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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.

LATROY DENARD CLINTON, SR.,

Defendant and Appellant.

A140056

(Sonoma County
Super. Ct. No. SCR604001)

Defendant Latroy Denard Clinton appeals from a judgment entered after a jury convicted him of voluntary manslaughter (Pen. Code, § 192, subd. (a))¹ and found he had personally used a firearm (§ 12022.5). He contends the trial court erred in failing to instruct the jury on the lesser offense of involuntary manslaughter and failing to instruct on excusable homicide. We conclude the court did not commit instructional error and affirm the judgment.

BACKGROUND

Defendant was charged with the murder of Oscar Valencia. At trial, the prosecution and defense presented competing narratives as to how Oscar was killed.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

Account of the Prosecution's Eyewitnesses

After a night of partying, Oscar Valencia, Jaime Valencia,² Miguel Ceja, and Keith Quinn were in Ceja's car near the intersection of Homestead and Cumberland in Santa Rosa. Defendant drove up in a white van. He got out and started arguing with Quinn, who was then standing by Ceja's car talking on his cell phone. Oscar went over to defuse the situation, but pushing ensued. Everyone else then intervened. Ceja and Jaime pulled Oscar back. Quinn got defendant to back off. No one had a gun at that time.

Defendant retreated to his nearby house and a few minutes later emerged with a gun. Quinn was heard yelling " '[g]et . . . out of here' " at Ceja, Oscar, and Jaime, and was seen unsuccessfully trying to block defendant from returning to the parked cars. Defendant moved on toward Oscar, shouting " 'I'll kill you' " over and over. Oscar tried to convince defendant there had been a misunderstanding, but defendant shot him. There was no struggle for the gun. Defendant hovered over Oscar's body for a few seconds, then fled the scene in the van.

Quinn, Jaime, and Ceja all told roughly the same version of the altercation and killing.

A neighborhood resident also saw parts of the fight and saw a man come from across the street, walk up to two individuals and point a gun at one them. He then looked away and heard a gunshot. Another resident heard a voice say " '[d]on't do it' " followed by a pause and a gunshot.

Defendant's Account

According to defendant, he drove up to his house and saw Quinn. He got out of his car and greeted Quinn with a half hug. Oscar then "jumped up" and asked defendant

² Given that they have the same last name, we refer to Oscar and Jaime by their first names.

if he “ ‘[had] a . . . problem with my boy?’ ” Defendant asked Quinn “ ‘what’s your boyfriend’s . . . problem?’ ” Oscar pushed defendant, defendant pushed back. Oscar swung and hit defendant’s head, and defendant punched back. As they continued to fight, Ceja came to Oscar’s aid. Defendant, fearing he was losing the fight, started to run off, but tripped and fell. Oscar then kicked him and the fighting began again. This time, Quinn tried to stop another individual who had joined the fight, Jaime, telling him defendant was “ ‘June Bug’s cousin’ ” and to “ ‘let that shit go.’ ”

But as the struggle continued, Jaime pointed a gun at defendant. “Defending” himself, defendant “grabbed” the gun and “[i]t popped.” “It went off,” and defendant “grabbed [Jaime’s] hand and the barrel . . . and snatched it.” Defendant heard Oscar react and saw Jaime’s face and “knew it was bad.” At that point, defendant had gained control of the gun and, after ensuring that he was out of danger, left the scene in his van with the gun.

A third-party witness testified at the preliminary hearing that Jaime admitted pointing the gun at defendant and the gun went off as defendant reached for it. The jury heard this testimony when the witness refused to retake the stand at trial for fear of self-incrimination. In rebuttal, the prosecution offered evidence defendant had bribed the witness to lie for him and that Jaime had never told the witness anything about the gun.

Jury Instructions and Conviction

After the close of testimony, defense counsel asked for jury instructions on the lesser offenses of voluntary and involuntary manslaughter. The trial court agreed to give an instruction on voluntary manslaughter, but rejected one on involuntary manslaughter. Defense counsel briefly argued, as to involuntary manslaughter, “there was some evidence in regard to a struggle, some evidence in regard to a pushing of the weapon.” The trial court found the evidence insufficient to warrant the instruction.

Defense counsel also requested an instruction on excusable homicide by accident under section 195 and CALCRIM No. 510. Defendant hoped to argue Oscar was

accidentally shot when, as per defendant's testimony, defendant "push[ed] the gun away." The trial court viewed the instructions on self-defense as adequate and declined to instruct on accident.

The jury convicted defendant of voluntary manslaughter (§ 192, subd. (a)) and found he had personally used a firearm (§ 12022.5). Personal use means defendant intentionally displayed the weapon in a menacing manner, hit someone with the weapon, or fired it, and the jury was so instructed. (See CALCRIM No. 3146.) In finding defendant guilty of manslaughter, the jury rejected the greater charges of first degree and second degree murder.

Defendant appeals, asserting the trial court should have instructed on involuntary manslaughter and accident.

DISCUSSION

Involuntary Manslaughter Instruction

"If supported by substantial evidence, a trial court has the duty to instruct on a lesser included offense. [Citation.] 'The duty applies whenever there is evidence in the record from which a reasonable jury could conclude the defendant is guilty of the lesser, but not the greater, offense. . . .' [Citation.] Ultimately, '[i]t is for the court alone to decide whether the evidence supports instruction on a lesser included offense,' " and we independently review that decision. (*People v. Trujeque* (2015) 61 Cal.4th 227, 271, italics omitted.)

"Manslaughter is the unlawful killing of a human being without malice." (§ 192.) Voluntary manslaughter is such a killing "upon a sudden quarrel or heat of passion." (§ 192, subd. (a).) Involuntary manslaughter is such a killing "in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. . . ." (§ 192, subd. (b).) Both voluntary and involuntary manslaughter are lesser included offenses of murder. (*People v. Thomas* (2012) 53 Cal.4th 771, 813.)

Defendant asserts there was evidence of involuntary manslaughter under the first theory, i.e., the killing occurred during the course of a misdemeanor, namely while he was brandishing a gun at Jaime. As we have recounted, prosecution witnesses testified defendant procured a gun from his house, brandished it, and deliberately shot Oscar without a struggle. Defendant testified that Jaime produced the gun and Oscar was shot as Jaime and he struggled, and he never brandished the gun until after it discharged and he was trying to get away. Thus, defendant's involuntary manslaughter theory—that the killing occurred while he was brandishing a gun at Jaime—is grounded on the assertion a jury could have reasonably believed his account of the physical struggle between him and Jaime, but disbelieved his testimony that *Jaime* produced the gun. Or stated another way, defendant's theory assumes the jury could reasonably have disbelieved all of the prosecution witness's testimony about the altercation, except their testimony that defendant retrieved and was brandishing the gun.

What defendant asserts, in essence, is that the trial court, in deciding what instructions to give the jury, was required to conflate two conflicting versions of events, neither of which, alone, supported defendant's involuntary manslaughter theory, and to divine a hypothetical "third" version of events that could support defendant's killing-while-brandishing-the-gun-at-Jaime theory.

While it may be true, as an abstract principle, that a jury may believe parts of a witness's testimony and reject others (*People v. Wader* (1993) 5 Cal.4th 610, 641), for an instruction on a defense theory to be required, there must still be substantial evidence in the entire record to support it. (*People v. Elize* (1999) 71 Cal.App.4th 605, 615.)

“ “Speculation is an insufficient basis upon which to require the giving of an instruction on a lesser included offense.” ’ ’” (*People v. Valdez* (2004) 32 Cal.4th 73, 116; *People v. Mendoza* (2000) 24 Cal.4th 130, 174; *People v. Lewis* (1990) 50 Cal.3d 262, 277; *People v. Yarbrough* (1974) 37 Cal.App.3d 454, 457 [no involuntary manslaughter instruction based on hypotheticals].)

What defendant asked the trial court to do was to speculate. Indeed, a rational jury would not have invented the “third” scenario defendant has posited. (See *People v. Mentch* (2008) 45 Cal.4th 274, 289 & fn. 9 [when the defendant testified to providing marijuana to medical patients and to others, jury could not rationally ignore testimony about provision to others, and it was not error to deny instruction on defense that all provision of marijuana was as “primary caregiver”]; see also *People v. Young* (2005) 34 Cal.4th 1149, 1201 [despite some evidence of a two-person attack, no aiding and abetting instruction required when it would require speculation and selective disbelieving of testimony].) While an infinite number of scenarios could be constructed from selecting bits and pieces of trial testimony, not all would be rational. Here, there was no evidentiary basis for the jury to believe the “true” version of events was a peculiar intermingling of the prosecution and defense versions.

This is not a case where defendant asks us to simply attribute to him a different state of mind (e.g., accidental, intentional, mistaken perception) for the same course of conduct. (See *People v. Breverman* (1998) 19 Cal.4th 142, 162–164 [jury can disregard defendant’s claim of accident and consider voluntary manslaughter or unreasonable self-defense theories]; *People v. Barton* (1995) 12 Cal.4th 186, 202–203 [same]; *People v. Elize, supra*, 71 Cal.App.4th at p. 615 [same]; *People v. Ceja* (1994) 26 Cal.App.4th 78, 86 [when defendant’s testimony that his victim was armed could have been disbelieved (because no gun found at scene), instruction on unreasonable self-defense should be given]; cf. *People v. Mendoza, supra*, 24 Cal.4th at pp. 174–175 [when expert testimony suggested plan to burn house, not just a bed, trial court, in arson case, not required to instruct on lesser offense, setting fire to inhabited dwelling, which did not require an intent to burn house, but only a reckless act].) Rather, defendant asks us to imagine a wholly different course of events in the physical world to which no witness testified, and which, moreover, was wholly inconsistent with the prosecution witnesses’ and defendant’s own version of events.

Under these circumstances, the trial court did not err in refusing to instruct on involuntary manslaughter based on defendant brandishing a weapon at Jaime.

Even if the trial court erred, the error was harmless. “The failure to instruct on a lesser included offense in a noncapital case does not require reversal ‘unless an examination of the entire record establishes a reasonable probability that the error affected the outcome.’ [Citation.] ‘Such posttrial review focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so relatively strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.’ ” (*People v. Thomas, supra*, 53 Cal.4th at p. 814, fn. omitted.)

We have already explained why no reasonable jury could have adopted the hybrid version of the killing defendant advocates on appeal. It follows the jury would not have been likely to adopt that highly speculative version had they received an involuntary manslaughter instruction based on defendant’s supposed commission of misdemeanor brandishing a weapon at Jaime. (*People v. Thomas, supra*, 53 Cal.4th at p. 814.)

Defense of Excusable Homicide/Accident

In California, raising the “defense” of accident is akin to arguing the prosecution did not meet its burden to prove requisite criminal intent. (*People v. Anderson* (2011) 51 Cal.4th 989, 997.) That an accident is not a crime is “ ‘made clear by the culpability requirements of specific offense definitions’ ” (*Ibid.*) “A trial court’s responsibility to instruct on accident therefore generally extends no further than the obligation to provide, upon request, a pinpoint instruction relating the evidence to the mental element required for the charged crime.” (*Id.* at pp. 997–998, italics omitted; see also *People v. Mitchell* (2012) 209 Cal.App.4th 1364, 1381.)

“When a legally correct instruction is requested, however, it should be given ‘if it is supported by substantial evidence, that is, evidence sufficient to deserve jury consideration.’” (*People v. Wilkins* (2013) 56 Cal.4th 333, 347.)

Defendant, putting his involuntary manslaughter theory aside, alternatively contends the killing was an accident that occurred when he “push[ed] the gun away” from Jaime and therefore he was entitled to an instruction on excusable homicide. Even if the shooting were an accident in layman’s terms, the legal question is how did defendant act. Defendant testified he grabbed at Jaime’s gun while “defending” himself. Thus, even if he were believed, defendant acted intentionally and volitionally in self-defense. He grabbed or pushed intentionally; he did not accidentally fire a gun. (See *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1357 [self-defense applies to intentional conduct, not accidental conduct]; cf. *People v. Villanueva* (2008) 169 Cal.App.4th 41, 50 [“an accidental shooting” when defendant aims the gun “is inconsistent with an assertion of self-defense”], italics omitted.) That defendant’s alleged grab or push resulted in a gunshot does not make the grab or push an accident. Moreover, the jury was fully instructed on a self-defense theory consistent with defendant’s testimony, but rejected it.

Even if the trial court should have given an accident instruction, its failure to do so was harmless. The jury was told they could convict defendant of voluntary manslaughter, or any of the murder offenses, only if they found his conduct was *intentional*. (3 CT 585.) (See generally *People v. Barton, supra*, 12 Cal.4th at p. 199 [voluntary manslaughter requires intentional conduct].) Given that the jury convicted defendant, they necessarily found he acted intentionally, and “it is clear, beyond credible argument, that the jury necessarily rejected the evidence adduced at trial that would have supported a finding to the effect that defendant’s ‘accident and misfortune’ defense . . . was valid.” (*People v. Jones* (1991) 234 Cal.App.3d 1303, 1315–1316.)

Any failure to instruct on a theory of accident was therefore not prejudicial. (*People v. Jones, supra*, 234 Cal.App.3d at pp. 1351–1316; see also *People v. Anderson,*

supra, 51 Cal.4th at p. 997 [defense of accident generally incorporated into the instructions setting forth charged offense].) It is not “ ‘reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of’ ” such error. (*People v. Wilkins* (2013) 56 Cal.4th 333, 349 [applying the state-law prejudice test of *People v. Watson* (1956) 46 Cal.2d 818 to failure of trial court to give a pinpoint instruction].)

DISPOSITION

The judgment is affirmed.

Banke, J.

We concur:

Humes, P. J.

Dondero, J.