

III. MENS REA: PURPOSE TO KILL OFFENSES*

In California, there are three types of murder that involve a purpose to kill—a conscious object to end another’s life: (1) premeditated murder; (2) purpose to kill without premeditation; and (3) purpose to kill as a result of provocation. Premeditated murder involves a purpose to kill, accomplished with forethought.¹ A purpose to kill without premeditation, on the other hand, is a purposeful murder accomplished without reflection or sufficient provocation.² A purposeful killing committed upon provocation involves an individual who acts rashly and not by judgment in response to provocative conduct of the victim. Section A explains how courts define and assess premeditated murder. Section B clarifies purposeful murder without premeditation or adequate provocation—second-degree murder. Section C elucidates what constitutes adequate provocation, which enables a court to reduce first-degree murder to voluntary manslaughter.

A. Premeditation

1. The elements: purpose to kill and preexisting reflection

Murder in California is defined as “killing . . . with malice aforethought.”³ Malice aforethought involves a malicious will. “Malice may be express or implied.”⁴ It is express when the defendant possesses a purpose to take another’s life.⁵ It is implied “when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and

* Julie Engels: J.D. Candidate, May 2004, Loyola Law School; B.A., Comparative Literature, Brown University. I would like to thank my parents, Marty and Nancy Engels, my brother, Ken Engels, and Craig Gerber for their love, support and humor.

1. See discussion *infra* Section A.

2. See discussion *infra* Section B.

3. CAL. PENAL CODE § 187 (1999).

4. *Id.* at § 188.

5. See *id.*

malignant heart.”⁶ While premeditated murder requires a purpose to kill,⁷ it also demands a “preexisting reflection and weighing of considerations.”⁸ Thus, the mental state or mens rea required for premeditation involves a purpose to kill and preexisting reflection.⁹ Premeditation does not, however, demand careful, intelligent, or meaningful reflection.¹⁰ In effect, purpose to kill and preexisting reflection are separate elements, both of which comprise the mental state needed for premeditation.¹¹

While premeditation is often defined as a preexisting purpose to kill, a purpose to kill alone is not sufficient to support a finding of premeditation.¹² In *People v. Thomas*, the defendant shot and killed his wife.¹³ The question before the court was whether the defendant acted with premeditation when he carried out his purpose to kill the victim.¹⁴ For a first-degree murder conviction, the purpose to kill must be formed upon a preexisting reflection.¹⁵ A mere purpose to kill is insufficient.¹⁶ Although the defendant admitted to waiting for his wife to return in order to kill her, waiting was insufficient proof of a preexisting reflection to kill.¹⁷

6. *Id.*

7. See Suzanne Mounts, *Premeditation and Deliberation in California: Returning to a Distinction Without a Difference*, 36 U.S.F. L. REV. 261, 275 (2002).

8. *People v. Perez*, 2 Cal. 4th 1117, 1125, 831 P.2d 1159, 1163, 9 Cal. Rptr. 2d 577, 581 (1992).

9. See *People v. Bender*, 27 Cal. 2d 164, 182, 163 P.2d 8, 18 (1945); *People v. Thomas*, 25 Cal. 2d 880, 900, 156 P.2d 7, 18 (1945); *Perez*, 2 Cal. 4th at 1125, 831 P.2d at 1163, 9 Cal. Rptr. 2d at 581; see also CAL. PENAL CODE § 189 (1999) (“All murder which is perpetrated by means of . . . poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, . . . is murder of the first degree. All other kinds of murder are of the second-degree.”).

10. See *id.*

11. See *People v. Holt*, 25 Cal. 2d 59, 70, 153 P.2d 21, 27 (1944); see also Mounts, *supra* note 7 at 290.

12. See *Thomas*, 25 Cal. 2d at 901, 156 P.2d at 18.

13. *Id.* at 888, 156 P.2d at 11–12.

14. See *id.* at 885, 156 P.2d at 11.

15. See *id.* at 900, 156 P.2d at 19.

16. See *id.*

17. See *id.* at 891, 156 P.2d at 13.

No considerable amount of time between the purpose to kill and the killing itself needs to exist because “they may be as instantaneous as successive thoughts of the mind.”¹⁸ Reflection and consideration, however, must precede the purpose to kill.¹⁹ If that requirement is satisfied, then once the purpose to kill is formulated, the “act of killing may instantaneously follow the intention.”²⁰ Thus, the test for premeditation does not consider the duration, but rather the extent of reflection.²¹

In *People v. Memro*, the court found the defendant guilty of the premeditated killing of two boys even though the time period between the defendant’s purpose to kill and the actual killing was minimal.²² The defendant murdered three young boys.²³ He killed the first after he became enraged at the boy’s remark towards homosexuals.²⁴ He murdered the second after the victim screamed in response to the first murder.²⁵ The court found ample evidence of premeditation for the second murder, reasoning that the time between the scream and the defendant running over to the second victim was “imbued with deliberation and premeditation”²⁶ because the defendant considered his options as he ran from his first victim to his next. The murder of the third victim was also premeditated because the defendant’s act of tying the victim’s hands behind his back and strangling him gave the defendant sufficient time, although short, for reflection.²⁷

Even less time existed between the purpose to kill and the killing in *People v. Hughes*.²⁸ In that case, the defendant stabbed and murdered his neighbor.²⁹ More specifically, the defendant’s failure to inflict any fatal stab wounds provoked him to strangle his victim

18. *Id.* at 900, 156 P.2d at 18 (quoting *People v. Sanchez*, 24 Cal. 17, 30 (1864) (citations omitted)).

19. *See id.*

20. *Id.*

21. *See id.*

22. 11 Cal. 4th 786, 905 P.2d 1305, 47 Cal. Rptr. 2d 219 (1995).

23. *See id.* at 811–14, 905 P.2d at 1314–16, 47 Cal. Rptr. 2d. at 228–30.

24. *See id.* at 814, 905 P.2d at 1316, 47 Cal. Rptr. 2d at 229–30.

25. *See id.* at 814, 905 P.2d at 1316, 47 Cal. Rptr. 2d at 230.

26. *Id.* at 863, 905 P.2d at 1347, 47 Cal. Rptr. 2d at 261.

27. *See id.*

28. 27 Cal. 4th 287, 39 P.3d 432, 116 Cal. Rptr. 2d 401 (2002).

29. *See id.* at 316, 39 P.3d at 450, 116 Cal. Rptr. 2d at 422–23.

in order to eliminate her as a witness.³⁰ Because the victim had not died from the stab wounds, the defendant acted upon sufficient reflection in strangling her to death.³¹ This was sufficient evidence to support an inference of a preexisting purpose to kill, despite the lack of an appreciable amount of time between the initial stabbing and the strangulation.³²

2. *Anderson* factors: planning, motive, and manner

It is difficult to distinguish between a bare purpose to kill and a purpose to kill resulting from preexisting reflection.³³ Following *People v. Anderson*,³⁴ California courts look for three factors as evidence of premeditation.³⁵ The three *Anderson* factors are merely guidelines for gauging evidence of premeditation; *Anderson* does not set forth a strict rule.³⁶ These factors do not have independent legal significance, but they stand as potential indicators of the degree to which the defendant reflected upon a decision to kill prior to the actual killing.³⁷ Despite this caveat, the modern court still uses the *Anderson* factors as guidelines for assessing premeditation.

In *Anderson*, the defendant perpetrated a brutal murder upon a ten-year-old girl. Nevertheless, the court convicted the defendant of second-degree murder rather than first-degree murder because there was an absence of premeditation.³⁸ The first factor the court examined involves planning activity—the defendant’s actions prior to the killing.³⁹ The second factor is motive.⁴⁰ Proof of motive is

30. *See id.* at 371, 39 P.3d at 486, 116 Cal. Rptr. 2d at 466.

31. *See id.* at 371, 39 P.3d at 487, 116 Cal. Rptr. 2d at 466.

32. *See id.*

33. *See* Suzanne Mounts, *Malice Aforethought in California: A History of Legislative Abdication and Judicial Vacillation*, 33 U.S.F. L. REV. 313, 332 (1999).

34. 70 Cal. 2d 15, 447 P.2d 942, 73 Cal. Rptr. 550 (1968).

35. California courts must also review the whole record, “drawing all reasonable inferences in favor of [the judgment to] . . . determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Hughes*, 27 Cal. 4th at 370, 39 P.3d at 486, 116 Cal. Rptr. 2d at 454 (citations omitted).

36. *See infra* note 76 and accompanying text.

37. *See infra* subsection 2.b.

38. *See Anderson*, 70 Cal. 2d at 35–36, 447 P.2d at 954–55, 73 Cal. Rptr. at 563.

39. *See id.* at 26–27, 447 P.2d at 942, 73 Cal. Rptr. at 557.

40. *See id.*

significant to the extent it reveals reflection. The defendant's prior relationship with the victim or the defendant's conduct towards the victim may reveal a premeditated desire to kill.⁴¹ The third factor considers the manner of the killing.⁴² If the manner of killing implies that the defendant must have purposefully killed according to a "preconceived design,"⁴³ courts will infer that the defendant acted with preexisting reflection. California courts typically find premeditation when there is evidence of all three factors.⁴⁴ Either strong evidence of planning or evidence of motive, in conjunction with planning or manner of killing, however, is often sufficient.⁴⁵

In *Anderson*, although the defendant murdered the daughter of the woman with whom he was living,⁴⁶ the court found insufficient evidence of the above three factors: planning, motive, and manner.⁴⁷ The defendant's actions prior to the murder did not support a preexisting reflection.⁴⁸ Furthermore, the defendant lacked a tangible motive to kill the victim.⁴⁹ Finally, the manner of killing did not suggest that the victim's wounds were "deliberately calculated to result in death."⁵⁰ Therefore, despite the brutality of the murder, the court found that the defendant did not kill with premeditation. Accordingly, the defendant was convicted of second-degree murder rather than first-degree murder.

a. applying the Anderson factors

People v. Bolin is an example of a case in which all three *Anderson* factors were present.⁵¹ The defendant shot three individuals, including his "business" partner, because his partner showed their marijuana plants to the other two individuals.⁵² The

41. *See id.*

42. *See id.*

43. *See People v. Koontz*, 27 Cal. 4th 1041, 1081, 46 P.3d 335, 361, 119 Cal. Rptr. 2d 859, 891 (2002).

44. *See id.*; *see also Anderson*, 70 Cal. 2d at 27, 447 P.2d at 949, 73 Cal. Rptr. at 557.

45. *See Anderson*, 70 Cal. 2d at 19, 447 P.2d at 944, 73 Cal. Rptr. at 557.

46. *See id.*

47. *See id.* at 33–34, 447 P.2d at 953, 73 Cal. Rptr. at 561.

48. *See id.* at 34–35, 447 P.2d at 953–54, 73 Cal. Rptr. at 561–62.

49. *See id.*

50. *Id.* at 33–34, 447 P.2d at 953, 73 Cal. Rptr. at 561.

51. 18 Cal. 4th 297, 956 P.2d 374, 75 Cal. Rptr. 2d 412 (1998).

52. *Id.* at 310, 956 P.2d 384, 75 Cal. Rptr. 2d at 422.

court held that the defendant's murders were premeditated. First, the defendant planned the murders; once he realized his partner had shown his crop to others, he walked to his cabin to retrieve his gun, and before leaving the crime scene, he tried to cover up his involvement.⁵³ Second, defendant's motive for the killings suggested reflection; he sought to protect his marijuana crop, punish his partner for betraying his trust, and eliminate witnesses to the crimes of marijuana possession and murder.⁵⁴ Finally, the manner of killing revealed preexisting reflection; the victims died of multiple gunshot wounds. While each gunshot would have been fatal, the defendant continued shooting at the victims, suggesting a purpose to kill imbued with premeditation.⁵⁵ Although the time between his purpose to kill and the actual killing occurred over a short period, the defendant's actions revealed a purposeful, reflective killing.⁵⁶

Similarly, in *People v. Steele* all three *Anderson* factors were present.⁵⁷ In that case, the defendant murdered his victim by strangulation and multiple stab wounds.⁵⁸ A reasonable jury could infer that the defendant planned to murder the victim because the defendant carried a knife with him into the victim's house.⁵⁹ Once in the house, the defendant told the victim to "[p]ut the phone down or I'll kill you."⁶⁰ Although the time between this threat and the murder was minimal, this statement "suggest[ed] a planned killing."⁶¹ Furthermore, the defendant's admission that he hated women and had murdered a woman in the past established sufficient evidence of motive, which suggested reflection.⁶² Moreover, the defendant murdered another woman in almost the same distinct manner.⁶³ The

53. *See id.*

54. *See id.* at 333, 956 P.2d 399, 75 Cal. Rptr. 2d at 437.

55. *See id.*

56. *See id.*

57. 47 P.3d at 225, 120 Cal. Rptr. 2d at 432, 447–48 (2002); *see also Perez*, 2 Cal. 4th at 1127, 831 P.2d at 1164, 9 Cal. Rptr. 2d at 582 (finding premeditation where the defendant beat and stabbed his victim to death despite "evidence [that] is admittedly not overwhelming.").

58. *See Steele*, 27 Cal. 4th at 1238–39, 47 P.3d at 230, 120 Cal. Rptr. 2d at 439.

59. *See id.* at 1250, 47 P.3d at 238, 12 Cal. Rptr. 2d at 448.

60. *Id.*

61. *Id.*

62. *See id.*

63. *See id.*

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pattern of using multiple stab wounds and strangulation in order to kill women suggested a “calculated design to ensure death, rather than an unconsidered ‘explosion’ of violence.”⁶⁴

Generally, if the *Anderson* factors are satisfied, a killing will appear especially brutal; however, “the brutality of a killing [alone does not] support a finding [of] premeditation”⁶⁵ Acts of severe violence are not sufficient to establish that an individual acted with “careful thought and weighing of considerations.”⁶⁶ Rather, the “People bear the burden of establishing [premeditation] beyond a reasonable doubt”⁶⁷ Therefore, the presumption rests in favor of a finding of second-degree murder rather than first-degree murder.⁶⁸

For instance, the brutal beating of an eighty-two-year-old stepfather was insufficient evidence of premeditation.⁶⁹ In *People v. Tubby*, the defendant and his stepfather had an “amicable” relationship.⁷⁰ The defendant, however, was severely intoxicated during his vicious outburst.⁷¹ Even though “the defendant dragged the [victim] inside the house to continue his assault . . . that in itself [does not point to] a pre-existing intent to kill.”⁷² Thus, the *Tubby* court found that the defendant did not plan to kill his stepfather, either before or during the beating.⁷³

64. *Id.* (quoting *People v. Alcala*, 36 Cal. 3d 604, 627, 685 P.2d 1126, 1138, 205 Cal. Rptr. 775, 787 (1984)).

65. *Anderson*, 70 Cal. 2d at 24, 447 P.2d at 947, 73 Cal. Rptr. at 555.

66. *Bender*, 27 Cal. 2d 164, 184, 163 P.2d 8, 19 (1945) (discussing the meaning of deliberate); see also *People v. Caldwell*, 43 Cal. 2d 864, 869, 279 P.2d 539, 542 (1955); *People v. Tubby*, 34 Cal. 2d 72, 78–79, 207 P.2d 51, 55 (1949).

67. *Anderson*, 70 Cal. 2d at 24, 447 P.2d at 947, 73 Cal. Rptr. at 555.

68. See *Anderson*, 70 Cal. 2d at 25, 447 P.2d at 947–48, 73 Cal. Rptr. at 555–56.

69. See *Tubby*, 34 Cal. 2d at 74–75, 207 P.2d at 55.

70. *Id.* at 77, 207 P.2d at 54.

71. See *id.*

72. *Id.* at 78–79, 207 P.2d at 55.

73. See *id.* at 79, 207 P.2d at 55.

b. Anderson factors as guidelines, not rules

Although courts employ the *Anderson* factors as support for premeditation, these factors “do not establish normative rules.”⁷⁴ Instead, they provide descriptive guidelines for a premeditation analysis.⁷⁵ The *Anderson* factors aid courts in determining whether sufficient evidence exists to support an inference that the killing was the result of “preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse.”⁷⁶ The factors do not provide an exclusive list of evidence that supports premeditation, nor must they exist in a particular combination or hold a specified weight.⁷⁷

In *People v. Thomas*, for example, only two of the three *Anderson* factors were present, but the court still allowed the defendant to be convicted of first-degree premeditated murder for killing two individuals.⁷⁸ The court found that planning activity was present because the defendant returned to his car to retrieve his rifle before shooting the victims.⁷⁹ Additionally, due to a malfunction in the defendant’s rifle, he had to reload before each shot, suggesting planning.⁸⁰ Furthermore, the manner of the killings showed the defendant’s premeditated, preconceived design because both victims were shot at point-blank range.⁸¹ The court, however, chose not to decide whether a motive existed because the prosecution had never

74. *People v. Sanchez*, 12 Cal. 4th 1, 32, 906 P.2d 1129, 1148, 47 Cal. Rptr. 2d 843, 863 (1995). “The *Anderson* analysis was intended as a framework to assist reviewing courts in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and weighing considerations. It did not refashion the elements of first degree murder or alter the substantive law of murder in any way.” *People v. Thomas*, 2 Cal. 4th 489, 517, 828 P.2d 101, 114, 7 Cal. Rptr. 2d 199, 212 (1992) (citation omitted). It has been argued, however, that “the court now seems to regard the category of premeditated and deliberated murders as sort of a ‘catchall’ for murders that the court deems particularly reprehensible but that are not committed by one of the other means specified in section 189.” Mounts, *supra* note 7, at 324.

75. *See Perez*, 2 Cal. 4th at 1125, 821 P.2d at 1163, 9 Cal. Rptr. 2d at 581.

76. *Id.*; *see also Steele*, 27 Cal. 4th at 1250, 47 P.3d at 237, 120 Cal. Rptr. 2d at 447 (jury could infer that because defendant carried a knife into the victim’s house, defendant deliberated about the possibility of homicide).

77. *See Perez*, 2 Cal. 4th at 1125, 821 P.2d at 1163, 9 Cal. Rptr. 2d at 581.

78. 2 Cal. 4th 489, 828 P.2d 101, 7 Cal. Rptr. 2d 199 (1992).

79. *See id.* at 517, 828 P.2d at 115, 7 Cal. Rptr. 2d at 213.

80. *See id.*

81. *See id.* at 518, 828 P.2d at 115, 7 Cal. Rptr. 2d at 213.

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before been required to prove a motive. The court held that, “[a] senseless, random, but premeditated killing supports a verdict of first degree murder.”⁸²

Therefore, premeditated murder requires both a purposeful, conscious object to end another’s life, as well as a preexisting reflection and weighing of considerations. No specific amount of time needs to exist between the formation of a purpose to kill and the killing itself, but a preexisting reflection must pervade the murder. Furthermore, although not required to do so, courts use the *Anderson* factors—planning, motive, and manner—to aid in the premeditation analysis and to determine whether the evidence is sufficient to support an inference that the defendant killed with reflection. The original notion of *Anderson* was to provide a strict guideline for courts to assess evidence of premeditation. If the factors were present, then courts would hold that the killing was premeditated. The modern trend, however, is to apply the *Anderson* factors more leniently. The result is that premeditation has taken on less and less meaning, becoming more synonymous with a purpose to kill.

*B. Second-Degree Murder with Express Malice:
Purpose to Kill without Premeditation*

Second-degree murder is the catch-all murder. If a murder is not committed in the first degree—if it is not accomplished with premeditation, or if it is not an enumerated felony-murder—then it is second-degree murder.⁸³ Unlike premeditation, which requires express malice, the mental state for second-degree murder can be either express or implied.⁸⁴ If the mental state is express, the

82. *Id.* at 519, 828 P.2d at 116, 7 Cal. Rptr. 2d at 214.

83. “All murder which is perpetrated by means of . . . poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate arson, rape, carjacking, robbery, burglary, mayhem . . . is murder of the first degree. All other kinds of murder are of the second-degree.” CAL. PENAL CODE § 189 (1999).

84. *See* *People v. Butts*, 236 Cal. App. 2d 817, 827, 46 Cal. Rptr. 362, 368 (1965).

“Malice” may be either express or implied.

[Malice is express when there is a manifested intention unlawfully to kill a human being.]

[Malice is implied when:

defendant must possess a purpose to kill, but preexisting reflection is not required. In these cases, the span of reflection necessary to constitute premeditated murder is absent.⁸⁵ Second-degree murder with express malice also includes situations in which the defendant harbors a purpose to kill and kills his victim without sufficient provocation.

On the other hand, if malice is implied, then proof of a purpose to kill is not required.⁸⁶ Malice is implied “when the circumstances surrounding a killing reveal a malignant heart.”⁸⁷ This section explains killings committed with express malice—a purpose to kill—but which lack sufficient evidence of premeditation or provocation.

1. The elements: purpose to kill

Second-degree murder with express malice requires the prosecution to prove both that the defendant committed an act that caused the killing, and that the defendant committed that act with a

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1. The killing results from an intentional act,
 2. The natural consequences of the act are dangerous to human life, and
 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.]

[When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought.]

...
 The word “aforethought” does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede rather than follow the act.

CALJIC No. 8.11 (1996); *see also* *People v. Love*, 111 Cal. App. 3d 98, 108, 168 Cal. Rptr. 407, 412–13 (1980) (holding that malice can either be express or implied for second degree murder, as second degree murder encompasses both life-threatening conduct accomplished with a purposeful intent, and subjective awareness of the risk involved as well as life-endangering conduct which is *only* done with the awareness that the conduct is contrary to the laws of society).

85. *See Butts*, 236 Cal. App. 2d at 828, 46 Cal. Rptr. at 368. “Murder of the second-degree is [also] the unlawful killing of a human being with malice aforethought when the perpetrator intended unlawfully to kill a human being but the evidence is insufficient to prove deliberation and premeditation.” CALJIC No. 8.30.

86. *See Butts*, 236 Cal. App. 2d at 827, 46 Cal. Rptr. at 368.

87. *Id.*

purpose to kill.⁸⁸ A purpose to kill does not demand a hatred for the victim.⁸⁹ Rather, a purpose to kill implies “a wish to . . . injure another person, or an intent to do a wrongful act, established either by proof or presumption of law.”⁹⁰ In effect, the mens rea required for second-degree murder with express malice is a purpose to kill. As long as a defendant, who harbors a purpose to kill, neither murders with premeditation nor acts upon a sudden heat of passion or adequate provocation, then he has acted with express malice and is guilty of second-degree murder.⁹¹

The purpose to kill that is required for second-degree murder with express malice, however, is not synonymous with the mental state required for premeditated murder.⁹² While premeditated murder includes both a purpose to kill as well as a preexisting reflection, second-degree murder with express malice only requires a purpose to kill. Thus, if the prosecution proves that the defendant purposefully killed, but does not prove premeditation,⁹³ the verdict should then be second-degree murder, not first-degree murder.⁹⁴

For example, In *People v. Bender*, the Supreme Court reduced the defendant’s conviction from murder in the first degree to murder in the second degree because the defendant purposefully killed his victim, but he did so without premeditation.⁹⁵ The defendant strangled his wife following a marriage characterized by violent, drunken arguments over the fact that the defendant was still married to his first wife.⁹⁶ The trial court’s jury instructions, however,

88. See *Love*, 111 Cal. App. 3d at 105, 168 Cal. Rptr. at 410 (1980). Malice aforethought exists “when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.” CAL. PENAL CODE § 188 (1999).

89. See *Love*, 111 Cal. App. 3d at 105, 168 Cal. Rptr. at 410.

90. CAL. PENAL CODE § 7(4) (1999).

91. See *Love*, 111 Cal. App. 3d at 105–06, 168 Cal. Rptr. at 411.

92. See *People v. Bender*, 27 Cal. 2d 164, 179, 163 P.2d 8, 17 (1945); see also Suzanne Mounts, *Malice Aforethought in California: A History of Legislative Abdication and Judicial Vacillation*, 33 U.S.F. L. REV. 313, 328 (1999) (“An intentional killing in the absence of adequate provocation was committed with malice and unless accompanied by premeditation and deliberation, or other aggravating circumstances, was second-degree murder.”).

93. See *Bender*, 27 Cal. 2d at 179, 163 P.2d at 17 (citing *People v. Howard*, 211 Cal. 322, 329, 295 P.2d 333, 336 (1930)).

94. See *id.*

95. 27 Cal. 2d 164, 167, 163 P.2d 8, 11 (1945).

96. See *id.* at 168, 163 P.2d at 11.

blurred the distinction between a purposeful murder and a murder committed with calculation and forethought.⁹⁷ While first-degree premeditated murder and second-degree murder with express malice both require a purpose to kill, an individual cannot properly be convicted of first-degree murder if the murder was purposeful, yet without reflection and calculation.⁹⁸ Thus, because the defendant in *Bender* had a purpose to kill, but not a preexisting reflection, his conviction was reduced to second-degree murder.⁹⁹

Furthermore, in *People v. Butts*, the court found the defendant guilty of second-degree murder where there was insufficient evidence of premeditation.¹⁰⁰ There, defendant Otwell engaged in a knife fight that resulted in the victim's death.¹⁰¹ The defendant argued that because the jury found that he did not commit the murder with premeditation, the court could not find that he acted with a purpose to kill the victim and thus could not convict him of second-degree murder.¹⁰² Because the defendant used a knife in a fight against unarmed individuals while shouting, "You damn right I've got a knife, and I'm going to use it," the court found that a jury could infer that the defendant possessed a purpose to take the victim's life.¹⁰³ Ultimately, the defendant was found guilty of second-degree murder, despite a lack of premeditation, because the defendant possessed the requisite mental state of a purpose to kill.¹⁰⁴

Courts also look at the previous relationship between the defendant and the victim when assessing whether the murder is committed in the first degree or second degree. In *People v. Mendes*, the defendant had an argument with a stranger in a bar.¹⁰⁵ The defendant left the scene of the argument, but later returned with a gun. A police officer then chased after the defendant, and the defendant, believing the officer was the stranger, shot and killed him.¹⁰⁶ Regardless of whether the defendant thought his pursuer was

97. *See id.* at 183–84, 163 P.2d at 19–20.

98. *See id.* at 180–81, 163 P.2d at 18.

99. *See id.* at 186–87, 163 P.2d at 21.

100. 236 Cal. App. 2d 817, 46 Cal. Rptr. 362 (1965).

101. *See id.* at 825, 46 Cal. Rptr. at 367.

102. *See id.* at 829, 46 Cal. Rptr. at 369.

103. *Id.*

104. *See id.*

105. 35 Cal. 2d 537, 219 P.2d 1 (1950).

106. *See id.* at 540, 219 P.2d at 3.

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the stranger or the police officer, there was insufficient evidence that the defendant premeditated the killing.¹⁰⁷ The defendant did not know either the stranger or the police officer prior to the shooting. Without a prior relationship or a motive suggesting a reflective rather than impulsive killing, the evidence supported a finding that the defendant was guilty of second-degree murder, not first-degree murder.¹⁰⁸

Additionally, if the defendant does not meet his burden of producing sufficient evidence of provocation, the result will be a second-degree murder verdict.¹⁰⁹ The defendant, however, must still possess express malice—a purpose to kill. If the defendant does not kill in response to adequate provocation, a court will not reduce the crime to voluntary manslaughter, and the defendant will be convicted of murder in the second degree.

In *People v. Fields*, for example, the court found the defendant guilty of second-degree murder, despite possessing a purpose to kill his victim, because the murder was neither a result of preexisting reflection nor a response to adequate provocation.¹¹⁰ The defendant ingested sedative pills that caused extreme mood changes, and then he shot and killed his friend.¹¹¹ Although his mood was volatile on the night of the shooting, the defendant harbored no anger towards his victim. This lack of anger indicated that the murder was not planned.¹¹² Furthermore, there was no evidence of provocation prior to the shooting.¹¹³ Rather, the court found that the defendant's sudden reach for the gun after hearing someone enter the room suggested that the killing was the result of a "sudden and unconsidered" impulse.¹¹⁴ The conviction, therefore, was for second-degree murder because the killing was purposeful, but lacking in both premeditation and provocation.

Additionally, in *People v. Pacheco*, the defendant was convicted of second-degree murder because he failed to produce sufficient

107. *See id.* at 545, 219 P.2d at 5.

108. *See id.* at 544–45, 219 P.2d at 5–6.

109. *See People v. Ashland*, 20 Cal. App. 168, 175, 128 P. 798, 801–02 (1912).

110. 99 Cal. App. 2d 10, 221 P.2d 190 (1950).

111. *See id.* at 11–12, 221 P.2d at 191.

112. *See id.* at 14, 221 P.2d at 192.

113. *See id.* at 13, 221 P.2d at 192.

114. *Id.*

evidence of provocation for a lesser conviction of voluntary manslaughter.¹¹⁵ The defendant engaged in an argument with his girlfriend's first husband. The argument resulted in the first husband's death.¹¹⁶ The defendant stabbed the unarmed, first husband forty-five times.¹¹⁷ The first husband's arms and hands contained stab wounds, indicating that he tried to shield himself from the attack.¹¹⁸ Although the defendant claimed that finding his girlfriend with her lover (her first husband) was adequate provocation sufficient to arouse the passions of a reasonable man, the court found this to be insufficient proof of provocation.¹¹⁹ Rather, the defendant, deemed the first aggressor by the jury, engaged in a brutal fight with a man with whom he had a peaceful encounter that same evening.¹²⁰ Therefore, the defendant was guilty of second-degree murder because he purposefully killed without provocation.

2. Jury instructions

A trial court must give a second-degree murder instruction if evidence of provocation would allow a jury to infer that the defendant formed a purpose to kill as a direct response to the provocation.¹²¹ Likewise, if sufficient evidence exists to justify a finding of premeditation, as well as a finding that the defendant possessed a purpose to kill without premeditation, the court must give the jury a second-degree murder instruction.¹²²

Courts supply second-degree murder instructions where evidence can reveal either the occurrence of a first-degree or second-degree murder. In *People v. Wickersham*, the trial court failed to give the jury a second-degree murder instruction where the defendant shot her husband during a scuffle that occurred after her husband saw

115. 116 Cal. App. 3d 617, 627, 172 Cal. Rptr. 269, 274 (1981).

116. *See id.* at 622–24, 172 Cal. Rptr. at 271–73.

117. *See id.* at 624, 172 Cal. Rptr. at 272.

118. *See id.*

119. *See id.* at 627, 172 Cal. Rptr. at 274.

120. *See id.*

121. *See People v. Wickersham*, 32 Cal. 3d 307, 330, 650 P.2d 311, 323, 185 Cal. Rptr. 436, 448 (1982), *overruled by* *People v. Barton*, 12 Cal. 4th 186, 906 P.2 531, 47 Cal. Rptr. 2d 569 (1995) (overruled only on the grounds that “unreasonable self-defense” is a “defense”).

122. *See id.*

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the gun.¹²³ Although sufficient evidence existed to justify a finding of first-degree murder, “such a finding was not compelled.”¹²⁴ According to the same facts, the jury could have found that the defendant did not premeditate the murder, but acted impulsively in response to the scuffle.¹²⁵ In effect, the defendant could have had a purpose to kill her husband, while not acting upon adequate provocation or with premeditation.¹²⁶

C. Provocation

Manslaughter is “the unlawful killing of a human being without malice.”¹²⁷ “Malice is presumptively absent when [a] defendant[, in response to sufficient provocation,] acts upon a sudden quarrel or heat of passion”¹²⁸ A person who purposefully kills another as a result of provocation is guilty of voluntary manslaughter, not murder.¹²⁹

1. The elements

Defining provocation is not easy. Rather than provide a succinct definition, California courts often define provocation by example—by what does or does not constitute provocation. Despite this confusion, provocation can be broken down into three basic elements. First, provocation is an action, caused by the victim, which causes a reasonable person to lose self-control and act rashly. This action must be caused by the victim, or the defendant must

123. *See id.* at 329, 650 P.2d at 313–14, 185 Cal. Rptr. at 438–39.

124. *Id.* at 330, 650 P.2d at 323, 185 Cal. Rptr. at 448.

125. *See id.* at 329–30, 650 P.2d at 323, 185 Cal. Rptr. at 448.

126. *See People v. Jeter*, 60 Cal. 2d 671, 676, 388 P.2d 355, 358, 36 Cal. Rptr. 323, 326 (1964) (trial court erred in giving only first degree murder instructions where the defendant shot and killed his victim during a robbery, for a reasonable jury could have concluded that defendant purposefully killed his victim without deliberation).

127. CAL. PENAL CODE § 192 (1999).

128. *People v. Lee*, 20 Cal. 4th 47, 59, 971 P.2d 1001, 1007, 82 Cal. Rptr. 2d 625, 631 (1999). An “unreasonable, but good faith, belief that deadly force is necessary [for] self defense” can also mitigate a crime to voluntary manslaughter. *Id.*; *see also* CAL. PENAL CODE § 192(a) (1999) (defining voluntary manslaughter as the “unlawful killing of a human being . . . upon a sudden quarrel or heat of passion.”).

129. *See People v. Lasko*, 23 Cal. 4th 101, 108, 999 P.2d 666, 671, 96 Cal. Rptr. 2d 441, 446 (2000).

reasonably believe the victim engaged in the provocative conduct.¹³⁰ Second, the conduct must be sufficiently provocative such that it would encourage a reasonable person of average disposition to act without consideration.¹³¹ The victim's conduct can be physical or verbal,¹³² and thus, no specific type of provocation is required for a court to mitigate a crime to voluntary manslaughter. Third, at the time of the killing, the defendant must be in an actual heat of passion; he must act from passion, not from judgment.¹³³ The

130. See *Lee*, 20 Cal. 4th at 59, 971 P.2d at 1007, 82 Cal. Rptr. at 631; see also *In re Thomas C.*, 183 Cal. App. 3d 786, 798, 228 Cal. Rptr. 430, 438 (1986); *People v. Brooks*, 185 Cal. App. 3d 687, 694, 230 Cal. Rptr. 86, 89 (1986).

131. See *Lee*, 971 P.2d at 1007, 82 Cal. Rptr. at 631; see also *People v. Berry*, 18 Cal. 3d 509, 515, 556 P.2d 777, 780, 134 Cal. Rptr. 415, 418 (1976). "To satisfy the objective or 'reasonable person' element of this form of voluntary manslaughter, the accused's heat of passion must be due to 'sufficient provocation.'" *Wickersham*, 32 Cal. 3d at 326, 650 P.2d at 321, 185 Cal. Rptr. at 446 (citing *People v. Sedeno*, 10 Cal. 3d 703, 719, 518 P.2d 913, 923, 112 Cal. Rptr. 1, 11 (1974) (overruled on other grounds)).

132. See *Berry*, 18 Cal. 3d at 515, 556 P.2d at 780, 134 Cal. Rptr. at 418 (1976).

133. See *People v. Barton*, 12 Cal. 4th 186, 201, 906 P.2d 531, 540, 47 Cal. Rptr. 2d 569, 578 (1995). See also CALJIC No. 8.42 (2002), which states:

To reduce an unlawful killing from murder to manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of the character and degree as naturally would excite and arouse the passion, and the assailant must act under the influence of that sudden quarrel or heat of passion.

The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up [his][her] own standard of conduct and to justify or excuse [himself][herself] because [his][her] passions were aroused unless the circumstances in which the defendant was placed and the facts that confronted [him][her] were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation. [Legally adequate provocation may occur in a short, or over a considerable, period of time.]

The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from passion rather than from judgment.

If there was provocation, [whether of short or long duration,] but of a nature not normally sufficient to arouse passion, or if sufficient time elapsed between the provocation and the fatal blow for passion to

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aroused passion may be a result of rage, or it can consist of any violent, intense emotion.¹³⁴ Aside from the above elements, there must be a lack of cooling time. If sufficient time exists between the provocative conduct and the killing, the law presumes that the defendant should have cooled off—as the reasonable person would have—thus precluding mitigation to voluntary manslaughter.

a. applying the elements

“[P]rovocation must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment.”¹³⁵ Courts have found that a separated spouse in a romantic relationship with another is insufficient provocation to inflame the passions of a reasonable person. In *People v. Lujan*, for example, the court found that the defendant did not kill as a result of provocation.¹³⁶ The defendant and his wife were separated, but he continually stalked and harassed her.¹³⁷ After watching his wife walking and talking with another man, the defendant bludgeoned both of them to death.¹³⁸ The defendant did not act upon a heat of passion because neither victim engaged in any provocative conduct;¹³⁹ a separated woman in a romantic relationship with a man other than her husband is not a sufficiently provocative action.¹⁴⁰ The court also found that this conduct should not arouse a person to act rashly.¹⁴¹ The defendant and his wife were separated, and a police officer warned the defendant that he must stay clear of his wife.¹⁴² The defendant’s rash temptation to kill was not reasonable, and thus the court refused to mitigate the crime to voluntary manslaughter.

subside and reason to return, and if an unlawful killing of a human being followed the provocation and had all the elements of murder, as I have defined it, the mere fact of slight or remote provocation will not reduce the offense to manslaughter.

134. *See Lasko*, 23 Cal. 4th at 108, 999 P.2d at 670, 96 Cal. Rptr. 2d at 446.

135. *Lee*, 20 Cal. 4th at 60, 971 P.2d at 1008, 82 Cal. Rptr. at 632.

136. 92 Cal. App. 4th 1389, 112 Cal. Rptr. 2d 769 (2001).

137. *See id.* at 1412, 112 Cal. Rptr. 2d at 786–87.

138. *See id.* at 1414, 112 Cal. Rptr. 2d at 788.

139. *See id.*

140. *See id.* at 1415, 112 Cal. Rptr. 2d at 789.

141. *See id.*

142. *See id.*

Courts also find the predictable conduct of a victim resisting the crime to be insufficient provocation.¹⁴³ In *People v. Williams*, the court properly refused voluntary manslaughter instructions where the defendant shot his two victims.¹⁴⁴ The victims allegedly robbed the defendant's home.¹⁴⁵ After his wife threatened to leave him over the event, the defendant went to the victims' home, engaged in an argument with them, and then shot them.¹⁴⁶ The defendant maintained that the victims' statement, "we didn't rob you on Saturday, Kerry did," was adequate provocation justifying the reduction of his conviction to voluntary manslaughter.¹⁴⁷ The court, however, disagreed because dialogue between a victim and her attacker is not adequate provocation.¹⁴⁸

b. timing

Generally, provocation requires a lack of cooling time between the provocative conduct and the killing. If sufficient time has elapsed between the provocation and the killing, courts will presume that the defendant's passions have cooled, thereby precluding a finding of provocation. No specific time limit, however, needs to exist to prohibit a finding of provocation. Rather, courts take an ad hoc approach, examining each case to determine if sufficient time has passed to enable a reasonable person's passions to subside.

In *People v. Brooks*, for example, the court found adequate provocation despite a two-hour period between the provocative conduct and the killing.¹⁴⁹ The defendant's brother was stabbed to death.¹⁵⁰ The defendant, "in a very excited, upset state, was running around talking to people," trying to ascertain who murdered his

143. See *People v. Williams*, 40 Cal. App. 4th 446, 454, 46 Cal. Rptr. 2d 730, 734 (1995); see also *People v. Jackson*, 28 Cal. 3d 264, 306, 618 P.2d 149, 169–70, 168 Cal. Rptr. 603, 623–24 (1980) (holding that the defendant's brutal attack and killing of one of his elderly victims when she awakened during the robbery and began to scream was a predictable reaction of a resisting victim and not a sufficient provocation to reduce a murder charge to manslaughter).

144. 40 Cal. App. 4th 446, 454–55, 46 Cal. Rptr. 2d 730, 734 (1995).

145. See *id.* at 451, 46 Cal. Rptr. 2d at 732.

146. See *id.* at 452, 46 Cal. Rptr. 2d at 733.

147. See *id.* at 453, 46 Cal. Rptr. 2d at 733.

148. See *id.* at 454–55, 46 Cal. Rptr. 2d at 734.

149. 185 Cal. App. 3d 687, 230 Cal. Rptr. 86 (1986).

150. See *id.* at 690, 230 Cal. Rptr. at 86.

brother.¹⁵¹ The defendant finally determined who shot his brother and shot that person five times.¹⁵² Even though two hours had passed between his brother's murder and the victim's murder, there was substantial evidence that the defendant killed in a heat of passion.¹⁵³

Provocation, however, can occur over a long period of time and can include any kind of high-wrought emotion. In *People v. Borchers*, the court found sufficient evidence of provocation where the defendant was involved in a relationship with a woman who admitted infidelity, constantly threatened to commit suicide, and repeatedly urged the defendant to shoot her by calling him "chicken."¹⁵⁴ A chain of events over a considerable length of time can cause a defendant to act rashly and without consideration.¹⁵⁵ The court held that passion does not need to be rage or anger, but can consist of any violent or intense emotion.¹⁵⁶ Thus, sufficient evidence existed for a finding of provocation—that the defendant "killed in wild desperation induced by [the victim's] long continued provocatory conduct."¹⁵⁷

Provocation can also take the form of a long, smoldering accumulation of provocation inciting rage and passion. In *People v. Berry*, a forty-six-year-old defendant married a twenty-year-old woman, who left for Israel three days after their marriage.¹⁵⁸ The defendant maintained that upon her return, she announced that she had met another man abroad, fallen in love with him, and engaged in sexual intercourse with him.¹⁵⁹ Over the next two weeks, the victim allegedly provoked the defendant with sexual taunting, alternating between inviting his sexual advances and rejecting them.¹⁶⁰ The situation purportedly culminated in a screaming match followed by the defendant strangling the victim. The court held that a "cumulative series of provocations" coupled with the final screaming

151. *Id.* at 691, 230 Cal. Rptr. at 87.

152. *See id.* at 690, 230 Cal. Rptr. at 87.

153. *See id.* at 696, 230 Cal. Rptr. at 90.

154. 50 Cal. 2d 321, 328–29, 325 P.2d 97, 102 (1958).

155. *See id.*

156. *See id.*

157. *Id.*

158. 18 Cal. 3d 509, 512, 556 P.2d 777, 778, 134 Cal. Rptr. 415, 416 (1976).

159. *See id.* at 513, 556 P.2d at 779, 134 Cal. Rptr. at 417.

160. *See id.* at 513–14, 556 P.2d at 779, 134 Cal. Rptr. at 417.

fit could cause a person to kill in an uncontrollable rage “under the sway of passion.”¹⁶¹ Ultimately, on retrial, the defendant was convicted of second-degree murder.

c. intent to kill?

While most killings that result from provocation involve a purpose to kill, a heat of passion killing may also not be purposeful. An individual in the heat of passion can merely intend to scare or cause injury to the victim, but his actions may still result in death.¹⁶² At a minimum, these cases involve recklessness—acting despite an awareness of a substantial and unjustifiable risk. Nonetheless, a heat of passion killing performed with the intent to scare or injure is considered voluntary manslaughter.

A purpose to scare, as opposed to a purpose to kill, was sufficient to convict the defendant in *People v. Lasko* of voluntary manslaughter.¹⁶³ The defendant was found guilty of provocation even though he did not purposefully kill the victim.¹⁶⁴ The defendant killed the victim over a money quarrel which developed into a brutal fight.¹⁶⁵ The defendant maintained that he unintentionally killed the victim with a bat only as a response to the victim hitting him with the same bat.¹⁶⁶ The court held the defendant guilty of voluntary manslaughter despite an absence of a purpose to kill because a conviction of voluntary manslaughter does not require a purpose to kill.¹⁶⁷ California Penal Code section 192 defines manslaughter as an unlawful killing without malice. It further defines voluntary manslaughter as a killing resulting from a sudden heat of passion.¹⁶⁸ The statute, however, says nothing about a purpose to kill.¹⁶⁹ A killer “who acts in a sudden quarrel or heat of passion lacks malice

161. *Id.* at 514, 556 P.2d at 779, 134 Cal. Rptr. at 418.

162. *See People v. Barton*, 12 Cal. 4th 186, 906 P.2d 531, 47 Cal. Rptr. 2d 569 (1995).

163. *See Lasko*, 23 Cal. 4th 101, 999 P.2d 666, 96 Cal. Rptr. 2d 441.

164. *See id.* at 104, 999 P.2d at 668, 96 Cal. Rptr. 2d at 443.

165. *See id.* at 105–06, 999 P.2d at 668–69, 96 Cal. Rptr. 2d at 443–44.

166. *See id.*

167. *See id.* at 108, 999 P.2d at 620, 96 Cal. Rptr. 2d at 445.

168. *See id.*; *see also* CAL. PENAL CODE § 192 (1999).

169. *See Lasko*, 23 Cal. 4th at 108, 999 P.2d at 671, 96 Cal. Rptr. 2d at 446.

and is therefore not guilty of murder, irrespective of the presence or absence of an intent to kill.”¹⁷⁰ The court in *Lasko* further stated:

Just as an unlawful killing *with* malice is murder regardless of whether there was an intent to kill, an unlawful killing without malice (because of a sudden quarrel or heat of passion) is voluntary manslaughter, regardless of whether there was an intent to kill. In short, the presence or absence of an intent to kill is not dispositive of whether the crime committed is murder or the lesser offense of voluntary manslaughter.¹⁷¹

Thus, a purpose to kill, although often present, is not a necessary element of provocation. Mere recklessness is sufficient.

2. Burden of proof

Provocation holds a unique place in the law. Unlike most crimes which are comprised of elements which need to be established to prove the crime, provocation merely mitigates an unlawful, intentional homicide. Provocation, standing alone, does not establish or increase criminal liability.¹⁷² In effect, what distinguishes murder from manslaughter is not the elements of a crime, but rather the mitigating factor of provocation. Thus, provocation resembles an affirmative defense. Unless the prosecution’s case makes it apparent that the murder was committed upon sufficient provocation, the defendant has the burden of production—the defendant must raise the issue of provocation.¹⁷³

170. *Id.* at 109, 999 P.2d at 671, 96 Cal. Rptr. 2d at 447.

171. *Id.* at 109–10, 999 P.2d at 671, 96 Cal. Rptr. 2d at 447. Although some courts appear to have held to the contrary, that voluntary manslaughter requires an intent to kill, none expressly have held that “a defendant who kills in a sudden quarrel or heat of passion, with conscious disregard for life but without intent to kill, is guilty of murder.” *Id.* at 110; *see also* *People v. Hawkins*, 10 Cal. 4th 920, 958, 897 P.2d 574, 595–96, 42 Cal. Rptr. 2d 636, 657–58 (1995); *People v. Ray*, 14 Cal. 3d 20, 28, 533, 897 P.2d 1017, 1021, 120 Cal. Rptr. 377, 381 (1975); *People v. Forbs*, 62 Cal. 2d 847, 852, P.2d 825, 828, 44 Cal. Rptr. 753, 756, 402 (1965); *People v. Brubaker* 53 Cal.2d 37, 44, 346 P.2d 8, 12 (1959); *People v. Gorshen*, 51 Cal.2d 716, 732–33, 336 P.2d 492 (1959); *People v. Bridgehouse*, 47 Cal.2d 406, 413, 303 P.2d 1018, 1022 (1956); *People v. Bender*, 27 Cal. 2d 164, 181, 163 P.2d 8, 18 (1945).

172. *See* *People v. Rios*, 23 Cal. 4th 450, 459, 2 P.3d 1066, 1072, 97 Cal. Rptr. 2d 512, 519 (2000).

173. *See id.* at 461–62, 2 P.3d at 1074, 97 Cal. Rptr. 2d at 521.

The prosecution then has the burden of proving the absence of provocation beyond a reasonable doubt.¹⁷⁴

In *People v. Dixon*, for example, the defendant failed to meet his burden of showing both adequate provocation and heat of passion evidence.¹⁷⁵ In that case, the defendant shot a prostitute in the back after she did not follow through with her agreement to produce sexual favors for cocaine.¹⁷⁶ The defendant did not provide testimony as to the time that elapsed between when the victim received the cocaine and when she refused sexual favors.¹⁷⁷ In addition, the defendant did not provide adequate testimony to establish that the provocation at issue was sufficient to arouse the passions of an ordinary, reasonable person.¹⁷⁸ The court found that the refusal of sexual activity as payment for drugs did not constitute the provocative conduct necessary to mitigate murder to voluntary manslaughter.¹⁷⁹ Thus, the court was not required to provide a manslaughter instruction because the defendant failed to meet his burden of offering substantial evidence of provocation.¹⁸⁰

3. Jury instructions

The court has the obligation to give jury instructions on lesser offenses when the evidence raises a question as to whether all of the necessary elements of the crime are met¹⁸¹—regardless of whether the defendant requests the lesser offense instructions.¹⁸² If there is no evidence of provocation, then the court does not have the obligation to give instructions for the lesser offense of voluntary manslaughter.¹⁸³ To warrant voluntary manslaughter instructions, the evidence of provocation must be “substantial enough to merit

174. *See id.*; *see also* *People v. Sedeno*, 10 Cal. 3d 703, 719, 518 P.2d 913, 923, 112 Cal. Rptr. 1, 11 (1974); *People v. Spurlin*, 156 Cal. App. 3d 119, 123–24 (1984).

175. 32 Cal. App. 4th 1547, 38 Cal. Rptr. 2d 859 (1995).

176. *See id.* at 1551, 38 Cal. Rptr. 2d at 860.

177. *See id.* at 1555, 38 Cal. Rptr. 2d at 863.

178. *See id.* at 1555–56, 38 Cal. Rptr. 2d at 864 (citations omitted).

179. *See id.* at 1556, 38 Cal. Rptr. 2d at 864.

180. *See id.*

181. *See* *People v. Breverman*, 19 Cal. 4th 142, 154, 960 P.2d 1094, 1100, 77 Cal. Rptr. 2d 870, 876 (1998).

182. *See id.*

183. *See id.*

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consideration.”¹⁸⁴ This is to ensure that the defendant is only convicted of the crime he actually committed.

In *People v. Breverman*, for example, substantial evidence of provocation existed to require voluntary manslaughter instructions.¹⁸⁵ A group of people charged the defendant’s car while he attempted to enter it.¹⁸⁶ The group was large, mob-like, and armed with dangerous weapons.¹⁸⁷ The group further intimidated the defendant when they challenged him to fight and damaged his car.¹⁸⁸ These circumstances indicated to the court that a jury could infer from the evidence that the defendant was blinded by a sudden heat of passion when he shot towards the mob and killed the victim.¹⁸⁹ Thus, the court was obligated to give voluntary manslaughter instructions.

Even if the defendant requests that the court abstain from giving instructions on the lesser offense, the court must still supply the instructions if substantial evidence of the lesser crime exists. In *People v. Barton*, the defendant contended that he shot his victim accidentally.¹⁹⁰ The defense requested the trial court omit voluntary manslaughter instructions for tactical reasons; the defense believed that because voluntary manslaughter required a purpose to kill,¹⁹¹ the court’s instructions that the jury convict the defendant of voluntary manslaughter if it found that the killing occurred upon a sudden heat of passion were inconsistent with the defense’s assertion that the killing was accidental.¹⁹² The court, however, held the instruction appropriate. There was a substantial question as to whether the elements of murder existed, thus requiring instructions of the lesser offense.¹⁹³

184. *Id.* at 162, 960 P.2d at 1106, 77 Cal. Rptr. at 882 (citations omitted).

185. *See id.* at 163–64, 960 P.2d at 1107, 77 Cal. Rptr. 2d at 883.

186. *See id.*

187. *See id.*

188. *See id.*

189. *See id.*; *see also* Self Defense, *infra* Part IX.

190. *See Barton*, 12 Cal. 4th 186, 192, 906 P.2d 531, 533, 47 Cal. Rptr. 2d 569, 571 (1995).

191. In most instances, including *Barton*, a provocation theory presumes a purpose to kill even though it is not legally required.

192. *See id.* at 193–94, 906 P.2d at 534, 47 Cal. Rptr. 2d at 572.

193. *See id.* at 194, 906 P.2d at 534, 47 Cal. Rptr. 2d at 572.

On the other hand, in *People v. Fenenbock*, substantial evidence of provocation did not exist to merit a voluntary manslaughter instruction.¹⁹⁴ In that case, a group of people brutally murdered their victim out of revenge for the sexual molestation of one of the defendant's children.¹⁹⁵ The defendant's reason was not obscured by passion because after hearing about the molestation, the defendant continued with his daily activities and did not confront the victim.¹⁹⁶ The defendant's passions had cooled, and the killing became an act of revenge, not passion.¹⁹⁷ As a result, the court affirmed the trial court's omission of a provocation instruction because insufficient evidence existed that the defendant had acted in a heat of passion.

Thus, provocation requires an action that is caused by the victim, which causes the defendant to passionately lose self-control and act rashly without judgment. The victim's conduct, whether physical or verbal, must be such that it could cause an individual to lose control. Moreover, at the time of the killing, the defendant must be in an actual heat of passion. Finally, there must be a lack of cooling time between the provocative conduct and the killing. Otherwise, courts will presume that a reasonable person should have cooled off, thus precluding mitigation to voluntary manslaughter.

194. 46 Cal. App. 4th 1688, 54 Cal. Rptr. 2d 608 (1996).

195. *See id.* at 1695-96, 54 Cal. Rptr. 2d at 612.

196. *See id.* at 1704, 54 Cal. Rptr. 2d at 617.

197. *See id.*; *see also* *People v. Golsh*, 63 Cal. App. 609, 617, 219 P.2d 456, 459 (1923).