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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DELIA RABINA CONTRERAS, Defendant and Appellant.	D043657 (Super. Ct. No. SCD141940)

APPEAL from a judgment of the Superior Court of San Diego County, H. Ronald Domnitz, Judge. Affirmed in part and reversed in part.

A jury convicted Delia Rabina Contreras of voluntary manslaughter (Pen. Code, § 192, subd. (a)), a lesser included offense of second-degree murder, with which she was charged. The jury also found Contreras personally used a firearm to commit the killing. (§ 12022.5, subd. (a)(1).) The court sentenced Contreras to 15 years in the state

penitentiary, consisting of the upper term of 11 years for voluntary manslaughter and the middle term of 4 years for the personal use enhancement.

Contreras contends (1) the court erred by denying her motion under *People v. Wheeler* (1978) 22 Cal.3d 258; (2) her federal constitutional right to present a defense was violated by the court's refusal to admit evidence that she was afraid the victim would kill her if she left him and the victim had threatened to shoot her ex-husband; (3) the court erred by admitting expert testimony of wound analysis because the expert was not qualified; (4) the chain of custody was not established for a gunshot residue test; (5) the court erroneously instructed with an outdated version of CALJIC No. 8.40; and (6) the court erroneously instructed the jury on self-defense. During the pendency of this appeal, we asked the parties for supplemental briefing on the applicability of *Blakely v. Washington* (2004) 540 U.S. 965, [124 S.Ct. 2531] (*Blakely*) to the upper-term sentence imposed for voluntary manslaughter. We vacate that sentence and remand for resentencing consistent with *Blakely*. In all other respects, we affirm.

FACTUAL AND PROCEDURAL HISTORY

About 2:27 a.m. on December 29, 1998, National City police officers responded to a reported suicide. When officer John Dougherty arrived, Contreras was in the doorway, waving at him. Anselmo Vasquez was lying on his back in the hallway between the living room and the master bedroom. There was a bloodstained towel around his head and a locked black gun case at his feet. Blood was pooled around his mouth, his eyes were half-shut, and he appeared to be dead. Vasquez was pronounced dead about 20 minutes later, after the paramedics had arrived.

Deputy medical examiner Dr. Robert Whitmore opined the cause of death was a gunshot wound that was not self-inflicted. The bullet entered the front of the right chest, perforating the aorta in two places, both lungs, and the left bronchus. Whitmore opined the wound to the bronchus would cause Vasquez to cough up blood almost immediately, especially if Vasquez walked around or tried to talk. Based upon the large amount of blood found in his body, Whitmore opined Vasquez lived five to ten minutes after he was shot. No gunshot residue was found on Vasquez's hands.

Prosecution expert Brian Kennedy is a consultant who analyzes blood stains for the purpose of reconstructing crime scenes. Kennedy concluded Vasquez did not remain standing up very long after he was shot because had Vasquez remained erect he would have coughed up or projectile vomited streams of blood. However, there was no evidence of this blood on the walls, on the floor, or on Vasquez's clothing. Had Vasquez walked in the apartment, he would have walked through the blood he coughed up and left footprints, but no such prints were found in the apartment.

While searching the apartment, police found a broken window in the back bedroom. The window frame of the sliding pane and several large pieces of glass had been placed on the floor. The stationary pane was still in the window. It contained two holes, each about one inch in diameter, which prosecution experts agreed were caused by blunt force and not by a bullet. Although three firearms were found in the apartment, the firearm used to kill Vasquez was not found. Prosecution and defense experts agreed that firearm was probably a Marlin rifle. From the shape of the bullet, prosecution experts

opined the bullet went directly into the body without first striking another object, such as the window pane.

After officer Francisco Gonzalez arrived at Contreras's apartment, Contreras told him she had heard a loud noise that could have been a window breaking. Vasquez came to the bedroom door, said he was shot, had problems opening the gun case, and fell to the ground. Contreras told officer Daniel Fabinski she had fallen asleep while Vasquez was watching television. After she heard a loud noise, Vasquez walked into the bedroom holding a gun case, told her he had been shot, and collapsed on the floor.

When officer Greg Seward, who began to interview Contreras on the stairs outside her apartment, told Contreras that Vasquez had been pronounced dead, she did not appear upset. Contreras told Seward she was awakened by a gunshot, went into the living room and saw Vasquez walking towards her, holding a gun case and saying, " 'Delia! Delia! I got shot. I got shot.' " He then fell to the floor. After she called 911, she wiped the blood coming from Vasquez's mouth with a towel and propped up his head to help him breathe. She then called 911 again to find out why no one had come. Seward drove Contreras, who had wrapped herself up in a blanket, to the police station. Once there, Contreras wondered why Vasquez had killed himself and said she thought his family would think she killed him. She said Vasquez always put a gun in his pocket when he watched TV "for people who make noise outside." She did not know to use a gun. She and Vasquez had argued the night before and she had kicked him.

About one-half hour later, Seward placed bags on Contreras's hands in preparation for another officer to conduct a gunshot residue test. Criminologist Steven Dowell

testified the test showed three specific particles of gunshot residue on Contreras's right palm, two specific particles and several consistent particles on her left palm, and several consistent particles on the back of her left hand. Although gunshot residue can be transferred to a defendant's hands from the back of a police car, Contreras's hands had more specific particles of gunshot residue than that found in either the studies Dowell had read or the study he was conducting.

On two different occasions, a police officer interviewed Contreras's mother, Virginia Rabina, about a conversation she had had with Contreras when Contreras was in jail. Rabina told officer Randy Bishop that Contreras told her she and Vasquez had fought, Vasquez pulled out a gun, pointed it at her and said he was going to kill her. Contreras pushed Vasquez and the gun went off. She said she acted in self-defense. Rabina told officer Estella Cordero that Contreras said she and Vasquez had fought again, Vasquez got a gun, and hit her "too much."[1] He was going to shoot her, so she grabbed the gun from him and shot him. Vasquez had threatened to kill Contreras once before and Rabina had told her to leave him. Contreras said she could not leave Vasquez because he would kill her if she left. At trial, however, Rabina testified Contreras told her she did not kill Vasquez, but the police had forced her to say she killed him.

On January 1, 1999, deputy sheriffs April Pruitt and Roberta McClain were on duty at Las Colinas Detention Facility (Las Colinas). About 3:30 p.m., Pruitt turned on

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1 Cordera taped her interview with Rabina. The tape was played for the jury and the jury was given a transcript of the tape.

the intercom in the housing unit where Contreras was staying and overheard Contreras speaking with other inmates. Pruitt testified Contreras said, " 'I did it because he accused me of having affairs and I wasn't. And he said he'd kill me.' " McClain testified Contreras said, " 'I did it because he was always accusing me of having affairs, and hitting me and he was going to kill me.' " Jhoanna Pascua testified for the defense that she was an inmate at Las Colinas and was present during the conversation overheard by Pruitt and McClain. Contreras did not say she shot Vasquez. Instead, she said that after she went to sleep, Vasquez knocked on her door and said he was bleeding. Contreras then called an ambulance.

Piedad Vaugh, Vasquez's coworker, testified for the limited purpose of establishing Vasquez's state of mind. About four months before his death, Vasquez began speaking to Vaugh about his problems with Contreras. He said they always fought and he wanted to leave her but he was afraid. During these conversations, he appeared scared and worried. On December 6, 1998, Vasquez told Vaugh he was going to leave Contreras after he and Contreras returned from a trip to Las Vegas. Vasquez was frightened because Contreras had told him she would kill him if he ever left her again.

Richard Contreras (Richard), Contreras's ex-husband, testified that in May 1992, when he and Contreras argued over their pending divorce, she threw a knife into the living room where he and their three children were sitting. In June 1992, after Richard accused Contreras of having an affair, Contreras quickly raised the kitchen knife she was using over her head. Richard slapped her and the knife dropped onto the floor. As he began to leave the house, Contreras grabbed his shoulder, ripping his shirt, and threw a

portable telephone at him, striking his left shoulder. After the divorce, Richard encountered Vasquez, who "demonstrated a handgun to [Richard]" in "an unfriendly manner." On December 29, 1998, Contreras called Richard to tell him she had been charged with murder and had messed up her life. She said there had been yelling and Vasquez shot himself.

Antonio Bosch, one of Vasquez's neighbors, testified for the defense that in December 1998, he saw Vasquez with a gun. Pilar Moore, another neighbor, was awakened around 12:00 a.m. or 1:00 a.m. on December 29 by the sound of someone trying to open her window or her door. She then heard cracking noises and the sound of falling glass. Someone with a flashlight warned her that someone else had broken a window and might break Moore's window.

Lydia DeLeon, Vasquez's landlord, testified that Vasquez had not told her he was planning to move out. On December 28, 1998, she inspected the apartment building between 4:00 p.m. and 5:00 p.m. and she did not notice any problems with the windows in Vasquez's apartment.

Aurora Cudal, president of the Filipino American Organization of San Diego County, testified she had known Contreras for two years and was aware of her reputation as a nonviolent person.

Defense expert Harry Bonnell, a forensic pathologist, testified Vasquez could have been ambulatory for five to ten minutes after being shot, and would have died within minutes of collapsing. Vasquez could have swallowed the blood from his wounds until

he collapsed. Bonnell opined the bullet was already deformed by hitting an object before it struck Vasquez.

Defense expert Peter Barnett, a criminologist, testified he found no conclusive evidence that the bullet that killed Vasquez had gone through glass. The shearing on the side of the bullet could have been caused by glass, but could not have been caused by the soft tissue of the body.

DISCUSSION

I. *Wheeler Motion*

The California and the federal constitutions each prohibit using peremptory challenges to remove prospective jurors "on the sole ground of group bias." (*People v. Wheeler, supra,* 22 Cal.3d at pp. 276-277; *Batson v. Kentucky* (1986) 476 U.S. 79, 89.) A party suspecting a violation must make a timely objection and "must then make as complete a record as possible under the circumstances to establish a prima facie case of group bias . . . ." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1284.) In order to establish a prima facie case, the objecting party "must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias." (*People v. Johnson* (2003) 30 Cal.4th 1302, 1318.) If the objector establishes a prima facie case, the burden shifts to the other party to provide a race-neutral explanation. (*Hayes*, at p. 1284.)

"We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges ' "with great restraint." ' [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and

give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal." (*People v. Burgener* (2003) 29 Cal.4th 833, 864 (*Burgener*).)

Contreras contends the court committed reversible error by failing to properly evaluate her claim that the prosecutor's use of a peremptory challenge to excuse Juror No. 27 was discriminatory. During voir dire, Juror No. 27 stated her cousin had been shot to death and the perpetrator had not been found. Later, the following exchange took place:

> "[Prosecutor]: Yesterday when the judge asked you if there was any reason why you didn't think you could be fair, you kind of hesitated and you said well, I don't think so. So what was going on in your mind when you made that comment of you don't think so?
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> "[Juror No. 27]: Actually I really don't like judging people because I don't know — the person could be innocent, and then they can also, if they're charged guilty, and then later on, like 10 years later they found out something else and then they might be innocent years later, it will probably be on my conscience that I said that the person was guilty and later on they were innocent.
>
> "[Prosecutor]: So do you feel — well, let me ask you this. If I proved my case to you beyond a reasonable doubt, are you going to be able to say guilty, or in the back of your mind are you going to think well, maybe down the road I might change my mind?
>
> "[Juror No. 27]: I have to let that be evidence. I have to see what the evidence is.
>
> "[Prosecutor]: If I don't prove my case to you beyond a reasonable doubt, are you going to have any — be uncomfortable at all in saying not guilty? If I don't prove my case to you, I would hope that you would say not guilty.
>
> "[Juror No. 27]: Yeah. I can say not guilty if you don't prove it.

"[Prosecutor]: But if I prove it, can you say guilty?

"[Juror No. 27]: It's just —

"The Court: Both sides are entitled to a fair trial, both sides.

"[Juror No. 27]: Yeah.

"The Court: Both sides are entitled to unbiased jurors. I'm going to tell you what reasonable doubt is. If [the prosecutor] proves her case beyond a reasonable doubt, will you follow the law and find the person guilty? That's all we're asking.

"[Juror No. 27]: Yes."

Near the end of the jury selection, defense counsel moved for a mistrial stating the prosecutor had removed all the people of color, which consisted of Juror No. 27, an African-American woman, and two other jurors.[2] In response to court's question as to why the prosecutor exercised a peremptory challenge on Juror No. 27, the prosecutor said she was wary about the unresolved shooting of Juror No. 27's cousin and also stated: "[Juror No. 27] specifically stated when asked a couple of times by yourself when she gave kind of evasive answers, as well, I think I can be fair, I'm not sure." The court denied Contreras's motion for a mistrial, stating, "There's absolutely no showing of any kind that there was any sort of racial prejudice exercising [the prosecutor's] peremptory challenges."

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[2] Contreras did not appeal the peremptory challenges the prosecutor exercised against the other jurors.

Juror No. 27 showed great hesitancy when asked whether she could find a defendant guilty. "A prosecutor legitimately may exercise a peremptory challenge against a juror who is skeptical about imposing the death penalty." (*Burgener, supra*, 29 Cal.4th at 864.) Similarly, a prosecutor may legitimately exercise a peremptory challenge against a juror who is hesitant about finding a defendant guilty. Accordingly, the court did not abuse its discretion by finding the prosecutor had a valid, race-neutral reason for excusing Juror No. 27.

II. *Contreras's Fear of Vasquez*

Contreras contends the court erred by refusing to admit Richard's testimony that Contreras was afraid of Vasquez. We review the court's rulings as to the admissibility of evidence, including the relevancy of that evidence, for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717-718.)

After Vaugh testified Vasquez was afraid to leave Contreras because she had threatened to kill him if he left her, defense counsel made an offer of proof that Richard would testify Contreras told him she was afraid to leave Vasquez for fear he might harm her. Contreras argued this testimony was relevant to impeach Vaugh's testimony that Vasquez was afraid of Contreras because her fear of him rebutted his fear of her. The court refused to admit the testimony, holding it to be hearsay and irrelevant.

Contreras contends the proffered testimony was admissible as evidence of state of mind. Evidence Code section 1250, subdivision (a) defines the state of mind exception to the hearsay rule as follows: "[E]vidence of a statement of the declarant's then existing

state of mind, emotion, or physical sensation . . . is not made inadmissible by the hearsay rule when: [¶](1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action . . . ."[3] Contreras offered the statements to show her state of mind — her fear of Vasquez — at the time she made the statement. Accordingly, the evidence is admissible if it is relevant. (*People v. Thurmond* (1985) 175 Cal.App.3d 865, 871.)

Contreras contends the evidence is relevant to impeach Vaugh's testimony that Vasquez was afraid because Contreras threatened to kill him if he left her. In determining a witness's credibility, a "jury may consider . . . any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony . . . including . . . [t]he existence or nonexistence of any fact testified to by him." (Evid. Code, § 780, subd. (i).) We agree that Contreras's statement to Richard that she was afraid to leave Vasquez due to Vasquez's threats to harm her, if believed, makes it less likely Vasquez feared Contreras. Further, the statement is also relevant to a claim of self-defense by Contreras. Accordingly, we find the court erred by denying Contreras's motion to admit the evidence.

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3 Evidence Code section 1250 provides: "(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant. [¶] (b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed."

However, we find the error harmless. We determine whether the court's error in excluding evidence is harmless under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*People v. Thuss* (2003) 107 Cal.App.4th 221, 233.) The jury heard the tape recording of officer Cordero's interview with Rabina, in which Rabina stated Contreras had said she was afraid to leave Vasquez because he had threatened to kill her if she left him. Because evidence of Contreras's fear of Vasquez due to his threat to kill her was already admitted at trial, it is not reasonably probable a more favorable result would have been reached had Richard been allowed to testify to such fear.

Contreras also contends the court's refusal to admit the evidence violated her right to present a defense. She relies upon *Chambers v. Mississippi* (1973) 410 U.S. 284, 301, which holds the court cannot exclude trustworthy hearsay necessary to the defense. Here, Contreras was not denied a defense because the jury heard other, equally strong evidence of Contreras's fear of Vasquez.

III. *Vasquez Pointed a Gun at Richard Contreras*

Contreras also contends the court abused its discretion by refusing to admit Richard's testimony that Vasquez pointed a gun at him. Contreras proffered Richard's testimony that when he went to Contreras and Vasquez's apartment with his baby daughter in his arms, Vasquez pointed a gun at him and said that if Richard continued to come to the apartment, he would shoot him. Contreras offered the evidence to rebut Vaugh's testimony that Vasquez was afraid of Contreras's violence because it showed Vasquez was not the type of person to be afraid of Contreras and to bolster a claim of

self-defense. The court ruled the evidence was not relevant to Contreras's state of mind because she had not proffered evidence she was aware of the incident.

In order for the incident to be relevant to Contreras's state of mind, there must be evidence Contreras knew of the incident. (Cf. *People v. Minifie* (1996) 13 Cal.4th 1055, 1066 [a group's reputation for violence is relevant when defendant knows of that reputation].) Here, Contreras failed to proffer such evidence. Accordingly, the court did not abuse its discretion by ruling the evidence was not relevant to Contreras's state of mind.

Even if the court erred by refusing to admit this evidence, the error was harmless. The court had already admitted evidence of Vasquez's propensity for violence: (1) a neighbor testified he saw Vasquez carrying a gun; and (2) Richard testified Vasquez had demonstrated a gun to him in an unfriendly manner. Consequently, we do not find it reasonably probable a more favorable result would have been reached had the evidence been admitted.

Contreras also contends the court's refusal to admit this evidence violated her right to a fair trial. "It is 'the general rule that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal.' " (*People v. Raley* (1992) 2 Cal.4th 870, 892 (*Raley*).) " 'Specificity is required both to enable the court to make an informed ruling on the motion or objection and to enable the party proffering the evidence to cure the defect in the evidence.' " (*People v. Boyette* (2002) 29 Cal.4th 381, 424.) This rule applies to federal constitutional rights. (*Ibid.* [failure to object did not

preserve federal due process, fair trial, reliable penalty determination objection]; *Raley, supra,* 2 Cal.4th at p. 892 [hearsay and Evid. Code, § 352 objection did not preserve federal due process and confrontation clause objections]; *People v. Benson* (1990) 52 Cal.3d 754, 786, fn. 7 [Evid. Code, § 352 objection did not preserve objection based on violations of the Fifth, Eighth & Fourteenth Amendments]; *People v. Gordon* (1990) 50 Cal.3d 1223, 1240, fn. 2 [objection based on Evid. Code, § 1101 did not preserve federal due process objection] overruled on other grounds in *People v. Edwards* (1991) 54 Cal.3d 787, 835.) Contreras failed to raise the claim that she was denied a fair trial below. Accordingly, she has waived this claim.

IV. *Expert Testimony*

Contreras contends the court committed reversible error by allowing Kennedy to testify on the mechanics of Vasquez's wounds because Kennedy was not qualified to give expert testimony on wound mechanics. Contreras specifically objects to Kennedy's testimony that Vasquez must have fallen shortly after he was shot.

We review the court's determination that a witness qualifies as an expert in a particular area for abuse of discretion. (*People v. Bolin* (1998) 18 Cal.4th 297, 321-322 (*Bolin*).) The court abuses its discretion where " ' the evidence shows that a witness *clearly lacks* qualification as an expert and the judge has held the witness to be qualified as an expert witness.' " (*People v. Hogan* (1982) 31 Cal.3d 815, 852 (*Hogan*) disapproved on other grounds in *People v. Cooper* (1991) 53 Cal.3d 771, 836.)

" ' "Where a witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence that its admissibility." ' " (*Bolin*, at p. 322.)

Kennedy is a retired sergeant from the Sacramento County Sheriff's Department, who has worked as a consultant on bloodstain patterns since 1984. He testified he had a full day's training at evidence technician school in wound pathology relative to crime scenes. He also attended homicide investigation courses comparing the crime scene to the victim's pathology. In graduate school, Kennedy attended a medical-legal training course in which a pathologist taught wound mechanics. He also read portions of a book on wound ballistics and discussed the book with its author.(RT 498)! Additionally, he had field experience comparing the pathology of different types of injuries to the crime scene. This evidence shows Kennedy was trained in and had field experience in understanding how a wound's pathology affects the evidence found in crime scenes. Accordingly, the court did not abuse its discretion in finding this evidence sufficient to qualify Kennedy as an expert on wound mechanics.

We reject Contreras's reliance on *Hogan*, which is distinguishable from this case. The witness in *Hogan*, who analyzed blood splatter evidence, had had no formal education or training on blood splatter patterns but had merely read a book and observed bloodstains. (*Hogan, supra*, 31 Cal.3d at pp. 852-853.) In contrast, Kennedy had formal education and field experience in the effect various injuries have on crime scenes. Further, unlike the witness in *Hogan* whose expertise in blood typing was not related to blood splatter, Kennedy's testimony was related to his unchallenged expertise in

bloodstain patterns because his testimony was based on the lack of bloodstain evidence to support the theory that Vasquez walked through the apartment before he collapsed.

V. *Gunshot Residue Evidence*

Contreras contends the court erroneously admitted evidence of the gunshot residue test performed on her hands because the chain of custody was broken. We review the court's admission of evidence, including its determination that a proper foundation was laid for the evidence, for abuse of discretion. (*County of Sonoma v. Grant W.* (1986) 187 Cal.App.3d 1439, 1448.)

Contreras filed an in limini motion to exclude the evidence of gunshot residue taken from her hands because police officers did not bag Contreras's hands until about 30 minutes after she arrived at the police station. Contreras contends the failure to bag her hands resulted in a break in the chain of custody because she could have picked up the gunshot residue in her apartment, in the police car, or in the police station. The court ruled the bagging of Contreras's hands goes to the weight of the evidence and not to its admissibility.

Contreras misconceives the issue as one of the chain of custody. The chain of custody is the chain of possession of the evidence to insure that the evidence received has not been tampered with or altered. (*People v. Catlin* (2001) 26 Cal.4th 81, 134.) However, Contreras does not contest that the gunshot residue tested was the residue found on her hands. Instead, Contreras's objection concerns the possibility that the gunshot residue found on her hands did not come from firing a gun, but from another source, such as the back seat of the police car. This concern goes to the weight of the

evidence and not its admissibility. (*State v. Montgomery* (Mo. App. 1976) 545 S.W.2d 655, 656 [one-day lapse between shooting and gunshot residue test went to the weight and not the admissibility of the test results].)

VI. *CALJIC No. 8.40*

We agree with Contreras's contention that the court error by instructing the jury with a prior version of CALJIC No. 8.40, but find the error to be harmless. The prior version of CALJIC No. 8.40 requires intent to kill as one of the elements of voluntary manslaughter.[4] However, in *People v. Lasko* (2000) 23 Cal.4th 101 (*Lasko*), the California Supreme Court held a person who kills during a sudden quarrel or in the heat of passion commits voluntary manslaughter if he or she acts with either intent to kill or conscious disregard for life. Because *Lasko* did not establish a new rule of law, it applies to all cases that were not final as of the date of the decision, June 2, 2000.[5] (*People v.*

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4 CALJIC No. 8.40 as given in the instructions provides in part the following: "Every person who unlawfully kills another human being without malice aforethought but with an intent to kill, is guilty of voluntary manslaughter in violation of Penal Code section 192(a). [¶] There is no malice aforethought if the killing occurred upon a sudden quarrel or heat of passion or in the actual but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A human being was killed; [¶] 2. The killing was unlawful; and [¶] 3. The killing was done with the intent to kill. [¶] A killing is unlawful, if it was neither not justifiable nor excusable."

5 In a companion case, *People v. Blakeley* (2000) 23 Cal.4th 82, the court held voluntary manslaughter under the theory of imperfect self-defense can also be committed with intent to kill or conscious disregard for life. The court also ruled that its decision as to imperfect self-defense "is an unforeseeable judicial enlargement of the crime of voluntary manslaughter, and thus may not be applied retroactively to defendant." (*Id.* at p. 92.)

Crowe (2001) 87 Cal.App.4th 86, 94-95.) Accordingly, the court erred by failing to instruct the jury that if it found Contreras killed Vasquez during a sudden quarrel or in the heat of passion, it could convict Contreras of voluntary manslaughter if it found she acted with either intent to kill or conscious disregard for life.[6]

We next determine whether the error was prejudicial. " '[I]n a noncapital case, error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under [*People v.*] *Watson* . . . . A conviction of the charged offense may be reversed in consequence of this form of error only if, "after an examination of the entire cause, including the evidence" [citation], it appears "reasonably probable" the defendant would have obtained a more favorable outcome had the error not occurred.' " (*Lasko, supra,* 23 Cal.4th at p. 111.)

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6 CALJIC No. 8.40 currently provides: "Every person who unlawfully kills another human being [without malice aforethought but] either with an intent to kill, or with conscious disregard for human life, is guilty of voluntary manslaughter in violation of Penal Code section 192, subdivision (a). [¶] [There is no malice aforethought if the killing occurred [upon a sudden quarrel or heat of passion] [or] [in the actual but unreasonable belief in the necessity to defend [oneself] [or] [another person] against imminent peril to life or great bodily injury. [¶] The phrase, 'conscious disregard for life,' as used in this instruction, means that a killing results from the doing of an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who know that his or her conduct endangers the life of another and who acts with conscious disregard for life. [¶] In order to prove this crime, each of the following elements must be proved: 1. A human being was killed; 2. The killing was unlawful; and 3. The perpetrator of the killing either intended to kill the alleged victim, or acted in conscious disregard for life; and 4. The perpetrator's conduct resulted in the unlawful killing. [¶] [A killing is unlawful, if it was [neither] [not] [justifiable] [nor] [excusable].]"

Here, the court instructed the jury that in order to convict Contreras of voluntary manslaughter it had to find she acted with intent to kill and she killed without malice aforethought. (CALJIC No. 8.40.) The jury was further instructed it could not find malice aforethought if the killing occurred either in the heat of passion or due to imperfect self-defense. (CALJIC No. 8.40.) The court also instructed that a killing without malice aforethought and without intent to kill is involuntary manslaughter. (CALJIC No. 8.45.)

"[W]e presume that the jury 'meticulously followed the instructions given.' " (*People v. Cruz* (2001) 93 Cal.App.4th 69, 73.) In finding Contreras guilty of voluntary manslaughter, the jury necessarily concluded Contreras intended to kill Vasquez. Had the jury found Contreras unintentionally killed Vasquez in the heat of passion, it would have convicted her of involuntary manslaughter. Therefore, Contreras was not prejudiced by the court's failure to instruct that voluntary manslaughter can be committed if the defendant kills in the heat of passion with a conscious disregard for life.

VII. *Self-Defense Instructions*

Contreras contends the court erred by instructing on self-defense because those instructions conflicted with her defense that someone else shot Vasquez through the bedroom window. Prior to trial, Contreras moved in limine to exclude jury instructions on self-defense. However, when arguing the court should admit evidence that Vasquez pointed a gun at Richard, defense counsel, in effect, withdrew that motion, saying, "[The People] brought up in their case self-defense through their statements. There was an

instruction, *we should be able to get an instruction on self-defense* so self-defense is an issue." (Italics added.)

Even if Contreras had not withdrawn the motion, we would find the court did not err by giving self-defense instructions sua sponte. A court has a sua sponte duty to instruct on a defense " 'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such defense *and* the defense is not inconsistent with the defendant's theory of the case.' " (*People v. Breverman* (1998) 19 Cal.4th 142, 157.) Here, there was substantial evidence of self-defense. Two police officers testified Rabina told them Contreras said that after Vasquez pulled a gun on her and told her he was going to kill her, she pushed him and the gun went off. Additionally, two deputy sheriffs testified they overheard Contreras tell her fellow inmates at Las Colinas that she killed Vasquez because he accused her of having affairs, hit her and threatened to kill her. Further, self-defense was not inconsistent with Contreras's theory of the case because she relied on it at the end of closing argument: "I will say one last thing with regards to if somehow you believe that there was some type of struggle or that she somehow was involved in this shooting, remember there's no gunshot residue on her clothing, then there's — there would be a basis for self-defense, because that's basically what she's talking about when there's a struggle."

VIII. *Blakely v. Washington*

After this appeal was filed, we asked for supplemental briefing on the applicability of *Blakely*, *supra*, 540 U.S. 965, [124 S.Ct. 2531] to the upper term sentence the court imposed for voluntary manslaughter. The issue of *Blakely's* application to California's

sentencing scheme is currently pending before the California Supreme Court. (*People v. Towne*, review granted July 14, 2004, S125677; *People v. Black*, review granted July 28, 2004, S126182.)[7]

In *Blakely*, the United States Supreme Court applied the following rule first articulated in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490: " 'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " (*Blakely*, *supra*, 542 U.S. at p. ____ [124 S.Ct. at p. 2536], italics omitted.) The statutory maximum is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Id.* at p. ____ [124 S.Ct. at p. 2537], italics omitted.)

In California, where a penal statute provides for three possible prison terms for a particular offense, the court must sentence a defendant to the middle term, unless the court finds by a preponderance of the evidence that "there are circumstances in aggravation or mitigation of the crime." (Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 4.420.) " '[W]hen the judge's authority to impose a higher sentence depends

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7 This court is split on the applicability of *Blakely* to an upper term sentence. We decline to follow *People v. Wagener* (2004) 123 Cal.App.4th 424, review granted January 12, 2005, No. S129579, a decision of this court, in which a majority of that panel concluded *Blakely* is not applicable to California's determinate sentencing scheme. We instead follow *People v. George* (2004) 122 Cal.App.4th 419, review granted December 15, 2004, No. S128582, and *People v. Lemus* (2004) 122 Cal.App.4th 614, review granted December 1, 2004, No. S128771, both of which held *Blakely* applies to the upper term sentence.

on the finding of one or more additional facts, 'it remains the case that the jury's verdict alone does not authorize the sentence,' as required to comply with constitutional principles. [Citation.] . . . Because the maximum penalty the court can impose under California law without making additional factual findings is the middle term, *Blakely* applies.' " (*People v. Vu* (2004) 124 Cal.App.4th 1060, 1066.)

Under *Blakely*, a jury trial is required to determine beyond a reasonable doubt any fact that " 'the law makes essential to the punishment,' " other than the fact of a defendant's prior conviction. (*Blakely, supra,* 542 U.S. at p. ____ [125 S.Ct. at p. 2537 & fn. 5].) Here, the trial court based its decision to impose the upper term for manslaughter on the following: (1) Contreras took advantage of a position of trust; (2) she had a prior chance to kill Vasquez; and (3) she showed no remorse.[8] Because the jury made no such findings, the court's decision to select the upper term sentence violated Vasquez's Sixth Amendment right to a jury trial. Accordingly, we vacate the sentence and remand for a new sentencing hearing consistent with *Blakely.*

DISPOSITION

The sentence is vacated and the case is remanded to the superior court to conduct a new sentencing hearing consistent with the principles discussed in this opinion. In all other respects, the judgment is affirmed.

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8 The court found Contreras's lack of a significant record to be a mitigating factor.

O'ROURKE, J.

WE CONCUR:

HALLER, Acting P. J.

McDONALD, J.