

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

RAFAEL A. RAMIREZ,

Defendant and Appellant.

B218413

(Los Angeles County  
Super. Ct. No. BA265226)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Larry P. Fidler, Judge. Reversed in part and affirmed in part.

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Landra E. Rosenthal, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Yun K. Lee and  
Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of part I.

Rafael A. Ramirez appeals from convictions on one count of murder and two firearms charges. He argues that the superior court erred by failing to instruct the jury on voluntary manslaughter on a heat of passion theory, and we agree.

We also conclude that the error was prejudicial. In particular, we reject respondent's argument that the instructional error was rendered harmless by the jury's determination that Ramirez was guilty of first degree murder rather than second degree murder. (*People v. Berry* (1976) 18 Cal.3d 509, 518.)

We accordingly reverse Ramirez's murder conviction but affirm the firearms convictions.

### BACKGROUND

The information charged Ramirez with one count of murder under subdivision (a) of Penal Code section 187<sup>1</sup> (count 1); one count of possession of a concealed firearm under subdivision (a)(2) of section 12025 (count 2); one count of obliterating the identification of a firearm under section 12090 (count 3); and one count of possession of a firearm with the identification numbers removed under subdivision (a) of section 12094 (count 4). As to count 1, the information further alleged that Ramirez personally used a firearm, personally and intentionally discharged a firearm, and personally and intentionally discharged a firearm causing great bodily injury and death within the meaning of section 12022.53, subdivisions (b), (c), and (d). The information also alleged as to count 1 that Ramirez committed the offense for the benefit of, at the direction of, and in association with a criminal street gang and with the specific intent to promote, further, and assist in criminal conduct by gang members, within the meaning of subdivision (b)(1)(A) of section 186.22. Ramirez pleaded not guilty and denied the allegations.

The charges were tried to a jury. The prosecution moved to dismiss count 3 pursuant to section 1385, and the court granted the motion. The jury found Ramirez

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

guilty of first degree murder on count 1, guilty on counts 2 and 4, and the special allegations true.

The trial court sentenced Ramirez to 25 years to life on count 1, plus 25 years for the firearm allegation, plus the high term of 3 years on count 3, to run consecutively. As to count 4, the court imposed, but stayed under section 654, a sentence of 180 days in county jail.

The evidence introduced at trial, viewed in the light most favorable to the judgment, showed the following facts. In the afternoon of February 27, 2004, Ramirez was “hanging out” with fellow Loco Park gang members Gerardo Sanchez and “Little Boy” at Gerardo’s home.<sup>2</sup> At some point Gerardo and “Little Boy” left to go to the store, leaving Ramirez at the house with Gerardo’s brothers Eduardo, Miguel, Benito, Jose, and Gabriel.

That same afternoon, Jack Artiga, who lived nearby, was walking home when two Black males “jumped” him, beat him, and took his cell phone. Artiga ran home and called the police, but while waiting for them to arrive he saw one of his assailants, later identified as Anthony Boothe, in the street outside his home. Artiga also saw Gerardo (apparently on his way back from the store with “Little Boy”) and asked him to help get the cell phone back. Gerardo called to Ramirez, who was across the street. Gerardo confronted Boothe, who was apparently a member of the Four Trey gang, and told him to give the cell phone back to Artiga. Boothe insisted he did not have it.

Artiga described what happened next as follows: Gerardo and Boothe argued, made gang signs, and claimed their respective gangs. Gerardo walked away saying, “I got some homeys, I’ll be back. I got homeys from Loco Park.” Boothe walked away as well. Within five or ten minutes, Boothe returned with another Black male on a bike.

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<sup>2</sup> Because Gerardo Sanchez and his brothers have the same last name, we will refer to them by their first names. No disrespect is intended.

Gerardo also returned, there was a further confrontation with Boothe and the other Black male, and Artiga then heard shots.

Gerardo's description of the course of events is somewhat different: After Boothe repeatedly denied having the cell phone, another Black male rode up on a bike, and Boothe asked to borrow the bike so he could go get the cell phone. After Boothe got on the bike, however, Artiga again demanded the cell phone, and Boothe, who had had the phone in his pocket the whole time, took it out and threw it on the ground, breaking it.

Boothe then got off the bike and punched someone. According to Gerardo, Boothe punched Artiga in the face, but Artiga testified that Boothe punched Gerardo in the neck. One of the investigating officers, however, testified that one of Gerardo's brothers told him that when Ramirez returned to the Sanchez home after the shooting, Ramirez said that Boothe had punched him (i.e., Ramirez). And in a taped interview that was played for the jury, Gerardo's brother Benito said the same thing: When Ramirez returned to the Sanchez home after the shooting, Ramirez said he had been punched by Boothe. In any event, after the punch, Boothe started "get[ting] crazy," saying "this is my hood and all that." Ramirez then started shooting and continued to shoot as Boothe tried to flee.

When Ramirez arrived at Gerardo's house a few minutes later, Ramirez was shivering and said "[t]hat he dropped some guy" who had punched him. Boothe died from multiple gunshot wounds, two to his arms and three to the back of the head.

## DISCUSSION

Ramirez argues that the trial court committed prejudicial error by not instructing the jury sua sponte on voluntary manslaughter as a lesser included offense of murder, on the theory that Ramirez shot Boothe in the heat of passion after Boothe provoked him by punching him. We conclude that the trial court erred by failing to give the instruction and that it is reasonably probable that Ramirez would have obtained a more favorable result if the instruction had been given. (See *People v. Moye* (2009) 47 Cal.4th 537, 555-

556 (*Moye*) [omission of voluntary manslaughter instruction is reviewed for harmlessness under the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836].)

### I. Instructional Error

““It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury’s understanding of the case.” [Citation.] That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.] The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given. [Citations.]” (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155.) Voluntary manslaughter based on a “sudden quarrel or heat of passion” (§ 192, subd. (a)) is a lesser necessarily included offense of intentional murder. (*People v. Breverman*, *supra*, 19 Cal.4th at pp. 153-154.)

“A heat of passion theory of manslaughter has both an objective and a subjective component. [Citations.]” (*Moye, supra*, 47 Cal.4th at p. 549.) “To satisfy the objective or “reasonable person” element of this form of voluntary manslaughter, the accused’s heat of passion must be due to “sufficient provocation.” [Citation.]” (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1144.) “To satisfy the subjective element of this form of voluntary manslaughter, the accused must be shown to have killed while under ‘the actual influence of a strong passion’ induced by such provocation. [Citation.]” (*Moye, supra*, 47 Cal.4th at p. 550.) “Heat of passion arises when ‘at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without

deliberation and reflection, and from such passion rather than from judgment.’  
[Citations.]” (*People v. Barton* (1995) 12 Cal.4th 186, 201.)

The record contains evidence that Ramirez was involved in an altercation with Boothe in which Boothe was the aggressor and punched Ramirez. That is sufficient to satisfy the objective element. The evidence that Ramirez immediately responded to the punch by shooting and was still shivering when he arrived at the Sanchez home afterward (from which the jury could reasonably infer that he was still under the influence of a strong passion or emotional agitation) is sufficient to satisfy the subjective element. We therefore conclude that the trial court erred by failing to instruct the jury on voluntary manslaughter.

Respondent’s arguments to the contrary are not persuasive. First, respondent contends that “there was no substantial evidence that appellant was struck” before he shot Boothe. That is not correct. As we have already stated, Benito said in his interview with the police that Ramirez said he was punched by Boothe, and one of the investigating officers said that one of Gerard’s brothers had told him the same thing. That is substantial evidence that Boothe punched Ramirez. (*People v. Barton, supra*, 12 Cal.4th 186 at p. 201, fn. 8.)

Second, respondent argues that the evidence showed that Ramirez was not “acting under the heat of passion” but rather that the shooting was “gang-related” and that Ramirez shot Boothe “because of racial animus.” We are not persuaded. Although the jury could have reasonably concluded, on the basis of the record evidence, that Ramirez acted in the manner respondent describes, the jury also could have reasonably concluded otherwise. In particular, the evidence that Ramirez immediately responded to the punch by shooting was sufficient to support a reasonable jury finding that Ramirez acted under heat of passion.

Third, respondent argues that there was no evidence that, if Ramirez was acting under heat of passion, “such mental state was reasonable under the circumstances,” because Ramirez “was simply acting based on racial prejudice and gang rivalry.” For the

reasons already described, we disagree—the jury was not required to conclude that Ramirez acted from racial animus and gang rivalry rather than from heat of passion. Respondent also points out that Gerardo “did not act due to any provocation, even though he was more directly involved in the incident than” Ramirez. But Gerardo’s failure to be provoked does not show that the provocation directed at Ramirez was legally insufficient or that Ramirez was not acting under heat of passion. Respondent also mentions that Ramirez “shot the victim in the back of his head multiple times as the victim tried to run away.” But those multiple shots could have happened in mere seconds, so they could all have been fired under heat of passion.

For all of the foregoing reasons, we conclude that the evidence introduced at trial was sufficient to support a reasonable inference that Ramirez was guilty of voluntary manslaughter on a heat of passion theory, rather than murder. The trial court therefore erred by failing to instruct the jury concerning voluntary manslaughter on a heat of passion theory.

## II. Prejudice

Ramirez argues that the erroneous omission of the heat of passion voluntary manslaughter instruction was prejudicial because the evidence against him was relatively weak. The prosecution’s case was based entirely on the statements of the Sanchez brothers, who themselves had gang affiliations, made inconsistent statements at various times, and might have pinned the crime on Ramirez in order to conceal their own guilt. (See *Moye, supra*, 47 Cal.4th at pp. 555-556 [the strength of the evidence supporting the judgment is a relevant consideration in determining prejudice].) Moreover, Gerardo admitted that he told the police Ramirez was the shooter only after the police told him they had evidence that he, Gerardo, was the shooter, and one of the investigating officers testified that the Sanchez brothers’ statements were the only evidence identifying Ramirez as the shooter, and that without those statements “you have no witnesses in this case and an unsolved murder.”

In rebuttal, respondent points out that “[e]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions.” (*People v. Lewis* (2001) 25 Cal.4th 610, 646.) Respondent contends that because the jury found that Ramirez acted willfully, deliberately, and with premeditation, it necessarily found that he did not act under the heat of passion.<sup>3</sup>

Respondent’s argument fails as a matter of law because the Supreme Court has held that the erroneous omission of an instruction on heat of passion voluntary manslaughter is not rendered harmless by a jury determination that the defendant was guilty of first degree murder rather than second degree murder. (*People v. Berry* (1976) 18 Cal.3d 509, 518.) The Supreme Court’s decision is binding on us. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

The remainder of Respondent’s rebuttal is largely a compilation of the arguments we have already rejected in discussing the claim of error—there was no evidence of provocation, no evidence that provocation would have been reasonable under the circumstances, no evidence that Ramirez was acting under heat of passion, and strong evidence of racial prejudice and gang rivalry.<sup>4</sup> Again, we are not persuaded. As the investigating officer conceded, the evidence against Ramirez all comes from the Sanchez brothers, so the case against Ramirez suffers from all of the weaknesses described above.

<sup>3</sup> The trial court used CALCRIM No. 521 to instruct the jury on first and second degree murder, stating that “[t]he defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation” and that “[a]ll other murders are of the second degree.” The instruction defined willfulness, deliberation, and premeditation as follows: “The defendant acted willfully if he intended to kill. The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with premeditation if he decided to kill before committing the act that caused death.”

<sup>4</sup> Respondent also argues that because the jury found the gang allegation true, “the jury necessarily found the absence of the subjective element and that appellant did not act due to provocation.” We disagree. An *intentional* killing in a sudden quarrel or heat of passion is still voluntary manslaughter (*People v. Lasko* (2000) 23 Cal.4th 101, 104), and respondent does not explain why a person acting under heat of passion can intend to kill but cannot intend to assist a gang.



We conclude that the evidence against Ramirez was not so overwhelming as to show there is no reasonable probability that he would have obtained a more favorable result if the jury had been instructed concerning voluntary manslaughter on a heat of passion theory. Our resolution of this issue makes it unnecessary for us to address the remaining arguments raised by the parties.

#### DISPOSITION

The murder conviction is reversed but the firearms convictions are affirmed, and the case is remanded for further proceedings consistent with this opinion. The trial court is directed to prepare an amended abstract of judgment reflecting the change and forward a certified copy thereof to the Department of Corrections and Rehabilitation.

CERTIFIED FOR PARTIAL PUBLICATION.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.