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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL CARDONA INOSTROZ,

Defendant and Appellant.

A140482

(Alameda County
Super. Ct. No. CH53061)

This is an appeal from judgment after a jury convicted defendant Miguel Cardona Inostroz of second degree murder, assault with a deadly weapon, and illegal possession of a firearm by a felon, enhanced on several grounds, including personal and intentional discharge of a firearm and personal infliction of great bodily injury. Defendant challenges the judgment on two grounds – to wit, that the trial court prejudicially erred, first, by failing to instruct the jury that, should it harbor a reasonable doubt as to whether he committed murder or involuntary manslaughter, it must find that he committed the lesser offense and, second, by admitting inflammatory evidence relating to his argument with the victim over a debt two days before the murder, during which he warned the victim he had killed people “for less.” We reject these challenges and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On June 24, 2013, an amended information was filed charging defendant with first degree murder, enhanced by personal and intentional discharge of a firearm (Pen. Code, §§ 187, subd. (a), 12022.53, subd. (d)) (count one); assault with a firearm, enhanced by personal use of a firearm and infliction of great bodily injury (Pen. Code, §§ 245, subd.

(a)(2), 12022.5, subd. (a), 12022.7, subd. (a)) (count two); and possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)) (count three).¹ The amended information further alleged defendant had two prior strike convictions, and had served a prior prison term. (§§ 459, 211, 1170.12, subd. (c), 667, subd. (e)(2), 667.5, subd. (b).) Trial began on June 24, 2013, during which the following evidence was presented.

I. The Prosecution's Case.

On September 20, 2011, Nicole Silva (Nikki), Shanese Bode, and Maiko Ross moved their three dogs and belongings out of their foreclosed residence (hereinafter, the house), put their belongings into storage, and checked into a room at the La Quinta Inn in Hayward, where the housemates intended to stay for a few days before moving to Tracy. Defendant and a couple, Joann White and Tim Gamble, helped them move. Silva and defendant had been friends since childhood.

Also within this group of friends was James Parkins (Lucy), who, like defendant, regularly visited the house.² Two days earlier, defendant ran into Parkins as he was leaving the house. As Ross later recalled, she could hear Parkins and defendant arguing on the front porch about money. Specifically, defendant was angry about money taken from his food stamp card after he left the card at the house the previous night. Defendant blamed Parkins for this loss, telling her, "I've killed people for less."

Days later, at about 3:00 or 4:00 p.m. on September 20, the day of the move, the group of friends congregated at the room rented by White and Bode at the La Quinta Inn. Shortly thereafter, Silva, Bode and White left to go shopping and, a bit later, Gamble left to pick up food at a nearby Burger King. Once everyone had returned, Silva telephoned Parkins and a plan was made for Parkins to pick Silva up at the hotel so they could run

¹ Unless otherwise stated, all statutory citations herein are to the Penal Code.

² Lucy was a transgender who identified as female.

errands. During this call, defendant took his .38 caliber revolver and placed it in the back of his pants.³

Parkins arrived at the hotel about 5:48 p.m. with her pet Chihuahua. She went to a chair in the back of the room and began chatting with Bode and Ross. Just seconds later, defendant left the bed where he was sitting with others and approached Parkins, asking, “Where’s my money?” Parkins tried to give defendant a \$20 bill, but defendant slapped her hand away, stating, “Fuck that. What else you got?” Defendant proceeded to rummage through Parkins’ purse. When Parkins tried to pull her purse away, defendant pistol-whipped her on the head with the butt of his gun, which he was holding by the barrel in his right hand. Parkins continued to struggle with defendant, prompting defendant to grab her by the hair with his left hand and pull her out of the chair toward him.

At this point Silva intervened, yelling and attempting to pull defendant from Parkins by grabbing his arm. Defendant, still holding Parkins by the hair in his left hand and the gun in his right hand, pulled away from Silva’s grasp. As he did so, the gun fired, the single bullet entering Parkins’ left shoulder, passing through her chest cavity and perforating her left lung and aorta before lodging in her pelvis. Defendant immediately fled the scene. Parkins died a short time later from a massive hemorrhage.⁴

Hotel surveillance video shows defendant running from the hotel at about 5:54 p.m., six minutes after Parkins’ arrival. White and Gamble also left the hotel, but Bode, Ross and Silva stayed and contacted police. At about this time, Raul Medina, another friend of the group, arrived at the hotel with his mother. Medina left the room with Parkins’ purse and phone before police arrived; however, officers later located Medina

³ Earlier that day, Bode had accidentally sat on defendant’s gun, which had been left on the seat of the truck they were using, prompting defendant to apologize and move the weapon.

⁴ The coroner testified that Parkins’ cause of death was massive bleeding from a single bullet that entered her left shoulder area and perforated her aorta.

with Parkins' belongings at a nearby Target store. After some discussion, Silva and Bode identified defendant as the shooter.

A week later, on September 28, 2011 at 8:10 p.m., police officers located defendant in a vehicle and attempted to detain him by activating their lights and siren. Defendant accelerated, attempting to flee by car, before abruptly stopping the car to flee on foot. Eventually, defendant was caught, subdued and arrested.

At trial, Ross testified that she had told her housemates about defendant's argument with Parkins over money two days before the shooting, a fact Silva subsequently denied. Ross also testified that she told the police about defendant's and Parkins' argument. However, it was stipulated by the parties at trial that there was no mention of their argument in any of the police reports filed in this case.

II. The Defense Case.

Silva testified on defendant's behalf, stating her belief that defendant was waving his gun indiscriminately while dragging Parkins by the hair through the room. It was at this point, Silva stated, that defendant's gun discharged by accident. As Silva recalled, just as she managed to pull defendant's wrist down as they struggled for control of the gun, it fired.⁵

III. The Verdict, Sentencing and Appeal.

On July 9, 2013, the jury found defendant guilty of second degree murder, assault with a firearm, and being a felon in possession of a firearm, and found true the enhancements for personal use of and personal and intentional discharge of a firearm, and for infliction of great bodily injury. In a bifurcated trial, the trial court found true the alleged prior Strike offenses and prior prison term.

On October 24, 2013, the trial court sentenced defendant to an aggregate term of 112 years to life. This sentence consisted of 45 years to life on count one, plus 25 years to life for the personal and intentional discharge enhancement; 25 years to life on count two, plus seven years total for the firearm use and great bodily injury enhancements; a

⁵ Silva was a convicted felon.

stayed 25 year-to-life term for count three; and five years each for the two prior serious felony convictions. Defendant subsequently filed a timely notice of appeal.

DISCUSSION

Defendant raises two primary issues for our review. First, defendant contends the trial court prejudicially erred by failing to sua sponte instruct the jury that, if they had reasonable doubt as to whether he committed second degree murder or involuntary manslaughter, the jury must find that he committed the lesser offense rather than the greater offense. Second, defendant contends the trial court prejudicially erred by admitting marginally probative, yet highly inflammatory evidence that, two days before the murder, he had an argument with the victim over money taken off his food stamp card, during which he told the victim that he had “killed people for less.” We address each issue in turn below.

I. Failure to Sua Sponte Instruct the Jury in Accordance with *People v. Dewberry*.

Defendant’s first contention is that the trial court committed prejudicial error when it failed to sua sponte instruct the jury that, should there be a reasonable doubt as to whether he committed the more serious offense of second degree murder or the lesser offense of involuntary manslaughter, the jury could find him guilty only of the lesser offense. (See *People v. Dewberry* (1959) 51 Cal.2d 548.)⁶ Further, defendant contends,

⁶ In *People v. Dewberry, supra*, 51 Cal.2d 548, “the jury was instructed that: (1) if it had a reasonable doubt as to the defendant’s guilt, he was to be acquitted; (2) if it had a reasonable doubt as to whether the defendant was guilty of first degree or second degree murder, it could convict him only of second degree murder; and (3) if it had a reasonable doubt as to whether the killing was manslaughter or justifiable homicide, the defendant was to be acquitted. (*Id.*, at p. 554.) The trial court refused the defendant’s request for the additional instruction that if the jury had a reasonable doubt as to whether defendant was guilty of murder or manslaughter, it could convict him only of manslaughter. (*Ibid.*) [¶] The Supreme Court held that this was error: ‘[W]hen the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense.’ (51 Cal.2d at p. 555.) ‘The proposed instruction should have been given. It went directly to the defense of reasonable doubt of defendant’s guilt of second degree murder; it was clearly responsive to an issue raised by the evidence [citations]; and it was essential to

because the trial court did instruct the jury, in accordance with CALCRIM No. 3517, as to the effect of such reasonable doubt as between the charged offense of assault with a firearm and the lesser included offense of battery, the omission of a comparable instruction as to second degree murder and involuntary manslaughter was particularly confusing and damaging to his case. Given these circumstances, defendant continues, “the instructional error so infected the entire trial that the resulting conviction violates due process,” citing *Estelle v. McGuire* (1991) 502 U.S. 62, 72.

It is well-established that a trial court must instruct on the general principles of law governing the case even absent a request. (*People v. Michaels* (2002) 28 Cal.4th 486, 529-530.) However, “[t]he court has no duty to give an instruction if it is repetitious of another instruction also given.” (*People v. Barajas* (2004) 120 Cal.App.4th 787, 791.) Moreover, “ “[t]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.” ’ [Citation.]” (*Ibid.*, citing *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.)

Here, the instructional challenge relates to the court’s failure to give a “*Dewberry* instruction,” such as that embodied in CALJIC No. 8.72. This standard instruction instructs jurors that, “[i]f any juror is convinced beyond a reasonable doubt that the killing was unlawful, but that juror has a reasonable doubt whether the crime is murder or manslaughter, that juror must give the defendant the benefit of that doubt and find it to be manslaughter rather than murder.” The People, to the contrary, dispute any instructional error occurred, pointing to the trial court’s giving of a different instruction, CALCRIM

cure the misleading effect of its absence in the light of the other instructions given.’ (*Id.*, at pp. 557-558.) ‘The failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder.’ (*Id.*, at p. 557.)” (*People v. Crone* (1997) 54 Cal.App.4th 71, 75-76.)

No. 640, which they say adequately advised jurors of what to do if they have reasonable doubt as to whether defendant committed the greater or lesser offense.⁷

According to defendant, CALCRIM No. 640 was inadequate in this case because it failed to specifically instruct jurors “that the benefit of any reasonable doubt regarding whether he committed murder or involuntary manslaughter” must inure in his favor. We disagree. Given the totality of the jury charge in this case, we are confident there is no reasonable likelihood the jury misunderstood or misapplied the applicable law notwithstanding the court’s failure to give CALJIC No. 8.72 or the equivalent. (See *People v. Barajas, supra*, 120 Cal.App.4th at p. 791.)

⁷ CALCRIM No. 640, as read in this case, instructed the jury as follows: “You will be given verdict forms for guilty and not guilty of first and second degree murder and involuntary manslaughter. [¶] You may consider these different kinds of homicide in whatever order you wish, but I can accept a verdict of guilty or not guilty of involuntary manslaughter only if all of you have found the defendant not guilty of first and second degree murder. [¶] As with all of the charges in this case, to return a verdict of guilty or not guilty on a count, you must all agree on that decision. [¶] Follow these directions before you give me any completed and signed final verdict form. Return the unused verdict form to me, unsigned. [¶] 1. If all of you agree that the People have proved beyond a reasonable doubt that the defendant is guilty of murder and the degree, complete and sign that verdict form. Do not complete or sign any other verdict forms. [¶] 2. If all of you cannot agree whether the defendant is guilty of first degree murder, inform me that you cannot reach an agreement and do not complete or sign any verdict forms. [¶] 3. If all of you agree that the defendant is not guilty of first degree murder, then you must consider second degree murder. If all of you agree that the People have proved beyond a reasonable doubt that the defendant is guilty of second degree murder, complete and sign that verdict form. [¶] 4. If all of you agree that the defendant is not guilty of second degree murder, but also agree that the defendant is guilty of involuntary manslaughter, complete and sign the form for not guilty of first and second degree murder and the form for guilty of involuntary manslaughter. Do not complete or sign any other verdict forms. [¶] 5. If all of you agree that the defendant is not guilty of first and second degree murder but cannot agree whether the defendant is guilty of involuntary manslaughter, complete and sign the form for not guilty of first and second degree murder and inform me that you cannot reach further agreement. Do not complete or sign any other verdict forms. [¶] 6. If all of you agree that the defendant is not guilty of first and second degree murder or involuntary manslaughter, complete and sign the verdict forms for not guilty of each crime. Do not complete or sign any other verdict forms.”

As the case law makes clear, a *Dewberry* instruction is intended to supplement the standard criminal instruction that, if the jury has a reasonable doubt as to the defendant's guilt, it must acquit, by clarifying that, if the jury has a reasonable doubt as to whether the defendant committed a charged offense or the lesser included offense, it must convict only on the lesser offense. (*People v. Dewberry, supra*, 51 Cal.2d at pp. 557-558.) Thus, in *People v. Crone, supra*, the reviewing court held that the reasonable doubt instruction given to the jury was inadequate because, while the instruction "addresses the effect of reasonable doubt on the choice between conviction and acquittal, [it does] not [address] the choice between a greater and a lesser included offense." (54 Cal.App.4th at p. 78.)

Here, to the contrary, the jury was in fact instructed regarding when it must return a verdict of guilty on the lesser offense of involuntary manslaughter rather than the greater offense of second degree murder. Specifically, the jury was first instructed on the fundamental principle that, to find defendant guilty of murder, the People had the burden of proving beyond a reasonable doubt that "defendant acted with intent to kill or conscious regard for human life. *If the People have not met either of these burdens, you must find the defendant not guilty of murder.*" Next, the jury was instructed that it would "be given verdict forms for guilty and not guilty of first and second degree murder and involuntary manslaughter. [¶] You may consider these different kinds of homicide in whatever order you wish, but *I can accept a verdict of guilty or not guilty of involuntary manslaughter only if all of you have found the defendant not guilty of first and second degree murder.* [¶] As with all other charges in this case, to return a verdict of guilty or not guilty on the count, you all must agree on that decision." Then, the charge further advised that, if jurors agree defendant is not guilty of first degree murder, they must consider second degree murder and, if they all agree the People have proved beyond a reasonable doubt that he is guilty of second degree murder, they must complete and sign that verdict form. However, if all jurors agree defendant is not guilty of second degree murder, and then all agree he is guilty of involuntary manslaughter, jurors must "complete and sign the form for not guilty of first and second degree murder and the form for guilty of involuntary manslaughter." If, on the other hand, all jurors agree defendant

is not guilty of murder, but cannot agree whether he is guilty of involuntary manslaughter, jurors must “complete and sign the form for not guilty of first and second degree murder and inform [the judge] you cannot reach further agreement.” And, finally, if all jurors agree defendant is not guilty of murder or involuntary manslaughter, jurors must “complete and sign the verdict forms for not guilty of each crime.”

These instructions, considered together, made clear to the jurors that, if they had a reasonable doubt about whether defendant committed second degree murder but unanimously agreed he committed involuntary manslaughter, they must give defendant the benefit of this doubt by finding him guilty only of the latter. Emphasizing this point, the jurors were informed that, although they could consider the charged and lesser included homicide offenses in whatever order they desired, they could not convict defendant of the lesser offense of involuntary manslaughter unless they unanimously agreed he was not guilty of first or second degree murder. As such, the charge as a whole adequately conveyed the import of *Dewberry* – to wit, 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. Friend* (2009) 47 Cal.4th 1, 55) – notwithstanding the trial court’s failure to also give the jury CALJIC No. 8.72. (Accord *People v. Crone, supra*, 54 Cal.App.4th at p. 76; see also *People v. Barajas, supra*, 120 Cal.App.4th at p. 791 [a court has no duty to give an instruction “repetitious of another instruction also given”].)

Finally, even assuming for the sake of argument that the trial court erred by not giving CALJIC No. 8.72, we would nonetheless find no grounds for reversal. Indeed, there was a wealth of evidence indicating that defendant acted with malice. To wit, the record reflects that, upon learning Parkins was coming to the hotel room, defendant put his .38 caliber revolver in his pants. Then, once Parkins arrived, defendant violently confronted her, grabbing her by the hair, slapping away the money she offered him in repayment, and striking her in the head with the butt of his gun. This conduct, of course,

followed defendant’s warning to Parkins two days earlier that “I’ve killed people for less.”⁸

And, even more significant for purposes of our inquiry, the jury found true the special allegation that defendant personally and intentionally discharged a firearm, causing great bodily injury to Parkins within the meaning of section 12022.53, subdivision (d), a finding not challenged on appeal. Thus, the jury implicitly rejected any theory that defendant accidentally fired his weapon, rendering inconsequential any misdirection of the jury with respect to their option of finding him guilty of the lesser included offense of involuntary manslaughter rather than second degree murder.⁹ (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1085-1086 [“Error in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions”].)

Accordingly, having considered the record as a whole, we reject defendant’s claim that, but for instructional error, it was reasonably probable the jury would have acquitted him of second degree murder. (See *People v. Crone, supra*, 54 Cal.App.4th at pp. 78-79.)¹⁰

⁸ As we will discuss in Section II, contrary to defendant’s contention, the evidence of defendant’s warning statement to the victim two days before the crime was properly admitted by the trial court as more probative (of intent) than prejudicial.

⁹ As explained by CALJIC 17.19, “[t]he term ‘personally used a firearm,’ . . . means that the defendant must have intentionally displayed a firearm in a menacing manner, intentionally fired it, or intentionally struck or hit a human being with it.”

¹⁰ We also reject defendant’s argument that, because the purported instructional error violated his federal due process rights, we must apply the more stringent standard of prejudice. (See *Chapman v. California* (1968) 367 U.S. 18 (reversal required unless the prosecution proves that it is clear beyond a reasonable doubt the jury would have convicted the defendant of the charged crime notwithstanding the error].) As the California Supreme Court has explained, “federal law has no effect on the appropriate standard of California appellate review when, in a noncapital case, the defendant challenges his otherwise valid conviction of a charged offense on grounds the trial court failed *in its sua sponte duty* under California law to provide instructions, correct and

II. Admission of Evidence of Defendant’s “Bad Act” Two Days before the Murder.

Defendant’s final contention is that the trial court committed prejudicial error by admitting testimony from Ross that, two days before the murder, she overheard defendant arguing with the victim over money the victim had taken from his food stamp card and warning that he had killed people “for less.”

The applicable law is well-established. Generally, all relevant evidence is admissible. (*People v. Champion* (1995) 9 Cal.4th 879, 922.) Relevant evidence is that which has any tendency in reason to prove or disprove any disputed fact material to the outcome of the case. (Evid. Code, § 210.) “The test of relevance is whether the evidence tends ‘ “logically, naturally, and by reasonable inference” to establish material facts such as identity, intent, or motive. [Citations.]’ [Citation.] The trial court has broad discretion in determining the relevance of evidence [citations] but lacks discretion to admit irrelevant evidence. [Citations.]’ [Citation.]” (*People v. Hamilton* (2009) 45 Cal.4th 863, 940.)

Here, as the trial court recognized, the evidence of defendant’s threatening behavior just days before the killing was admissible under Evidence Code section 1101, subdivision (b) (section 1101(b)) to prove the hotly disputed issue of whether “this was an intentional or accidental shooting.” As defendant points out, “ ’[s]ubdivision (a) of [Evidence Code] section 1101 prohibits admission of evidence of a person’s character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. [However,] [s]ubdivision (b) of section 1101 clarifies . . . this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person’s character or disposition.’ [Citation.] ‘Evidence that a defendant committed crimes other than those for which he is on trial is admissible when it is logically, naturally, and by reasonable inference relevant to prove some fact at issue, such as motive, *intent*, preparation or identity. [Citations.] The trial court judge has the

complete, on all lesser included offenses” (*People v. Breverman* (1998) 19 Cal.4th 142, 172.)

discretion to admit such evidence after weighing the probative value against the prejudicial effect. [Citation.] When reviewing the admission of evidence of other offenses, a court must consider: (1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crime evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant. [Citation.] Because this type of evidence can be so damaging, “[i]f the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded.” [Citation.]’ [Citation.]” (*People v. Fuiava* (2012) 53 Cal.4th 622, 667 [italics added].)

“Because evidence of other crimes may be highly inflammatory, the admission of such evidence ‘ ‘ ‘must not contravene other policies limiting admission, such as those contained in Evidence Code section 352.’ ” ’ [Citations.] Under Evidence Code section 352, the probative value of a defendant’s prior acts must not be substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. [Citations.] ‘We review for abuse of discretion a trial court’s rulings on relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352.’ [Citation.]” (*People v. Davis* (2009) 46 Cal.4th 539, 602.)

In this case, the trial court rejected defendant’s challenge to this evidence under Evidence Code section 352 after finding it “highly relevant with respect to possible intent” and not substantially prejudicial. Having applied the above-stated principles to the facts at hand, we find no basis for disturbing the trial court’s admission of the challenged evidence. As the trial court aptly noted, the only defense offered at trial was that defendant had accidentally fired his gun, killing Parkins, after Silva grabbed his arm in an attempt to stop his assault on Parkins. The fact that defendant made a threatening statement just two days earlier that he had killed over less money than she owed him is indeed highly relevant to prove the opposite – to wit, that he deliberately fired his weapon at Parkins out of anger at her perceived theft of his money. (*People v. Rogers* (2013) 57 Cal.4th 296, 327 [trial court was “well within its discretion” in admitting other crimes

evidence on the element of intent where a key issue was whether the murder was premeditated and deliberate and committed with express malice].) While defendant's choice of words may have proved prejudicial at trial, it was not unduly so. (*People v. Karis* (1988) 46 Cal.3d 612, 638 ["Undue prejudice" refers not to evidence that proves guilt, but to evidence that prompts an emotional reaction against the defendant and tends to cause the trier of fact to decide the case on an improper basis: 'The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence' ".])

Finally, as the People note, defense counsel made a tactical decision to question Ross on cross-examination regarding the argument she allegedly overheard between defendant and Parkins, directly asking what defendant had said to Parkins after accusing her of taking money from his card:

"A. And I guess he found out there was ten bucks missing, maybe twenty dollars missing, some number low like that missing, it was his money.

Q. You said he then made a statement to her?

A. Yes.

Q. That was what?

A. I've killed people for less.

Q. What?

A. I've killed people for less."

Under these circumstances and given the substantial relevance of this challenged testimony to the hotly disputed issue of intent, there is no basis whatsoever for disturbing the trial court's ruling.

DISPOSITION

The judgment is affirmed.

Jenkins, J.

We concur:

McGuiness, P. J.

Siggins, J.

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