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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE BLUE,

Defendant and Appellant.

A133110

(Alameda County  
Super. Ct. No. 162371)

Originally charged with murder (Pen. Code,<sup>1</sup> § 187), defendant was convicted by a jury of voluntary manslaughter (§ 192, subd. (a)), with use of a firearm (§ 12022.5, subd. (a)). Defendant was sentenced to a total of 21 years in state prison. In this timely appeal, defendant contends that the jury was improperly instructed (failure to instruct pursuant to *People v. Dewberry* (1959) 51 Cal.2d 548 (*Dewberry*)<sup>2</sup> and that he was improperly sentenced (due to use of improper aggravating circumstances). We find no error and affirm.

**I. FACTUAL BACKGROUND**

Defendant and Ayesha Thomason (hereinafter the victim) had an on and off dating relationship; there was a history of domestic violence perpetrated upon the victim by

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

<sup>2</sup> Specifically, defendant contends that the trial court erred in failing to instruct the jurors that they should only convict on involuntary manslaughter if they had a reasonable doubt whether the crime committed was voluntary or involuntary manslaughter, citing *Dewberry*.

defendant. On June 6, 2009, defendant gave the victim a black eye. On the morning of June 16, defendant went to the McDonald's where the victim worked, looking for her. He asked the victim's boss when she would be at work; her boss responded that defendant would have to ask her. Defendant said that he had tried calling her and going by her house, but could not contact her. Defendant appeared "pissed off and angry."

Later that morning, defendant and the victim were seen by a neighbor (Tyrome Earby), arguing in front of the victim's home. The victim stood at the top of the stairs and defendant at the bottom of the stairs; they argued for about 20 minutes. Earby then went inside, but 10 minutes later defendant banged on his door and asked him to call 911. Defendant seemed panicky, backed up, fell down the porch stairs, and went back across the street. Defendant kept saying to call 911. Earby's mother called 911, while Earby watched defendant walk around in circles in the victim's front yard. Defendant also went inside the victim's home several times. Leslie Taylor also heard the argument; she heard the victim say, "Don't touch that gate. Don't cross that fence." The locking mechanism on the victim's front gate was later found to be out of alignment.

Officer Curtis Filbert responded to the victim's home. As he walked into the home, he observed the victim on the floor with her back resting against the sofa. A handgun was on the floor between the love seat and the sofa, approximately four to five feet away from the victim. A cordless phone was on the floor near the victim's legs; it was found to have blood on the keypad and when redial was pressed, the phone called 911.<sup>3</sup> A cell phone, later identified as defendant's, was found on the couch. The victim was bleeding from her mouth and forehead; she had suffered a single gunshot wound to the forehead. The victim was alive and struggling to breathe; she was unresponsive. After paramedics removed the victim from the home, a bullet was located in the seat back of the sofa. There was blood or tissue spatter on the walls behind the sofa.

The gun that was used to shoot the victim was a Glock that belonged to the victim's brother-in-law, Hurley Richardson (the victim lived with her sister and her

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<sup>3</sup> It was stipulated that the victim made a call to 911 at 9:56 a.m.

sister's husband). He testified that he had never shown the victim how to use the gun; it was stored in his sock drawer. In order to fire the gun, a round has to be chambered by racking the gun. The gun did not fire accidentally; it would not discharge if dropped; someone had to fire it. The weapon has three safety features: a trigger safety, a firing pin block, and a drop safety that blocks the striker from going forward. All of these safety features were functioning.

At the hospital, the victim later succumbed to her wound and was pronounced dead at 11:53 a.m. The cause of death was a single gunshot wound to the head, but blunt force trauma was also found to her head and neck, and bruises on her right arm and left wrist. Based upon the stippling pattern, the pathologist opined that the shot was fired from between three and 12 inches from the victim's head, and that there was an object between the muzzle of the gun and the surface of the victim's skin when the gun was fired. The cell phone found on the couch could have been the intervening object.

Defendant was found to have a particle of gunshot residue on the back of his right hand; the victim had one gunshot residue particle on her left hand and more on her right hand. This was interpreted to mean that both defendant and the victim were in the vicinity of a gun when it was fired, or that they had handled a recently fired firearm.

Defendant testified at trial, indicating that he did argue with the victim at her home that morning and that he followed her upstairs because he was afraid that she would hurt herself. She appeared at a window with a gun, and told him that if he broke the window she would shoot him. He coaxed her out of the house; she screamed at him not to touch the gate. He again was afraid she might commit suicide and told her that it would kill him if she killed herself. She told him to prove it and handed him the gun. He racked the gun and put it to his head. He returned the gun to her because she promised to put it away, but they started arguing again. At one point, the victim put the gun to her own head. At some point they moved into the house. They then stopped fighting and said they loved each other. Defendant grabbed the gun and tried to yank it from the victim; she grabbed his hand. They struggled over the gun, moving from the kitchen to the living room. The victim tripped and fell onto the couch; defendant fell on top of her. He then

yanked on the gun three times, and it went off, shooting the victim in the head. A defense forensic scientist testified that the victim was shot during a “take away” situation, when one person tries to take a weapon away from another. He opined that the muzzle of the gun was six to nine inches away from the victim’s forehead when it was fired. He said it was impossible to determine what intercepted the stippling particles between the weapon and the victim’s forehead.

## II. DISCUSSION

### A. *No Instructional Error*

The jury was instructed upon first and second degree murder, and upon voluntary and involuntary manslaughter. Defendant contends that the trial court erred by failing to instruct the jury *sua sponte*<sup>4</sup> that if it had a reasonable doubt whether the crime was voluntary or involuntary manslaughter, they must give the defendant the benefit of the doubt and convict only of involuntary manslaughter (pursuant to *Dewberry, supra*, 51 Cal.2d 548). In *Dewberry*, the defendant was convicted of second degree murder. The trial court had instructed that if the jury had a reasonable doubt whether the offense was first or second degree murder, it had to convict of second degree. The court refused to give an instruction that would have told the jury that if it found the defendant “. . . was guilty of an offense included within the charge . . . , but entertain(ed) a reasonable doubt as to the degree of the crime of which he [was] guilty,” it had a duty to convict only of the lesser offense (in that case of manslaughter rather than murder). The *Dewberry* court found this latter failure to instruct was prejudicial error. (*Dewberry, supra*, at pp. 554–555.) Defendant argues that the trial court in the present case was similarly required to instruct that if the jury had a reasonable doubt between voluntary and involuntary manslaughter, they must convict only of involuntary manslaughter. He has cited no case law or statutory authority requiring such an instruction as between the crimes of voluntary and involuntary manslaughter.

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<sup>4</sup> The jury must give the *Dewberry* instruction *sua sponte*, if it is applicable. (*People v. Crone* (1997) 54 Cal.App.4th 71, 79 (*Crone*).)

The Attorney General argues that *Dewberry* is not applicable as between voluntary and involuntary manslaughter, since involuntary manslaughter is not a lesser-included offense of voluntary manslaughter, citing *People v. Orr* (1994) 22 Cal.App.4th 780 (*Orr*) (decided in a double jeopardy context). The Attorney General is correct. As explained in *Orr*, voluntary and involuntary manslaughter are two kinds of manslaughter; involuntary manslaughter is not an included offense of voluntary manslaughter. Voluntary manslaughter can be committed without necessarily committing involuntary manslaughter, as the “definition of *unlawful* as an element of involuntary manslaughter differs significantly from that of voluntary manslaughter and requires the trier of fact to make substantially different findings.” (*Id.* at p. 784.) Defendant first responds that the holding in *Orr* was made in the context of double jeopardy; while true, that does not detract from its reasoning. Defendant then argues that the fact that involuntary manslaughter is not a necessarily included offense of voluntary manslaughter does not necessarily bring this case out of the ambit of the requirement of a *Dewberry* instruction, as that instruction must also be given with regard to all crimes with lesser degrees (not the case with manslaughter) or related offenses. Involuntary manslaughter, defendant argues, is a related offense of voluntary manslaughter.

It is true that the Supreme Court has described its ruling in *Dewberry* as holding that “a criminal defendant is entitled to the benefit of a jury’s reasonable doubt with respect to *all* crimes with lesser degrees *or related* or included offenses.” (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1262, second italics added (*Musselwhite*).) In the present case, while the crimes of voluntary and involuntary manslaughter arose from the same set of operative facts relating to the killing of the victim, the jury was not instructed upon involuntary manslaughter because it was a lesser-related offense to voluntary manslaughter. The jury was instructed upon involuntary manslaughter because it was a necessarily lesser-included offense of murder (just as was voluntary manslaughter).<sup>5</sup>

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<sup>5</sup> The trial judge did not instruct the jury in our case that involuntary manslaughter was a lesser-included or related offense of voluntary manslaughter. The court did instruct

Thus, the trial court did not err by failing to give a *Dewberry* instruction as between voluntary and involuntary manslaughter; indeed it would have been error had the trial court so instructed.<sup>6</sup>

**B. No Sentencing Error**

Defendant was sentenced to the aggravated term of 11 years on his voluntary manslaughter conviction and the aggravated term of 10 years on the use of a firearm enhancement, for a total of 21 years in state prison. On appeal, defendant challenges the imposition of each of these aggravated terms, contending that the trial court relied upon improper factors. We find no error in the sentencing.<sup>7</sup>

At the sentencing hearing, the court indicated that it was primarily considering the aggravating factors set forth in the probation report (rather than those argued by the district attorney). The court considered, among other things, the facts as they developed at trial, specifically referencing defendant's conduct in persisting in his attempt to enter

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the jury that it could find defendant guilty of one or the other of these offenses, but not of both.

<sup>6</sup> Even if it was error to not instruct pursuant to *Dewberry* as between voluntary and involuntary manslaughter, on the theory that they were “related offenses” within the meaning of *Dewberry* and *Musselwhite*, any error was harmless. The trial court gave a host of instructions regarding reasonable doubt (including CALCRIM No. 220—general burden of proof beyond a reasonable doubt, CALCRIM No. 510—burden of proving not accidental killing, CALCRIM No. 521—burden of proving first degree murder, CALCRIM No. 570—burden of proving not heat of passion, CALCRIM No. 580—burden of proving mental state for voluntary manslaughter), as well as CALCRIM No. 640 regarding completion of verdict forms, and CALCRIM No. 224 regarding circumstantial evidence and the requirement of adopting the conclusion that points to innocence. (See *Musselwhite, supra*, 17 Cal.4th at pp. 1262–1263; *People v. Friend* (2009) 47 Cal.4th 1, 55; *Crone, supra*, 54 Cal.App.4th at pp. 78–79.)

<sup>7</sup> The Attorney General argues that defendant has forfeited any alleged error in the trial court's sentencing determination, for failure to object in the trial court (citing *People v. Scott* (1994) 9 Cal.4th 331, 356 (*Scott*)). Defense counsel below did object to the aggravating factors listed in the probation report and argued by the district attorney, and argued generally against the imposition of the aggravated term. While he did not specifically object after the trial court made its findings regarding circumstances in aggravation, the issues raised on appeal were generally brought to the attention of the trial court and have been adequately preserved for appeal.

the victim's home, stating: "[I] am convinced that the defendant's conduct was simply inexcusable in persisting in trying to gain entrance into the house after Ayesha had retreated into the house to the extent that he put on a pair of gloves and started banging on the window to an extent Ayesha could reasonably think that he was trying to break the window. At that point, tragically, she armed herself with the firearm to try to make him leave; not even that worked . . . he was able to convince her to open the door and let him in and then we have the events as they unfolded. So I think all of that has to be taken into consideration, and again taking into consideration as to what sentence to impose." The court went on to specifically detail the aggravating circumstances under the California Rules of Court,<sup>8</sup> indicating that rule 4.421(a)(1) (the crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness) applied because the victim was shot in the head at point-blank range and because defendant racked the weapon before that occurred. The court also found that rule 4.421(a)(3) applied, as the victim was particularly vulnerable due to her past abusive relationship with defendant and his playing upon her emotions (she was in love with defendant and he was able to use that to gain access to her home),<sup>9</sup> where she was alone and where there was a gun (there being no evidence she even knew how to use the weapon). Additionally, although not specifically referenced by rule number, the court also considered rule 4.421(b)(1), finding that defendant engaged in violent conduct indicating a serious danger to society. Finally, the court indicated that defendant's conduct showed that there was no consideration by defendant of the consequences of his actions as they unfolded, a factor which could be considered as additional criteria reasonably related to the discretionary sentencing decision to impose the aggravated term, pursuant to rule 4.408. As to the aggravated term imposed on the use of a firearm

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<sup>8</sup> All further rule references are to the California Rules of Court.

<sup>9</sup> Although not specifically delineated by the court, this appears to also reference the factor in aggravation set forth in rule 4.421(a)(11), taking advantage of a position of trust (which was set forth in the probation report).

enhancement, the court indicated that it was relying upon the additional fact that the use of the gun brought about the death of a human being.

The imposition of the aggravated term is a sentencing choice which is reviewed for an abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 846.) Dual use of certain factors is prohibited. For example, the court may not use a fact that is an element of the crime as an aggravating factor (rule 4.420(d)), nor may the court use as a reason to impose a greater term the use of a firearm if that is the basis of an enhancement that is imposed (rule 4.420(c)). Additionally, the court cannot rely on the same fact to impose a consecutive sentence and to impose the aggravated term. (*Scott, supra*, 9 Cal.4th at p. 350, fn. 12.) The prohibition of dual use of facts is a limited one, however. As the court in *Scott* explained, dual use “is prohibited *to some extent*.” (*Id.* at p. 350, italics added.)

Contrary to the contentions of defendant, the trial court did not violate the dual use rule in sentencing him to the aggravated term on voluntary manslaughter and on the use enhancement. Defendant’s first argument is that the trial court abused its discretion by imposing the upper term for voluntary manslaughter because it relied upon an element of the crime, violent conduct resulting in death, as a factor in aggravation. The court did not improperly rely on an element of the crime. Violence is not necessarily an element of voluntary manslaughter, which is the unlawful killing of a human being, without malice, upon sudden quarrel or heat of passion. (§ 192, subd. (a).) While voluntary manslaughter does require that the defendant either intended to kill the victim, or acted in conscious disregard for life (*People v. Parras* (2007) 152 Cal.App.4th 219, 224), the crime may be committed without violence (as by means of poison or use of legal or illegal drugs, or the termination of medical treatment). (*People v. Dixie* (1979) 98 Cal.App.3d 852, 856 [violence not an element of murder].) Additionally, the trial court did not rely solely upon violence when applying the aggravating factor set forth in rule 4.421(a)(1); it also relied upon the high degree of cruelty, viciousness, or callousness involved in the commission of the offense (because defendant shot the victim at point-blank range and racked the gun before shooting).

Defendant also complains that the court relied upon the fact that his conduct showed that he had no consideration of the consequences of his actions as they unfolded. Defendant interprets this statement by the court as an improper dual use of an element of voluntary manslaughter (conscious disregard for human life). Defendant reads the court's comments too narrowly; a more reasonable interpretation in context is that the trial court was referring generally to defendant's actions as the scene unfolded at the victim's home, leading up to the shooting (not specifically to defendant's state of mind at the time of the shooting). Finally, defendant contends that the victim was not particularly vulnerable. The trial court properly found, however, that the victim's past relationship with defendant, and her feelings for him, made her particularly vulnerable under the circumstances. Defendant was able to take advantage of their past relationship and play upon the victim's emotions, talking himself into her home and putting himself in a position to take the gun and shoot her. We find no error in the aggravating circumstances relied upon by the trial court to impose the upper term on voluntary manslaughter.

With regard to the use of a firearm enhancement, we also find that the trial court acted within its discretion in imposing the aggravated term. The specific factor relied upon by the court in making this sentencing decision, in addition to the general aggravating factors considered above, was that the gun was not just used in any fashion, but was used to cause the death of a human being. As defendant notes, the use enhancement that was imposed here was pursuant to section 12022.5, subdivision (a). By referencing the fact that the use of the firearm resulted in death, the trial court may have been drawing an analogy to section 12022.53, applicable to murder and various other crimes (but not to manslaughter), which has three distinct sentences depending upon the proof of certain factors. The latter section provides for a 25-year-to-life enhancement if the crime resulted in great bodily injury or death. (§ 12022.53, subd. (18)(d).) Section 12022.5, subdivision (a) contains no similar provision enhancing the sentence if death results, however, that does not by itself prevent a court from considering the resulting death as a general circumstance in aggravation relating to the enhancement.

Defendant further contends that the death of the victim is an element of voluntary manslaughter (as it requires the killing of a human being) and that the court could, therefore, not rely upon that fact to aggravate the enhancement. Even if relying upon the simple fact of the victim's death, standing alone, was considered to be a dual use of an element of voluntary manslaughter, the court here also referenced back to factors it had relied upon in aggravating the base term on voluntary manslaughter. Those factors included the particular manner in which the gun was used (racking the gun prior to firing and shooting the victim point blank in the head). The factors relating to the manner in which the gun was used would have justified imposition of the aggravated term on the use enhancement, without reference to whether the use resulted in death.

Assuming that the trial court improperly relied upon the fact that the use of the firearm resulted in death in order to aggravate the use enhancement, there is no reasonable probability "that a more favorable sentence would have been imposed in the absence of the error," as there is no reasonable probability that the court would not have relied upon factors such as the manner in which the gun was used in order to impose the upper term on the enhancement. (*People v. Osband* (1996) 13 Cal.4th 622, 730 (*Osband*)). The question then is whether the court could rely upon the facts relating to the manner in which the firearm was used both to enhance the sentence on voluntary manslaughter, and to impose the aggravated term on the use enhancement. On this issue, there is a split of authority.

In *People v. Moberly* (2009) 176 Cal.App.4th 1191, 1197–1198 (*Moberly*), the court held that the dual use of a fact or facts to aggravate both the base term on voluntary manslaughter and the sentence on the enhancement for use of a firearm was not prohibited. The court found such use to be similar to the use of the same fact to impose the aggravated term on multiple offenses which are being imposed consecutively, which is not prohibited. We find the reasoning of *Moberly* to be more persuasive than *People v. Velasques* (2007) 152 Cal.App.4th 1503, 1516, footnote 12, whose holding to the contrary in a footnote is, as indicated in *Moberly*, dicta and unsupported by the *Scott* case, which it relies upon as authority.

Even if such dual use is prohibited, however, that would not end our inquiry. Taking the manner of the use of the gun out of consideration as a factor in aggravation regarding voluntary manslaughter, the court still relied upon ample remaining factors, as detailed above, for that sentencing choice. Since even a single factor in aggravation suffices to support an upper term, both the imposition of the aggravated term on voluntary manslaughter, as well as on the firearm use enhancement, were within the discretion of the trial court. (*Osband, supra*, 13 Cal.4th at p. 730.)

### III. DISPOSITION

The judgment is affirmed.

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Sepulveda, J.\*

We concur:

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Margulies, Acting P.J.

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Dondero, J.

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\* Retired Associate Justice of the Court of Appeal, First Appellate District assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.