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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

NARCISO HERNANDEZ,

Defendant and Appellant.

F051746

(Super. Ct. No. BF113180A)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. John I. Kelly, Judge.

Ann Hopkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael P. Farrell and Alison Elle Aleman, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted appellant Narciso Hernandez of second degree murder and possessing a sawed-off shotgun. He contends (1) the evidence was insufficient to sustain the second degree murder conviction; (2) the trial court erred in instructing the jury; (3) counsel rendered ineffective assistance; (4) the sentence imposed is cruel and unusual;

(5) imposition of consecutive sentences was error; and (6) the trial court erred in the award of presentence credits. We will reverse the second degree murder conviction and the accompanying enhancement on the basis of instructional error and remand the matter to the trial court.

### **FACTUAL AND PROCEDURAL SUMMARY**

On Christmas Eve and early Christmas morning in 2005, Narciso Hernandez (hereafter Hernandez) and his brother Jose Hernandez,<sup>1</sup> his cousin Everardo Contreras, and his neighbor Carolina B. were gathered in the front yard of his residence drinking and celebrating. When Contreras appeared to become intoxicated, Hernandez's sister, Melby,<sup>2</sup> drove Contreras around the corner to his house.

Melby walked Contreras to the door of his home, where he lived with his mother Melba Hernandez, his father, and his two sisters. Contreras wanted his mother to come outside and listen to a song on the radio in his truck; Melby left and went back home. A few minutes later, Jose walked around the corner to Contreras's house. Contreras and Jose were drinking and crying as they discussed Jose's father, who had been killed that year, and commenting that this was their first Christmas without him.

While Hernandez and Carolina were in his front yard, Manuel Madrigal, Jr., walked up to them and asked for a beer. Madrigal recently had been released from prison and was visiting family in the area. Hernandez gave Madrigal a beer and Madrigal left. A few minutes later, Madrigal returned and asked for cigarettes and another beer. Hernandez gave Madrigal another beer and told Madrigal he had no cigarettes. Madrigal left Hernandez's house and walked around the corner toward Contreras's house.

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<sup>1</sup> We will refer to Jose Hernandez, Melby Hernandez and Melba Hernandez by their first names, not out of disrespect but to avoid any confusion to the reader.

<sup>2</sup> Hernandez's sister's true name is Melba Hernandez. As Hernandez's aunt also is named Melba Hernandez, we will refer to his sister as "Melby," which is a nickname that appears in the record.

While Melba, Contreras, and Jose were outside listening to music, Madrigal approached and asked for cigarettes. Jose gave him a cigarette. None of the three had seen or met Madrigal before and they asked Madrigal to leave because they were discussing private family matters. At that point Madrigal responded, “Fuck that. This is my territory, and I’m not going to leave.”

Jose told Madrigal that he, Melba, and Contreras were going inside. Madrigal hit Jose and Jose fought back. Melba pulled Jose away from Madrigal and toward her; Madrigal then attacked Contreras. Contreras fell to the ground and was lying face down; Madrigal continued to hit Contreras with his fists and kick him. Melba held on to Jose and yelled for Madrigal to stop.

Melba managed to turn Contreras over so that he was lying face up. She screamed when she saw he was missing teeth and had a large knot on his head. Melba then noticed that Madrigal again was attacking Jose. Madrigal was on top of Jose, hitting him, while Melba continued to scream.

Hernandez and Carolina heard Melba’s screams. Hernandez went inside the house and retrieved a sawed-off shotgun. Carolina asked what he was going to do, and Hernandez responded that he was “not going to let what happened ... to his dad happen to his aunt.”

As Hernandez ran toward Melba’s house, Carolina ran after him. Carolina could still hear Melba screaming. Hernandez was running. By the time Hernandez arrived at Melba’s house, Contreras was in the street, motionless and bleeding. Jose was on the ground, with Madrigal on top of him, hitting him. Melba screamed at Madrigal to stop. Carolina was frightened and screaming.

Hernandez approached Madrigal and began yelling at him, asking him what he was doing. Hernandez thought Madrigal had killed Contreras and Jose. Madrigal stopped hitting Jose, got up, headed quickly toward Hernandez and motioned like he “was now going after” Hernandez. Hernandez fired twice, hitting Madrigal. After

Madrigal fell to the ground, Hernandez kicked him and then Hernandez began to cry. Hernandez stated, “[W]hy didn’t you leave? If you had left none of this would have happened.”

Melba knelt next to Madrigal. Hernandez continued to cry, threatened to kill himself, and began hitting himself.

Jose and Contreras were injured, not dead. Jose took the shotgun away from Hernandez and they all went into the house. Carolina went home.

Melby, Contreras, and Jose subsequently disposed of Madrigal’s body by dumping it along the roadside about two miles from the house. Hernandez was not involved in moving the body. The body was recovered and identified on December 26, 2005.

An autopsy disclosed that Madrigal had sustained a lethal gunshot wound to the right side of the chest. The shot caused massive injury to chest organs and extensive bleeding. This shot would have immediately incapacitated Madrigal. Madrigal also had a second gunshot wound in the right hip area, although it could not be determined which shot occurred first. There were abrasions to Madrigal’s face and a wound to the head that was consistent with having been kicked. The amount of blood from the head wound indicated that it was inflicted after Madrigal had been shot in the chest.

Madrigal had a blood-alcohol level of 0.17 at the time of death and also had cocaine in his system. Alcohol and cocaine together make cocaethylene, a central nervous system stimulant with psychoactive effects. Cocaethylene generally causes problems with information processing and judgment. Aggression, anxiety, and paranoia also can be present.

During an interview, Hernandez initially denied any knowledge of the shooting. Eventually, he told officers that he heard his aunt screaming, got his shotgun, and ran to her house. When he arrived at the house, he saw Madrigal hitting Jose and saw Contreras unconscious and bleeding in the street. Hernandez said he did not know why he had shot Madrigal. He cried during his interview.

The jury convicted Hernandez of second degree murder, a violation of Penal Code section 187, subdivision (a),<sup>3</sup> and possession of a sawed-off shotgun, a violation of section 12020, subdivision (a)(1). Two arming enhancements also were found true. Hernandez moved to vacate the second degree murder verdict. The trial court denied the motion.

At sentencing, the trial court imposed a term of 15 years to life for the second degree murder conviction, a consecutive 25-year term for the section 12022.53, subdivision (d) enhancement, and a consecutive two-year term for violating section 12020, subdivision (a)(1).

## **DISCUSSION**

Hernandez contends his second degree murder conviction must be reversed because the evidence was insufficient to support the conviction. He also claims the trial court erred in instructing the jury regarding heat of passion. Hernandez also argues counsel rendered ineffective assistance for failing to assure the jurors were properly instructed on heat of passion and for failing to object to the prosecutor's closing argument. In addition, Hernandez contends that under the circumstances of this case, a sentence of 40 years to life is cruel and unusual. Finally, he contends the trial court erred in imposing consecutive terms of imprisonment and in the calculation of presentence credits.

### **I. Prejudicial Instructional Error**

The People charged Hernandez with first degree murder and argued for that verdict at closing, asserting the evidence showed deliberation, premeditation, and intent. Hernandez argued that the evidence established that he had acted in self-defense or in

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<sup>3</sup> All further statutory references are to the Penal Code unless otherwise specified.

defense of others, either reasonably or unreasonably, or upon a sudden quarrel or heat of passion.

Hernandez had requested the trial court instruct the jury with Judicial Council of California Criminal Jury Instructions (2006), CALCRIM No. 570, which defines the crime of voluntary manslaughter upon a sudden quarrel or heat of passion. CALCRIM No. 570 states, in part:

“The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder.”

Instead of instructing the jury with CALCRIM No. 570, the trial court instructed with various CALJIC instructions. CALJIC No. 8.40 (voluntary manslaughter defined), CALJIC No. 8.42 (sudden quarrel or heat of passion and provocation explained), and CALJIC No. 8.44 (no specific emotion alone constitutes heat of passion) were all given. Nothing in these instructions informed the jury that the *People* had the burden of proving beyond a reasonable doubt that Hernandez did not kill as the result of a sudden quarrel or heat of passion.

The trial court also instructed the jury with a modified version of CALJIC No. 8.50 (murder and manslaughter distinguished—nature of act involved). The modification deleted critical language in the second and third paragraphs that pertain to heat of passion and sudden quarrel. The standard version of CALJIC No. 8.50 states:

“The distinction between murder [other than felony-murder] and manslaughter is that murder [other than felony-murder] requires malice while manslaughter does not.

“When the act causing the death, though unlawful, is done [in the heat of passion or is excited by a sudden quarrel that amounts to adequate provocation,] [or] [in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury,] the offense is manslaughter. In that case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent.

“To establish that a killing is murder [other than felony-murder] and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done [in the heat of passion or upon a sudden quarrel] [or] [in the actual, even though unreasonable, belief in the necessity to defend against imminent peril to life or great bodily injury].” (CALJIC No. 8.50 (Fall 2006 ed.) p. 394.)

The modified version given by the trial court deleted the bracketed portions of the second and third paragraphs that address heat of passion or sudden quarrel. The record does not contain any discussion of this instruction, or disclose any reason for the deletion.

The due process clause of the United States Constitution requires the prosecution to prove the absence of heat of passion. (*Mullaney v. Wilbur* (1975) 421 U.S. 684, 704.) After the United States Supreme Court issued its decision in *Mullaney*, CALJIC No. 8.50 was revised to conform to that decision and specifically to instruct the jury that the People have the burden of proving the absence of heat of passion or a sudden quarrel. (*People v. Najera* (2006) 138 Cal.App.4th 212, 227.)

By deleting the bracketed language from the third paragraph, the language that was added to conform to the *Mullaney* decision was omitted. There was no other instruction that specifically informed the jury that the People had the burden of proving the absence of heat of passion or sudden quarrel. Clearly, the trial court felt there was sufficient evidence from which a reasonable jury could conclude that Hernandez had acted in the heat of passion or on a sudden quarrel because the jury received numerous instructions on this point.

The People argue on appeal that the other instructions, including CALJIC No. 2.90, when taken as a whole, informed the jury of the People’s burden of proving the absence of heat of passion or sudden quarrel. None of the instructions given by the trial court, however, informed the jury whether the People had the burden of proving the absence of heat of passion or sudden quarrel or if the defense had the burden of proving its existence.

When a jury considers both murder and voluntary manslaughter, heat of passion is not an element of voluntary manslaughter; the absence of heat of passion is an element of murder the prosecution must prove beyond a reasonable doubt. (*People v. Rios* (2000) 23 Cal.4th 450, 462.) CALJIC No. 8.50 was modified after *Mullaney* to satisfy due process requirements and to instruct the jury on this fine distinction. When the defense is contending that a killing occurred in the heat of passion or upon a sudden quarrel, as Hernandez did, and there is evidence to support this contention, there is no valid reason for modifying CALJIC No. 8.50 to delete the language informing the jury that the People have the burden of proving its absence.

Without an instruction informing the jury that the People have the burden of proving the *absence* of heat of passion or a sudden quarrel, the jurors erroneously may conclude that the defense has the burden of proving its existence.

The People contend that any instructional error was harmless because the evidence of malice was “more than substantial.” We disagree. The evidence of malice was slight at best. Madrigal was a recent parolee with a violent history; Hernandez had no criminal record. Madrigal was the aggressor in the fight against Contreras and Jose. Melba testified that Madrigal headed toward Hernandez as though to fight with him. Hernandez responded to Melba’s screams, concerned about his aunt’s welfare, and with his father’s recent death fresh on his mind. Hernandez arrived around the corner at Melba’s house and found Contreras unconscious and bleeding and Jose on the ground being hit repeatedly by Madrigal. Madrigal then advanced toward Hernandez, at which time Hernandez fired.

The jury did request the written instructions and the prosecution’s “chart on definition of self defense,”<sup>4</sup> indicating that it was considering a verdict other than the first

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<sup>4</sup> The chart was not made part of the record on appeal.



degree murder verdict requested by the People and needed to review the instructions before reaching a verdict. A verdict was returned shortly after receipt of the requested information.

The problem was compounded by the prosecutor's erroneous statement of the law in closing argument. When arguing whether Hernandez could be found to have acted upon a sudden quarrel or heat of passion, the prosecutor stated that the jury was to evaluate Hernandez based upon whether the circumstances would have caused a "normal person" and "reasonable person" to have acted similarly. The People concede on appeal that the prosecutor's comments constituted a misstatement of the law regarding the application of the heat of passion or sudden quarrel principles, but assert that no prejudice resulted from the misstatement or defense counsel's failure to object to the statement. In light of the instructional error, we make no such assumption.

The failure to instruct the jury that the People had the burden of proving the *absence* of heat of passion or a sudden quarrel deprived Hernandez of his constitutional right to due process. The error was compounded by the prosecutor's misstatement of the law with respect to application of heat of passion or sudden quarrel to Hernandez's actions, misstatements that were not objected to by defense counsel or corrected by the trial court.

This is a very close case. We are not convinced beyond a reasonable doubt that a properly instructed jury would have returned a second degree murder verdict under the facts of this case.

We will reverse the second degree murder verdict. The true findings appended to that count also must be reversed in light of the reversal of the underlying offense.

## **II. Custody Credits**

Hernandez contends the trial court erred in calculating presentence credits. He asserts he was arrested and placed in custody on January 5, 2006, but the trial court calculated from January 9, 2006. Testimony established that Hernandez was interviewed

by the authorities on January 5, 2006. There was no testimony at trial regarding the date he was taken into custody. The probation report shows that Hernandez was placed in custody on January 9, 2006.

Hernandez's claim that he is entitled to four additional days of presentence custody credit is not supported by the record.

### **III. Conclusion**

In light of our conclusion that the instructional error was prejudicial, we need not address Hernandez's contentions regarding sufficiency of the evidence, ineffective assistance of counsel, and cruel and unusual punishment. The matter will be remanded for further proceedings.

### **DISPOSITION**

The second degree murder conviction and the true findings on the section 12022.5, subdivision (a) and section 12022.53, subdivision (d) enhancements are reversed. The conviction for violating section 12020, subdivision (a)(1) is affirmed. The matter is remanded to the trial court for further proceedings.

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CORNELL, J.

WE CONCUR:

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WISEMAN, Acting P.J.

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HILL, J.