent conduct" in killing wife]; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1315 [no danger of jury confusion where prior incidents of domestic violence were no more egregious than charged offense];

People v. Brown (2000) 77 Cal.App.4th 1324, 1338 [evidence of prior domestic violence properly admitted where not inflammatory, and less serious than charged act].)[17]

D. Admission of Hearsay re Tempongko's Statements to Houtz

The trial court permitted Houtz to testify about several statements that Tempongko made to him regarding appellant, ruling that these statements were admissible to show Tempongko's state of mind, as provided in Evidence Code section 1250 (section 1250). Appellant now contends that the challenged statements should not have been admitted, on three grounds: first, Tempongko's state of mind was not in issue, and the statements were not offered to prove or explain her acts or conduct; second, the statements in question were not "statement[s] of [Tempongko's] then existing state of mind, emotion, or physical sensation" (§ 1250); and third, even if admissible under section 1250, the evidence should have been excluded under section 352 as more prejudicial than probative. We review these contentions for the guidance of the trial court in exercising its discretion in the event of a retrial on remand. (See *People v. Ortiz* (1995) 38 Cal.App.4th 377, 386 (*Ortiz*) ["The trial court is vested with broad discretion in determining the admissibility of evidence. [Citation.] This is particularly true where, as here, underlying that determination are questions of relevancy, the state of mind exception to the hearsay rule and undue prejudice. [Citation.] The lower court's determination will be reversed only upon a finding of abuse. [Citations.]"].)

The specific testimony by Houtz to which appellant objects is as follows: (1) Tempongko told Houtz during the early months of their acquaintance that she had an ex-boyfriend (evidently referring to appellant); (2) during their outing to Sacramento on

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[17] Appellant also contends that the admission of the prior domestic violence evidence rendered his trial fundamentally unfair, in violation of his federal due process rights. Appellant recognizes that this argument is vitiated by *People v. Falsetta* (1999) 21 Cal.4th 903, 917 [admission of prior uncharged sex offenses under statute similar to Evid. Code § 1109 did not violate due process], but explains that he raises it to preserve it for federal review. In light of our reversal on other grounds, we need only acknowledge here that this issue has been properly raised and preserved at this stage of the proceedings.

the day Tempongko was killed, her demeanor changed after she received a telephone call from appellant; (3) after getting that call, Tempongko said that appellant kept "bothering her"; (4) Tempongko told Houtz in early October 2000 that in her mind, her relationship with appellant had been over since January 2000, but he had not been willing to let her go; (5) Tempongko told Houtz that appellant had not realized his relationship with her was over until recently, and had told her before then that the end of their relationship would occur only over his or her dead body; and (6) when they neared her apartment building upon their return from the Sacramento trip, Tempongko told Houtz not to stop, and to drive around the block instead.

Two of the statements at issue (items (2) and (6) in the above list) simply are not hearsay, and thus were properly admitted over appellant's hearsay objection. Houtz's testimony that Tempongko's demeanor changed after the telephone call is a description of his own observations, not a recitation of an out-of-court statement by Tempongko. His statement that Tempongko told him not to stop, but to drive around the block, is a report that Tempongko gave a request or command, not a recitation of an out-of-court statement of fact offered for its truth, and therefore also is not hearsay.[18] These two items of evidence also cannot be characterized as more prejudicial than probative, so even if appellant's objection under section 352 applied to them, the trial court was within its discretion in overruling it. Accordingly, our analysis of appellant's arguments about

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[18] Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing *and that is offered to prove the truth of the matter stated.*" (Evid. Code, § 1200, subd. (a), italics added.) "Requests and words of direction generally do not constitute hearsay. [Citations.]" (*People v. Garcia* (2008) 168 Cal.App.4th 261, 289; see *People v. Alexander* (2010) 49 Cal.4th 846, 908 [defendant's girlfriend's statement that he asked her to determine accomplice's whereabouts and tell accomplice to "stay strong" was not hearsay, because offered not for truth, but for fact that defendant made request]; *People v. Jurado* (2006) 38 Cal.4th 72, 117 ["Because a request, by itself, does not assert the truth of any fact, it cannot be offered to prove the truth of the matter stated."]; *People v. Reyes* (1976) 62 Cal.App.3d 53, 67 [declarant's "words of direction or authorization do not constitute hearsay since they are not offered to prove the truth of any matter asserted by such words"].)

Houtz's testimony is confined to items (1), (3), (4), and (5) on the above list, which we will refer to collectively as the challenged statements.

Appellant's first argument is that the challenged statements were not admissible under section 1250 because Tempongko's state of mind was not at issue. This contention shares a faulty premise with his argument, discussed *ante*, that the prior domestic violence evidence lacked probative value for the purpose of section 352. Like the prior domestic violence evidence, the challenged statements were relevant to show Tempongko's state of mind, i.e., that she wanted to end her relationship with appellant and was afraid of him. Appellant argues that Tempongko's state of mind did not make his theory of the case implausible, because she had previously continued to see appellant after he assaulted her, and had previously gotten back together with him despite her fear of him. These facts go to the weight of the challenged statements, however, and not to their admissibility.

We turn now to appellant's contention that the challenged statements were not admissible under section 1250 as statements of Tempongko's then existing state of mind, because they described behavior, attitudes, and words that Tempongko, in speaking to Houtz, attributed to appellant. Appellant's argument clearly does not apply to Tempongko's statements evidencing that in her view, her relationship with appellant was over (item (1) and part of item (4) on the list). Nor can it reasonably be argued that evidence of this attitude on Tempongko's part was more prejudicial than probative.

Appellant is correct, however, that the remaining statements—item (3) (appellant kept "bothering" Tempongko); the rest of item (4) (appellant was not willing to let Tempongko go); and item (5) (appellant did not realize his relationship with Tempongko was over, and told her it would end only over his or her dead body)—did not expressly describe Tempongko's present state of mind, and therefore were not admissible under the state of mind exception as codified in section 1250. Respondent urges that these statements were nonetheless admissible, with an appropriate limiting instruction, as *non*-hearsay circumstantial evidence of Tempongko's state of mind.

In making this argument, respondent relies on the analysis set forth in *Ortiz*, *supra*, 38 Cal.App.4th at pages 385-395. As the *Ortiz* court cogently explained, "The statement: 'I am afraid of John,' is hearsay if offered to prove that the declarant fears John. If the declarant's state of mind is relevant, the statement is admissible under section 1250. If a declarant says: 'John is dangerous,' the analysis becomes more difficult. If offered to prove John is dangerous, the statement is inadmissible hearsay. If, however, the statement is offered merely to prove the victim believed John to be dangerous, the statement is not offered for its truth (thus not hearsay) but merely as circumstantial evidence of the declarant's mental state. A similar result obtains when the statement describes conduct which the victim *believes* the appellant has engaged in. Examples include, 'John keeps calling my house and hanging up when I answer,' or 'John keeps driving by my house at night, but when I get to the window, he's gone.' The statement reflects a conclusion by the declarant which is manifestly unsupported by personal knowledge. However, if offered to prove the declarant's state of mind, the accuracy of the conclusion is irrelevant. If offered to prove a fearful state of mind of the declarant, what is important is not whether John actually engaged in the conduct, but that declarant *believes* he did. Certainly, there remains the question whether the declarant honestly believes John engaged in the reported conduct. However, a jury could find the declarant honestly believed John had engaged in the conduct without necessarily finding that John had, in fact, done so. A clear limiting instruction can, in large part, dispel prejudicial misuse of such evidence." (*Id.* at p. 390, original italics.)

We agree with respondent that under the analysis set forth in *Ortiz*, *supra*, 38 Cal.App.4th at pages 385-390, the portions of the challenged statements in which Tempongko described appellant's attitudes and behavior were admissible, with proper limiting instructions, as evidence that Tempongko *believed* the things she said about appellant, though not as evidence that the underlying facts were true. So construed, these portions of the challenged statements were relevant to rebut appellant's provocation defense by showing Tempongko believed that appellant was resistant to their breakup (thus making it less likely that she would invite him over, only to end up berating him for

abandoning her), and believed that he had threatened to harm her or himself if she insisted on separating from him (thus making it less likely that she would provoke him).

Turning to appellant's section 352 argument, as applied to the three portions of the challenged statements admissible under the theory described above, there is only one—the representation that appellant told Tempongko their relationship would only end over his or her dead body—that might qualify as more prejudicial than probative. In the event this issue arises again on retrial, the factual context may have changed in light of tactical decisions by counsel, or differences in the other evidence presented by the time the decision must be made. Accordingly, we leave it to the trial court to exercise its informed discretion on this question, in light of all the circumstances.

E. Other Issues

1. Admission of Autopsy Evidence

At the time of appellant's trial in September 2008, the United States Supreme Court had decided *Crawford, supra*, 541 U.S. 36, but had not yet decided *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. __ [129 S.Ct. 2527] (*Melendez-Diaz*). In *Crawford*, the high court held that a criminal defendant's Sixth Amendment right to confrontation precludes the admission of testimonial statements by a witness who is not subject to cross-examination at trial, even if those statements fall within an exception to the hearsay rule. In *Melendez-Diaz*, the court applied this holding to preclude the prosecution from relying on certificates setting forth the results of scientific tests on suspected controlled substances, holding that the prosecution was obligated, instead, to produce the lab analysts who conducted the tests, so that the defense could cross-examine them.

In the present case, appellant relies on *Crawford, supra*, 541 U.S. 36, and *Melendez-Diaz, supra*, 557 U.S. ___, in arguing that the trial court committed reversible error in admitting into evidence Stephens's autopsy report, the related documents, and Hart's expert testimony in reliance on those documents (collectively, the autopsy evidence). Respondent counters on three grounds: first, that the issue is forfeited due to appellant's counsel's failure to object on confrontation clause grounds; second, that the autopsy evidence was properly admitted under *People v. Geier* (2007) 41 Cal.4th 555

(*Geier*); and finally, that even if the admission of the autopsy evidence was error, it was harmless beyond a reasonable doubt.

The forfeiture and harmless error issues are mooted by our reversal of appellant's conviction on other grounds. On the merits, we note that the California Supreme Court has granted review in several cases in order to assess the continued validity of *Geier*, *supra*, 41 Cal.4th 555, in light of *Melendez-Diaz, supra*, 557 U.S. ___, and to decide how the confrontation clause affects the admissibility in California courts of evidence regarding autopsies and other forensic tests performed by scientists who do not testify. (See, e.g., *People v. Anunciation* (Dec. 22, 2009) D054988 [nonpub. opn.] [2009 WL 4931884], review granted March 18, 2010, S179423 (*Anunciation*); *People v. Gutierrez* (2009) 177 Cal.App.4th 654, review granted Dec. 2, 2009, S176620; *People v. Lopez* (2009) 177 Cal.App.4th 202, review granted Dec. 2, 2009, S177046; *People v. Dungo* (2009) 176 Cal.App.4th 1388, review granted Dec. 2, 2009, S176886 (*Dungo*); *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, review granted Dec. 2, 2009, S176213.) At least two of these cases—*Dungo* and *Anunciation*—present very similar facts to those in this case, i.e., the admission of an autopsy report, and expert testimony based on it, when the medical examiner who performed the autopsy did not testify. Thus, if appellant is retried on remand, we expect that guidance on this issue from our Supreme Court will be available to the trial court by the time of the retrial. Accordingly, we need not address it here.

2. Jury Instruction Regarding Prior Domestic Violence Evidence

The trial court instructed the jury regarding the relevance and permissible use of the prior domestic violence evidence by giving CALCRIM No. 852.[19] Appellant contends that this instruction improperly reduces the prosecutor's burden of proof, and misleads the jury. Appellant's counsel is commendably forthright in acknowledging that the same contentions were rejected with reference to an equivalent instruction in *People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1016 [upholding CALJIC No. 2.50.01], and with reference to CALCRIM No. 852 itself in *People v. Johnson* (2008) 164 Cal.App.4th 731, 739 (Cantil-Sakauye, J.). Respondent points out that CALCRIM No. 852 was also upheld as against a similar challenge in *People v. Reyes* (2008) 160 Cal.App.4th 246, 250-253. Appellant has raised these issues solely to preserve them for federal review, and again, in light of our reversal on other grounds, we need only acknowledge that the issues were properly raised before us.

3. Prosecutorial Misconduct in Direct Examination

Appellant argues that the prosecutor committed misconduct during the direct examination of Houtz. This argument is mooted by our reversal of appellant's conviction on other grounds, and the issue is not likely to arise again in the event of a retrial. Accordingly, we decline to address it.

4. Amount of Custody Credit

Finally, appellant and respondent agree that the abstract of judgment in this case should be modified to reflect appellant's entitlement to 972 rather than 969 days of custody credits. We rely on the trial court to award the correct number of days of custody

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[19] The pertinent portion of this instruction, as read to the jury in this case, was as follows: "If you decide the defendant committed the uncharged domestic violence described in testimony, you may but are not required to conclude from that evidence that the defendant is disposed or inclined to commit domestic violence; and, based on that decision, also conclude the defendant was likely to have committed the homicide charged in this case. [¶] If you conclude the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all of the other evidence. It is not sufficient by itself to prove the defendant is guilty of a homicide. The People must prove each element of every charge beyond a reasonable doubt."

credits to appellant if and when he is resentenced upon the conclusion of the proceedings on remand.

DISPOSITION

The judgment is reversed, and this case is remanded to the trial court for further proceedings.

RUVOLO, P. J.

I concur:

RIVERA, J.

REARDON, J.

I respectfully dissent. In my view, any alleged ambiguity in the instruction on provocation and voluntary manslaughter was harmless and the jury's verdict of second degree murder is well supported by the law and the evidence.

As the majority opinion observes, there was a long history of domestic violence between appellant and the victim. On the night of the murder, appellant entered the victim's apartment. The victim was present with her children. An argument between the victim and appellant ensued and lasted approximately 10 minutes. Suddenly, appellant walked very quickly into the kitchen area and grabbed a large kitchen knife. He returned to the living room, approached the victim, and commenced stabbing her repeatedly. The victim retreated, fell back onto the couch, and tried unsuccessfully to push appellant away. As she slid to the floor, appellant continued to stab her. He then fled the apartment, carrying the knife.

According to appellant, during the course of the verbal argument, appellant stated that he was leaving. The victim allegedly responded, " 'I knew you were going to walk away someday. That's why I killed your bastard. I got an abortion.' " Appellant testified that he had not known the victim was pregnant or that she had an abortion. He testified that he was shocked by this and had no recollection of what happened next, until he found himself holding a bloody knife with blood on his hands.

The victim had suffered 17 stab wounds and four blunt force injuries. She died from blood loss caused by the stab wounds.

The jury was instructed on murder and voluntary manslaughter. The jury returned a verdict of murder in the second degree. The majority would set aside this verdict because an instruction on provocation was "at least ambiguous, if not misleading . . . ." (Maj. opn. *ante*, p. 1.) The instruction, CALCRIM No. 570, as it existed at the time of trial, informed the jury that in considering whether the provocation was sufficient to "consider whether a person of average disposition would have been provoked and how such a person would react, in the same situation knowing the same facts." Appellant

contends that his reaction to the provocation is not relevant and sets the bar too high by requiring a homicidal reaction to establish voluntary manslaughter.

Whether the instruction is a correct statement of the law or "ambiguous, if not misleading," the bottom line is that it was not prejudicial. In short, given the overwhelming evidence of second degree murder, it is not reasonably probable that the jury would have returned a more favorable verdict in favor of appellant had the above language been deleted from the instruction.

I would affirm the judgment of conviction.

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Reardon, J.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Tare Nicholas Beltran***

No.: ____________

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On May 6, 2011, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Linda M. Leavitt
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Clerk of the Court
Court of Appeal of the State of California
First Appellate District, Division Four
350 McAllister Street
San Francisco, CA 94102-3600

Attention: Executive Director
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730 Harrison St., Room 201
San Francisco, CA 94107

The Honorable George Gascon
District Attorney
San Francisco County District Attorney's Office
850 Bryant Street, Room 325
San Francisco, CA 94103

County of San Francisco
Hall of Justice
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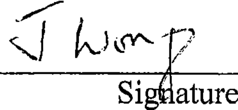
San Francisco, CA 94103

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 6, 2011, at San Francisco, California.

J. Wong
Declarant


Signature

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