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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ALEXANDER MOYE, Defendant and Appellant.	B192331 (Los Angeles County Super. Ct. No. KA074073)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles Horan, Judge. Reversed and remanded.

Patricia A. Scott, 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, Senior Assistant Attorney General, Linda C. Johnson and Elaine F. Tumonis, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Alexander Moye, appeals from his conviction of second degree murder. He contends he was denied due process as a result of the trial court's failure to instruct the jury on voluntary manslaughter as a lesser included offense. We find there was sufficient evidence in the record to justify giving the jury an instruction on voluntary manslaughter. This error may have affected the result of the case and we reverse the judgment.

STATEMENT OF THE CASE

In an information filed April 12, 2006, appellant and two co-defendants, Daniel Avendano and George Lopez, were charged with the murder of Mark Urrutia. (Count one, Pen. Code, § 187, subd. (a).) It was alleged that appellant personally used a deadly weapon, a bat, to commit the murder (Pen. Code § 12022, subd. (b)(1).) The information also alleged that appellant had one prior serious felony conviction within the meaning of the Three Strikes Law. (Pen. Code, § 667, subds. (b) – (i).) It was further alleged that he was previously convicted of two felonies, assault with a deadly weapon and violation of Penal Code section 496, subdivision (a). (Pen. Code, § 1203, subd. (e)(4).) Trial on the prior convictions was bifurcated.

A joint trial before a jury commenced on June 5, 2006. On June 12, 2006, the jury convicted appellant of second degree murder and found the deadly weapon allegation to be true. The co-defendants were acquitted. A court trial was held on appellant's prior felony allegations and the court found the allegations to be true. The court imposed a term of 15 years to life, doubled to 30 years under the Three Strikes law. A five year enhancement was imposed for the serious felony allegation and a consecutive one year for the armed enhancement; a total of 36 years to life. Restitution and parole revocation fines in the amount of $5,000 were imposed. Appellant was awarded 117 days of actual time credit. Court security and victim restitution fines were imposed.

At the time of sentencing, appellant was on probation in case number YA 095372. Upon his conviction, his probation was revoked and he received a consecutive seven-year sentence in case number YA095372.

On June 27, 2006, appellant filed a timely notice of appeal.

STATEMENT OF FACTS

Prosecution Evidence

The evidence is viewed in accordance with the usual rules on appeal (*People v. Kraft* (2000) 23 Cal.4th 978, 1053). The murder victim in this case was Mark Urrutia. Mark's brother, Ronnie, had a girlfriend named Jessica Sanchez. Jessica's mother, Kandie Sanchez, was appellant's girlfriend. In February 2006, Jessica lived on Paso Real in Rowland Heights with her mother, her grandmother and mother's live-in boyfriend, appellant Alexander Moye. Mark and Ronnie lived about a block away. Carlos Alberto Munoz was Mark Urrutia's best friend.

Saturday Night

On February 11, 2006, Mark was at a party in Fontana with his brother Ronnie and three of their friends; Carlos, Ruben, and Rudy. At some point that evening, Ronnie received three telephone calls from his girlfriend, Jessica. Jessica informed Ronnie appellant was bothering her. In one call, she told Ronnie that appellant was waiting outside of the house for Ronnie to come fight him. Ronnie and company left the party and headed to Jessica's home.

When they arrived at the Sanchez residence around 9:00 or 10:00 p.m., appellant and co-defendants Avendano and Lopez were in front of the Sanchez residence. Ronnie, already upset, got out of the car and inquired as to who was "messing" with his girlfriend. Ronnie and appellant started arguing and then began fighting. The two wrestled on the ground in the front yard of the house next door to Jessica's house. Appellant ended up on top of Ronnie. Carlos kicked appellant in the ribs to get him off of Ronnie. Then Mark got involved, hitting or tapping appellant twice in the back with a bat. The bat was blue or silver aluminum and had a black grip and dark writing one it. Mark retrieved the bat from the car. Carlos remembered Mark saying he didn't want to hit appellant any more.

Co-defendants Lopez and Avendano said, "Fight fair, fight fair, stop." However, neither Avendano nor Lopez got involved in the fight. Kandie Sanchez arrived during the fight and tried to break it up. She also tried to take the bat away from Mark.

Avendano's girlfriend, Monique Rodriguez, lived next door. She could hear the commotion during the fight, but stayed inside her home and did not watch. At some point during the incident, Avendano and Lopez entered Rodriguez's kitchen. Rodriguez first testified that she did not see what they took, but then recalled telling the investigating officer that they retrieved a steak knife.

When the fist fight ended, both appellant and Ronnie stood up, and Carlos, Ruben and Mark got into their vehicle. Ronnie moved to leave with Jessica in her car. According to Ronnie and Jessica, appellant then started chasing Ronnie with a kitchen knife. Ronnie was not injured. Carlos shouted that they should all get in the car.

Carlos heard Ronnie yell that appellant was trying to stab him, so he got out of the car and hit appellant twice in the arm with a broken ski pole. At some point, someone yelled that the police were coming, so Jessica and Ronnie got into the car with Mark, Carlos and the others and they all left the scene together. They all went to Mark and Ronnie's home for the night. Toward the end of the fight, but before grabbing the ski pole, Carlos lost his eyeglasses.

After the Fight

Appellant was on his feet and did not appear to be injured when the incident was over. Rodriguez saw that appellant had a black eye, a scratch near his nose, and some kind of mark on his back. When the sheriff's deputies arrived, they talked to Kandie and appellant, who told them that there had been a fight, but that it was over and everyone had left. The deputies asked appellant if he was okay and he said yes. The deputies did not take a report.

Kandie testified that after the fight appellant was out of breath, dehydrated and vomiting, had a cut on his chin, a wound on his knee and an injury from a hit to his eye. He later complained of back and leg pain.

Sunday Morning

The next morning Carlos awoke and realized that he had lost his glasses. Mark and Ruben were there, but Rudy had arisen earlier and left. Around 10:00 a.m., Carlos went outside and met his brother, Jose Munoz, and Jose's friend, Santos Buenrostro, who were waiting for him. Carlos asked them to walk down Paso Real, where the fight had occurred, to look for his glasses.

At that time, Rodriguez, Avendano and Lopez were eating breakfast in the front yard. Appellant and Kandie had joined them outside. There was a white car in the drive-way next to the men. Appellant was angry at Avendano and Lopez for not helping him during the fight on the previous night. Around this time, Carlos, Jose and Santos walked by. Either appellant or Avendano asked them for a cigarette and Jose and Santos replied that they did not smoke. They all heard one of them, possibly appellant, ask if those were "they guys" or "is that them?"; another replied, "Nah, that's not them," to which one responded, "Oh, good, because if it was I was about to do something," or "I was going to start swinging on him." All three kept walking past the house. Jose did not pay much attention to the comment because he did know yet know about the fight the night before.

After this, appellant went to the liquor store to buy cigars and on his way back said he thought he had seen "Ronnie and them." Appellant returned and told co-defendants Avendano and Lopez to get into the white car. Appellant then drove.

After passing appellant and the co-defendants, Carlos called Mark on his cell phone and told him the three men were outside looking for him. Carlos told him not to go down Paso Real. Mark told him he was on his way to meet them, but would avoid the residence, take another route and meet them on Desire, a private street adjacent to Paso Real. Carlos, Jose and Santos started to walk toward Desire Street, turning onto the "catwalk," a shortcut through the grounds of a nursery, which connected Paso Real and Desire. It took about two minutes to reach Desire. While walking on the catwalk, Jose saw a white car drive up Desire. After seeing the white car, Santos realized that one of the men inside the car was one of the men they passed earlier. The car almost stopped by

them, but drove off. Santos and his friends ran back towards Paso Real to tell Mark and Ruben not to go that way.

While they were through the catwalk, Carlos called Mark several times on his cell phone, but he did not answer. When they emerged from the catwalk, Jose saw the white car he'd seen earlier in the drive way with all its doors open. Appellant and his co-defendant jumped over a fence. Appellant had two bats; he handed them to co-defendant Lopez, who put them in the trunk. The men all jumped into the car and left the scene. They seemed nervous.

As the white car drove by, it slowed down. The windows were up, so Jose could not hear any words, but he saw the men gesturing as if to indicate they should just keep going. Jose thought that co-defendant Lopez was in the back seat. Carlos also saw the car; he saw appellant and two people inside. Concerned, Carlos and his companions started running. Then Carlos received a telephone call from Ronnie, who said that his brother, Mark, was dying.

After receiving the phone call from Carlos, Mark and Ruben walked down LaGuardia instead to avoid walking down Paso Real. They intended to meet their friends in the vicinity of the catwalk. Mark and Ruben saw a white car driving fast towards them, as if it was going to run them down. Appellant and his co-defendants were inside. Ruben thought that appellant was driving. The car stopped about eight feet away; the door opened. The three men got out of the car; Ruben did not see any of them holding a bat. Mark had a blue bat with him.

Ruben turned around and heard appellant say, "Come on, let's go, let's get these motherfuckers." Mark and Ruben headed for a fence. Mark jumped the chain link fence first, then Ruben jumped up and his hands and sweater got caught on the fence. He rolled over the fence and saw Mark keep going. Appellant and his co-defendant jumped the fence; Lopez chased Ruben and appellant and Avendano chased Mark. Mark was ahead of Ruben and at some point they split up. Ruben did not recall seeing whether Mark had the bat while they were running, or whether Mark dropped the bat. On the day of the

murder, Ruben told the police that Mark dropped the bat as he jumped over the fence and he eventually remembered that had occurred.

Ruben ran near a shed. He heard voices mumbling, and two thumping sounds, about fifteen feet away. Then he heard running and yelling; he heard car doors closing and he heard the people leave. When the car left, he ran to where Mark way and found him face down, breathing hard. Ruben checked Mark's pulse; he was still alive. He heard Mark's telephone ring and he answered it. Ronnie was on the line and Ruben told he needed to get there fast because Mark was dying. Ruben thought Mark was dying because he saw Mark's "brains hanging out of his head and . . . he didn't look right." Ruben called 911 and so did Ronnie. Ruben held Mark's head and waited for the paramedics. It took them about 15 minutes to arrive.

Carlos and Jose sprinted to where Ronnie said they were, in their large backyard. When he got close, he saw how badly Mark was hurt. He was bleeding badly from his head and breathing hard. His front upper teeth were cracked and gone, it looked as if a piece of his brain was coming out of his head. Carlos did not see any weapons near Mark. Jose called the fire department and spoke to the paramedics, at their direction, he took off his shirt and wrapped it around Mark's head to try and control the bleeding. Carlos and Jessica ran to get Ronnie and Mark's mother.

Later Monique saw the co-defendants return on foot. About ten minutes later, appellant returned. He left Monique's house carrying a bag containing shoes and a shirt.

Sometime after 11:00 a.m. on the morning of the incident, Christine Lopez was outside of her home on Honore Street in Rowland Heights. She saw a white car carrying three men that she did not know drive by and wave at her. Lopez recalled the car was moving fast and the men appeared to be laughing loudly or joking. As the car drove past he house, Lopez thought she saw the men throw something out of the car against the curb, and she heard a noise like a "tin can." She also heard one of the men say that the "lit him up" or "lighted up" or words to that effect. According to Lopez, there was a storm drain about a car length from her driveway. She identified two of the men as Avendano and appellant.

The Investigation

Deputy Sheriff Robert MacKenzie arrived at 2212 Desire Street in response to call about an assault with a deadly weapon. He drove his patrol car down a dirt road on the south side of the house toward the backyard. The victim was lying on the ground. Paramedics arrived 15 to 20 seconds after MacKenzie did. The victim's eyes were rolled back and unresponsive to light. MacKenzie asked one of the people there if the victim was breathing. The person said he did not know.

Officer Kevin Lloyd investigated the incident. Lloyd testified that Mark was located approximately 90 to 100 yards from the chain link fence he had jumped. Based on Lopez' statement, Lloyd recovered a blue baseball bat with a Dodger logo in the storm drain near Lopez' residence. The bat had various blood stains on it. Photos revealed that appellant, Avendano and Ibarra all suffered puncture wounds on their palms from climbing over the chain link fence. Lopez did not have any puncture wounds.

DNA analysis of a blood sample taken from the handle of the bat matched appellant's DNA profile; the probability of that match being one in 105 trillion. DNA analysis of a blood sample taken from the logo portion of the bat matched the profile of Mark; the probability of that match occurring being one in 3.4 quadrillion. A third sample contained a mixture of blood from three individuals. The murder victim was a possible contributor to the mixture; appellant could not be excluded as a possible contributor. The other contributors could not be identified. Co-defendants Avendano and Lopez were excluded as possible contributors to the DNA evidence found on the bat. No fingerprints were located on the bat.

An autopsy revealed that the cause of Mark's death was blunt force trauma to the head. The blunt object could have been a baseball bat. Mark sustained at least four blows to the head and three more to the rest on his body. In one area, the bone of his skull was broken into multiple small fragments. There were superficial incisions on the palms of Mark's hands; abrasions on the buttocks area could have been caused by a sharp object or a blunt object. There were defensive wounds on his hands and left forearm however, the wounds on his hands and superficial scratches on his lower back could have

been caused by climbing over a chain link fence. Toxicology tests were positive for metabolite of cocaine and marijuana. The cocaine metabolite was present in the blood and the urine; it can remain in the urine for up to 72 hours, and in the blood for up to 48 hours.

Autopsy and DNA Results

Mark died from blunt force trauma to his head consistent with four blows: forehead, left eye, back of the left side of the head and the base of his skull. Two blood samples were recovered from the bat. The samples came from both the handle and the top part of the bat. A D.N.A. analysis was performed. The stain from the bat handle had a single source genetic profile matching appellant with a statistical probability of 105 trillion to one. The stain at the top of the bat had a single source genetic profile matching Mark with a statistical probability of 3.4 quadrillion to one.

Prosecution Witnesses

Carlos testified that on Saturday night he hit appellant twice in the arm with a broken ski pole when Ronnie yelled out that appellant was trying to stab him. Carlos said he could not confirm that appellant had a knife because he lost his glasses. The next morning Carlos went to find his glasses at the Sanchez residence. Carlos' brother, Jose, and friend Santos came alone to help him find his glasses. As they walked passed the scene of the incident, Carlos saw appellant and co-defendants standing outside. He said one of them ran into the house because they thought he was Mark, but he could not remember who went inside. Then he heard somebody say, "was it him?" Carlos called Mark and told him appellant and co-defendants were outside the Sanchez residence and were looking for him. He advised Mark to go down Desire St., a private street adjacent to Paso Real. The next time Carlos saw Mark he was on the ground bleeding and breathing hard. According to Carlos, Mark's front upper teeth appeared cracked or gone and it looked like a piece of his brain was coming out of his head.

Jose, while walking with Carlos and Santos, testified that he heard more of the conversation that took place between the appellant and co-defendants. Jose heard appellant say, "Oh, is that them? I was going to start swinging on him."

Ruben testified that he walked with Mark to meet up with Carlos, Jose, and Santos. Mark got a phone call from Carlos, and Ruben then saw Mark pick up a bat to bring with him for protection. As they were walking a car sped towards them as if it were going to run them over and then stopped about eight feet away. Ruben heard the car doors open and turned to see Mark's legs as he was climbing over the fence. Then Ruben jumped, but his hands and sweater got caught on the chain link at the top, so he rolled over. Ruben saw appellant and codefendant Avendano jump the fence and chase Mark. Co-defendant Lopez was chasing Ruben. Mark kept going straight and Ruben went to the right. Ruben saw Mark discard the bat. Ruben heard a mumble as if from voices and two thumping sounds. Next he heard running, car doors closing, and the sound of the vehicle as it was leaving. Ruben then found Mark face down and breathing hard with his brains hanging out of his head.

Monique Rodriguez, co-defendant Avendano's girlfriend, lived next door to the Sanchez residence. She testified that on Saturday night she saw co-defendant's Avendano and Lopez come into the house and grab something from the kitchen. Monique told the detective that the two co-defendants came in to grab a black steak knife She also testified that she saw appellant throw the knife on the roof after the fight was over. Monique testified that the next morning appellant had a black eye, a scratch on his nose, and a bruise on his back from the bat. She did not hear appellant say that if Carlos, Jose, and Santos were the guys from the night before, he was going to start swinging. Monique testified that appellant was angry after the fight on Saturday night. "I heard Alex say, he said, 'F you guys, you guys didn't even jump in to help me.'"

Ronnie testified that on Saturday night he saw appellant rushing towards him with what he recalled to be a kitchen steak knife. Appellant chased him down the driveway and as Ronnie reached the street, he yelled out "He tried to stab me." Ronnie claimed appellant ran into Monique's house and retrieved the knife himself.

Jessica Sanchez, testified she saw appellant at the top of her home's driveway running towards Ronnie with a steak knife. She also saw that appellant went into Monique's to retrieve the knife. Jessica testified that after the fight appellant did not appear to be hurt since he was running around with a knife. She also said, "the boys didn't do anything to hurt [appellant]."

Kandie Sanchez, appellant's girlfriend, testified that on Saturday night she was blocking appellant from getting hit while he caught his breath. At some point she also saw appellant chasing Ronnie. She remembers him having something in his hand, but did not recall what it was. After the fight was over appellant was out of breath, throwing-up, dehydrated, and had wounds to his chin, knee, and eye. Later that night in Kandie's bedroom, appellant complained of pain to his back and legs.

Defense Witnesses

Appellant, Alexander Moye, testified about the Saturday night altercation. On the evening of February 11, 2006, he resided with his girlfriend Kandie Sanchez, her mother and her daughter, Jessica. That evening, appellant had gotten home from work when he and the grandmother argued about his staying at their residence; she wanted appellant to leave. Appellant ended up arguing with Jessica. When appellant tried to end the argument, Jessica said something about her boyfriend, to which appellant responded by saying that if Jessica brought her boyfriend over, appellant would have no choice but to defend himself.

About two hours later, Jessica's boyfriend Ronnie came over. Appellant was sitting outside with Avendano and Lopez when Ronnie and Carlos arrived and approached him. After a brief conversation, Ronnie and appellant engaged in a fist fight. Appellant noticed several more males coming toward him from behind with bats. As they chased him, appellant tried to defend himself, but slipped and fell to the ground on top of Ronnie. Appellant was kicked and hit with a bat a few times on his back and on the back of his neck.

The altercation lasted about fifteen minutes. At times appellant was running around while being chased with the bat. He was fighting "all these guys" alone. He was on the ground for only about one minute. When he was on the ground, he heard someone yelled that the police were coming. After the last blow from the bat, appellant yelled and they stopped. He got up and walked to the side of the garage. Kandie came over to him and tried to tell the others to leave. Appellant heard some kind of bottle being thrown. Appellant caught his breath, and told the man that he wanted a fair fight, one on one, with Ronnie.

After the males left, appellant saw Ronnie and Jessica getting into Jessica's car to leave. Still angry about being jumped, appellant began to chase Ronnie, still wanting to fight. Appellant did not arm himself with a knife or any other weapon, he did not throw anything on the roof, and he did not have anything in his hand when he chased Ronnie. Ronnie then began yelling that appellant was trying to "get" him and the males who had left, returned and picked him up. One of them, Carlos, hit appellant on the arm with a metal object before getting back into the car and leaving. Appellant asked Avendano and Lopez why they did not help him. Appellant testified he was angry about the incident.

The police arrived at thirty to forty minutes after the incident. The officers questioned appellant and Kandie. According to appellant, the officers noticed he was breathless, that he was bleeding on his right cheek and that his left eye was "black" or swollen. When asked what happened, appellant minimized having been in a fight because he was on probation and did not want to get into further trouble. After the police left, appellant showered and notice that his back had to large bruises and his knee was bloody and painful as though he had been stabbed.

The following morning appellant went outside and saw Avendano, Lopez and Rodriguez eating breakfast. He joined them, and at some point three males walked in front of the house. Appellant asked one of them for a cigarette, but was told they had none. Appellant then went to the liquor store. He did not hear anyone comment about the three males being involved in the fight the night before.

As appellant drove to the store, he saw a person whom he believed was Ronnie walking down the street with another person. He drove to Kandie's house and asked Avendano and Lopez to go with him to talk to Ronnie because Ronnie was not alone and he did not want to get jumped again. Appellant testified he wanted to talk to Ronnie to talk or "squash the incident" since he knew that Ronnie had dated Kandie's daughter and they would inevitably see each other again. He also did not want to worry about having further conflicts with Ronnie.

Appellant and the codefendant's got into the car. Appellant drove down Colima and turned onto Desire. Although it was Sunday, he was driving slowly because it was a school zone. As he was driving he saw Mark and Rubin. Appellant drove up and stopped to talk to them. When he did so, Mark, who was wearing a hooded sweatshirt, kicked appellant's car and then Mark and Ruben jumped over the gate. Appellant did not see a bat or anything else in their hands.

Appellant exited his car to see if there was any damage from the kick. Appellant was upset, so he followed Mark to see where he was going so he could call the police and report the incident. Appellant jumped over the fence and chased Mark, catching up with him in a field. He did not look back as he ran to see whether Avendano or Lopez followed him over the fence.

Appellant caught up with Mark in the field. When he was about four feet away from Mark, Mark turned around, and with a smirk on his face, said "yeah, now I got you." Appellant then noticed Mark had a bat in his hands. Mark attacked appellant with a bat, hitting him several times on his left forearm, the side of his arms, and his hands. He was blocking the bat with his arm so he would not be hit in the face. After four or five swings, appellant grabbed the bat from Mark. Mark tried to rush appellant, to attack him. Appellant hit him with the bat, striking him on his arm. Mark came at him again; each time he did, appellant hit him again. Appellant was not "in the right to state of mind." Appellant was afraid that if Mark retrieved the bat, he would be badly beaten, so he continued to hit Mark until he fell to the ground.. He did not want to "get beat down and possibly be killed." So, holding the bat with two hands, appellant kept hitting Mark

until he fell. He did not know how many times he hit Mark. Appellant testified he did not swing the back from over his head, but rather in a motion as though he were hitting a ball.

At that point, appellant saw that Mark was bleeding from the left side of his head and he got "kind of scared." He ran back to the car, carrying the bat with him. Avendano and Lopez were standing by the car. They all got in the car and appellant threw the bat onto the floor. He did not throw it into the trunk.

Appellant looked at the bat, he did not want it. He was shaken up and did not notice whether there was blood on the bat. He threw it into the gutter. He did not see Christine Lopez. Appellant denied they were laughing or making hand signs. No one yelled, "we just lit him up." He dropped off Lopez and Avendano at Rodriguez's house and went home to get the clicker to open the garage. Kandie was there; she asked him what happened. Appellant simply said he was going to leave. Appellant was staying with his aunt when he was arrested.

Prosecution Rebuttal Evidence

Sheriff's deputy Daniel Ort was dispatched to the residence on Paso Real following the fight on Saturday night. He spoke with appellant and noticed that appellant had blood on his lip, but did not notice the swollen eye or any other injuries. Appellant denied needing medical attention and stated there had been an argument earlier that evening during a party and the house. Deputy Ort did detect the order of alcohol coming from appellant's mouth. Appellant was very cooperative.

CONTENTIONS ON APPEAL

Appellant contends that the trial court prejudicially erred and violated his constitutional rights to due process and a fair trial by refusing to instruct the jury on the lesser included offense of voluntary manslaughter on the theory that appellant killed under the heat of passion. Respondent contends there was not sufficient evidence to warrant instructing the jury on heat of passion voluntary manslaughter and assuming

arguendo the trial court should have given that instruction, any resulting error was harmless.

STANDARD OF REVIEW

On appeal, the question of instructional error is reviewed de novo. "[A]n appellate court reviews a trial court's instruction independently." *People v. Alavarez* (1996) 14 Cal.4th 155, 217. Furthermore, as it pertains to instructional issues, California law also requires the reviewing court to look at the evidence in the light most favorable to the appealing party. "'[I]n determining whether or not the instructions given are correct, we must assume that the jury might have believed the evidence upon which the instruction favorable to the losing party was predicated, and that if the correct instruction had been given upon that subject the jury might have rendered a verdict in favor of the losing party.'" (*Henderson v. Harnischfeger* (1974) 12 Cal.3d 663, 674.)

On appeal, we review independently the question whether the trial court failed to instruct on defenses and lesser included offenses. (See, e.g., *People v. Waidla* (2000) 22 Cal.4th 690, 739.)

Applicable Law re Lesser-included Offenses

"'"It is settled that in criminal cases . . . the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] . . . ." [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.]'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*).) An instruction on a lesser included offense is required to be given only when the evidence to support it is substantial enough to merit consideration by the jury. (*People v. Barton* (1995) 12 Cal.4th 186, 195, fn. 4.) In this context, "'[s]ubstantial evidence is evidence sufficient to "deserve consideration by the jury," that is, evidence that a reasonable jury could find persuasive.' [Citation.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 645.)

Both parties agree that the *Watson* standard of harmless error applies to erroneous

failure to instruct on a lesser included offense. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837 (*Watson*); see *Breverman, supra*, 19 Cal.4th at pp. 164-165, 177-178; *People v. Hayes* (2006) 142 Cal.App.4th 175, 182.) Appellate review under the *Watson* standard "focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*Breverman, supra*, 19 Cal.4th at p. 177.)

"There is a reasonable probability of a more favorable result within the meaning of *Watson* when there exists 'at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error affected the result.'" (*People v. Mower* (2002) 28 Cal.4th 457, 484, quoting from *Watson, supra*, 46 Cal.2d at p. 837.)

DISCUSSION

Voluntary Manslaughter: *Elements as Lesser Included Offense to Murder*

The issue that must be determined here is whether sufficient evidence existed to require an instruction on a lesser included offense of manslaughter under a heat of passion theory. Voluntary manslaughter is a lesser-included offenses for the charge of murder. (*Breverman, supra*, 19 Cal.4th at pp. 189-190.) Voluntary manslaughter is defined as the "unlawful killing of a human being without malice," and is considered a lesser included offense of intentional murder when the requisite mental element of malice is negated by a sudden quarrel or heat of passion. (*People v. Lee* (1999) 20 Cal 4th 47, 58.) To establish voluntary manslaughter under a heat of passion theory, both provocation and heat of passion must be found. The provocation which incites the killer to act the heat of passion must be caused by the victim or reasonably believed by the accused to have been engaged in by the decedent. The test for adequate provocation is objective. Provocation by the victim may be verbal or physical, but must be such as to cause an ordinary person of average disposition to act rashly or without due deliberation

and reflection. (*Id*. at p. 59.) Any provocation is sufficient provided it is '"of such character and degree as naturally would excite and arouse such heat of passion . . . ."' (*People v. Rupe* (1988) 206 Cal.App.3d 1537, 1542.) "'However, if sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not a voluntary manslaughter . . . .'" (*Breverman, supra*, 19 Cal.4th at p. 163.)

The actor must be under the actual influence of a strong passion at the time of the homicide. (*People v. Wickersham* (1982) 32 Cal.3d 307, 327, disapproved on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 200.) The Supreme Court has pointed out that "'passion' need not mean 'rage' or 'anger' but may be any '[v]iolent, intense or high-wrought emotion' and concluded there 'that defendant was aroused to a heat of passion by a series of events over a considerable period of time. . . .' [Citation.]" (*People v. Berry* (1976) 18 Cal.3d 509, 515.)

There was Sufficient Evidence to Instruct on Voluntary Manslaughter

At trial, appellant argued that, taken together, (1) the beating appellant received on Saturday night, (2) the victim kicking appellant's car the following morning, and (3) the sudden attack moments later with the bat, were sufficient to satisfy a "series of events" that would amount to adequate provocation under the theory of heat of passion and attempted to convince the trial judge to give an instruction based on this theory. He argued, "my theory as to the heat of passion is that it's a culmination of the previous evening and what happened that morning."

We find that the testimony does not support a theory of heat of passion based on a series of events. Being beaten up, including being hit with a bat in an uneven fight and having a bottle of alcohol thrown at you, could possibly be sufficient provocation to arouse an ordinarily reasonable person to act without due deliberation. But, according to appellant's own testimony he was no longer upset about the unfair fight the night before, but more concerned about the safety of his girlfriend. Appellant only wanted to talk, with who he believed was Ronnie, to "squash" the incident. Ronnie was dating appellant's

girlfriend's daughter and he knew they would run into each other again. Appellant denied making the statements claimed by Jose and Santos that he was "about to start swinging" if they were the guys from the night before. There was no need for the trial court to submit the question to the jury of whether or not there had been a sufficient cooling off period after the prior evening's altercation. Appellant's testimony is an admission that he cooled off.

Although the appellant has not shown that Saturday night's events required an instruction, there was evidence regarding the next morning's encounter, including the victim kicking appellant's car and the victim's sudden attack on appellant with the bat. This evidence, especially considered in the light of the earlier beating, was sufficient to require the trial judge to instruct on voluntary manslaughter under a heat of passion theory. To be more specific, the act of the victim kicking appellant's car, is not by itself sufficient to render an ordinarily reasonable man to act rashly and without deliberation. The *Breverman* court agreed with the contention of the prosecution "that mere vandalism to an automobile is never sufficient provocation to warrant lesser included offense instructions on voluntary manslaughter." (*Breverman, supra*, 19 Cal.4th at p. 164, fn. 11.) Furthermore, appellant testified he was upset, but did not go over the fence after the victim with violent or high-wrought emotion, but rather merely to locate the victim in order to call the police. "I got kind of upset he kicked my car. So I wanted to see where he was going so that way I could call the police and tell them, you know, this guy kicked my car."

Nevertheless, the final incident with Mark wielding the bat, could qualify as adequate provocation. Under *Lee*, sufficient provocation may be verbal or physical. According to appellant's testimony victim turned to appellant with bat in hand and said, "Yeah, now I've got you." The victim's demeanor and words along with the fact that he was carrying a bat and attacked appellant with the bat is sufficiently provocative to cause an ordinary person of average disposition to act rashly and without due deliberation or reflection. Regarding whether the subjective element was satisfied, appellant testified, "I was defending my life. That's what I was doing. I thought he was going to kill me so I

hit him until he stopped moving." Appellant's testimony shows he was mainly concerned with defending himself. "I didn't want to get beat down and possibly killed, so I was just worried about getting hit. And then when I got the bat from him, I was worried about getting hit again, because he kept coming at me. So I kept hitting him until he fell." If believed, it is evident that appellant was in fear for his life at the time he was hitting Mark with the bat.

According to the record, appellant had proposed and was relying on voluntary manslaughter under the heat of passion theory. At trial, appellant's lawyer requested jury instructions on heat of passion theory several times. The trial court refused, insisting that the theory of heat of passion was inconsistent with appellant's testimony of self-defense. In so doing, the trial court ignored the rule that inconsistent defenses may be offered. (*People v. Conte* (1912) 17 Cal. App. 771.)

The remaining question thus becomes whether it is reasonably probable that defendant would have obtained a more favorable result had the jury been instructed on the definition of voluntary manslaughter. (*Breverman*, *supra*, 19 Cal.4th at p. 178; *Watson*, *supra*, 46 Cal.2d at p. 836.) Based on the verdict, it is clear that although the jury rejected justifiable or imperfect self-defense, they also rejected the prosecution's argument for premeditation. It is not our job to evaluate the credibility of witnesses, that is a task exclusively assigned to the jury. (*Breverman*, *supra*, 19 Cal.4th at. p. 162.) Because the only witness to the fatal events between appellant and Mark Uruttia is appellant himself, his credibility was central and it appears that they jury did afford his version of the events some weight.

Because the evidentiary threshold for lesser included offense instructions is relatively low, evidence of provocation may be sufficiently substantial to require a voluntary manslaughter instruction even where the same evidence is also sufficient to sustain a second degree murder conviction on appeal. In the leading case of *People v. Valentine* (1946) 28 Cal.2d 121, for example, the Supreme Court remarked that the evidence "would justify a verdict of voluntary manslaughter but [was] not insufficient to sustain a verdict of second degree murder," and therefore held that the question of the

degree of homicide was "one of fact for the jury under proper instructions" on both offenses. (*Id.* at p. 144.)

"There is a reasonable probability of a more favorable result within the meaning of *Watson* when there exists 'at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error affected the result.' " (*People v. Mower* (2002) 28 Cal.4th 457, 484, quoting from *Watson, supra,* 46 Cal.2d at p. 837.) Our review of the record in this case leaves us with such "serious doubt."

DISPOSITION

The judgment is reversed and the case remanded for a new trial.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COOPER, P. J.

We concur:

RUBIN, J.

FLIER, J.