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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ADALBERTO GRANADOS,

Defendant and Appellant.

B235026

(Los Angeles County
Super. Ct. No. BA354922)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald H. Rose, Judge. Affirmed.

Joanna McKim, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Assistant Attorney General, Chung L. Mar and Seth P. McCutcheon, Deputy Attorneys General, for Plaintiff and Respondent.

BACKGROUND

In the early afternoon of April 2, 2009, defendant Jose Granados fought with Evelyn Reynoso, the mother of his two young children, at the door to Reynoso's house, defendant trying to push his way in and Reynoso trying to keep him out. When Maria Carrillo, a neighbor, approached, defendant looked at her and entered the house, closing and locking the door. Carrillo testified she heard defendant repeatedly shout at Reynoso, "I'm going to kill you, damn bitch." She heard defendant and Reynoso fighting and throwing things, and several times Reynoso told defendant to leave her alone, but after a while her voice "started to diminish, diminish until you couldn't hear anything anymore."

Defendant hacked Reynoso with a meat cleaver and stabbed her several times with a knife, killing her. Los Angeles County Sheriff's Deputy Hector Andujo testified Reynoso "was very unrecognizable. It looked like someone had taken something and just chopped her into little pieces. Her eyeball was sticking out, her left eyeball. Her fingers were chopped off." "[T]he whole house appeared to have been overturned. [¶] There was blood splashed all over the walls and the floor." A Los Angeles County Sheriff's detective testified some of Reynoso's hair was on the kitchen floor, "like it had been either hacked or cut off her head." She had "deep lacerations to the top of her head, on the side of her head, on her neck area, and face as well." She also suffered numerous stab wounds that penetrated her carotid artery, jugular veins, and lungs.

While defendant attacked Reynoso, Rocio Granados, his sister, entered the house through a side door and came out with Reynoso's two children, whom she had heard crying inside. Carrillo testified Granados told her to take the children away so they would not see what their father was doing to their mother.

After killing Reynoso, defendant stabbed himself in the chest with a knife. Deputy Andujo testified defendant then waved the knife in the air "and he was growling. He was completely soaked in blood" The growls were "like sounds of anguish," "like he had maybe done something and he realized what have I done." Andujo testified he ordered defendant to drop the knife and get on the ground, but defendant ignored him

and began to pace “back and forth from side to side.” As officers approached, defendant plunged the knife into the side of his own neck, and collapsed.

Defendant was charged with one count of murder (Pen. Code, § 187, subd. (a))¹ and two counts of cruelty to a child (§ 273a, subd. (b)), and it was alleged he committed the murder with a deadly and dangerous weapon, a knife (§ 12022, subd. (b)(1)). He pleaded not guilty by reason of insanity.

At trial, Granados, defendant’s sister, testified that on the morning of the murder she observed defendant to be “[a] bit serious,” but otherwise normal, and he had not been drinking or using drugs. She had asked him to pick up her children from school, and he agreed.

The cruelty to a child counts were dismissed, and the jury found defendant guilty of second degree murder and found true the allegation that the murder was committed with a knife. At sentencing, defendant withdrew his not guilty plea. He was sentenced to 16 years to life in prison.

DISCUSSION

A. Jury Instructions Pertaining to Mental Impairment

Defendant requested an instruction in the terms of CALCRIM No. 3428, pertaining to mental impairment, which reads in pertinent part: “You have heard evidence that the defendant may have suffered from a mental (disease[,] / [or] defect[,] / [or] disorder). You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime, the defendant acted [or failed to act] with the intent or mental state required for that crime. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant acted [or failed to act] with the required intent or mental state If the People have not met this burden, you must find the defendant not guilty of [the charged crime].”

The trial court refused defendant’s request to give this instruction, stating, “I don’t see that there’s any evidence that the defendant was suffering from any mental disease or

¹ Undesignated statutory references are to the Penal Code.

defect or disorder. The fact that he chose to stab himself in the chest and the neck may actually only prove his guilt in that he had remorse for what he had just done, that he'd just butchered his girl friend in front of his two kids. [¶] Also the other evidence in this case clearly is that a short time before all this took place, the defendant was perfectly rational and normal. He'd spoken to his sister. His sister said he was fine." The court stated, "It's absolutely clear from the record that whatever noises the defendant made can only be interpreted as a result of whatever took place inside the home."

Defendant argues the testimony that he growled at police officers, waved a knife, ignored commands to drop the knife, and stabbed himself indicated he suffered a mental disorder, which supported an instruction both on mental impairment and on diminished capacity-involuntary manslaughter. He argues lack of the instructions violated his constitutional right to present a defense. We disagree.

With respect to any defense or defense theory, the trial court must give a requested instruction only if substantial evidence supports the defense or theory. (*In re Christian S.* (1994) 7 Cal.4th 768, 783.) For example, a trial court must instruct sua sponte on a lesser included offense if there is substantial evidence that would, if accepted by the trier of fact, absolve the defendant of guilt of the greater offense but not of the lesser. (*People v. Blair* (2005) 36 Cal.4th 686, 745-746; see *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1145 [involuntary manslaughter is a lesser included offense of murder].) "A verdict of involuntary manslaughter is warranted where the defendant demonstrates 'that because of his mental illness . . . he did not *in fact* form the intent unlawfully to kill (i.e., did not have malice aforethought).' [Citation.]" (*People v. Rogers* (2006) 39 Cal.4th 826, 884.) Substantial evidence in this context is "evidence from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist." (36 Cal.4th at p. 745.) In deciding whether substantial evidence necessitates an instruction, the court determines only the legal sufficiency of the evidence, not its weight. (*People v. Flannel* (1979) 25 Cal.3d 668, 684, overruled on another ground in *In re Christian S.*, at p. 777.) "Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused." [Citations.]" (*People v. Flannel*,

at p. 685, fn. 12.) The test is not whether there is any evidence, but whether there is evidence from which a reasonable jury could have found the specific facts supporting the instruction. (*Id.* at pp. 684-685, fn. 12.)

The record includes no evidence that defendant suffered from a mental disorder when he killed Reynoso. On the contrary, his sister testified that shortly before the murder he seemed normal, and she had asked and he had agreed to pick up her children from school.

Defendant argues his conduct *after* the murder was “crazy,” “like that of one suffering from a mental disorder.” Perhaps so. But as the trial court aptly observed, such conduct was indicative only of remorse, if anything, not of impaired ability to form an intent to kill.

Defendant relies on several cases holding a mental impairment or diminished capacity-voluntary manslaughter instruction is necessary when evidence suggests the defendant was incapable of forming the requisite intent to commit a crime. The cases are distinguishable because in each, the evidence was that the defendant suffered from diminished mental capacity before the crime. (E.g., *People v. Smithey* (1999) 20 Cal.4th 936, 955-956 [defendant had a brain dysfunction and had used drugs]; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1229-1230 [defendant had organic brain damage exacerbated by drug use]; *People v. Ray* (1975) 14 Cal.3d 20, 25 [defendant suffered a concussion and took drugs before the crime]; *People v. Larsen* (2012) 205 Cal.App.4th 810, 824-825 [defendant suffered from Asperger’s syndrome]; *People v. Webber* (1991) 228 Cal.App.3d 1146, 1163-1164 [defendant was “paranoid” and “high on drugs” before the crime]; *People v. Cox* (1990) 221 Cal.App.3d 980, 984, 988-989 [defendant was psychotic]; *People v. Aguilar* (1990) 218 Cal.App.3d 1556, 1569 [defendant suffered from paranoia possibly exacerbated by cocaine use]; *People v. Molina* (1988) 202 Cal.App.3d 1168, 1170-1171 [defendant suffered from depression]; *People v. Young* (1987) 189 Cal.App.3d 891, 907-909 [defendant suffered from schizophrenia].) Here, no evidence suggests defendant’s mental state after the murder also existed before the murder. The only evidence is to the contrary. Therefore, the trial court was not required

to instruct on the inapplicable theories of mental impairment or diminished capacity-involuntary manslaughter.

B. Prosecutorial Misconduct

During closing argument, the prosecutor, over defense objection, explained second degree murder to the jury in part by distinguishing it from first degree murder. She said, “So let’s talk a little bit about second degree murder. First of all, it’s not first degree murder. It’s a second degree. It is express malice without deliberation and premeditation. So the theory is that while there might be evidence to show the intent But maybe it wasn’t planned with the type of thorough deliberation that beyond a reasonable doubt would show a first degree murder. So instead we’re saying that the theory is that this is a murder with malice, but there’s no deliberation and premeditation. [¶] So basically the different degrees of murder involve the planning, deliberation, and premeditation. If you have an unlawful killing with malice aforethought, that’s a second degree murder. That’s all it takes. If that—if the circumstances of that murder involve willful, deliberate, and premeditated factors, then it’s a first degree murder.”

Defendant contends these comments suggested defendant’s conduct could arguably support a conviction for first-degree murder, thus insinuating there was more than enough evidence to convict him of second-degree murder, which would be less than he deserved. We disagree.

A prosecutor’s misconduct violates due process if it infects a trial with unfairness. (*People v. Harrison* (2005) 35 Cal.4th 208, 242.) Less egregious conduct by a prosecutor may nonetheless constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to attempt to persuade the court or jury. (*Ibid.*) If a prosecutorial misconduct claim is based on the prosecutor’s arguments to the jury, we consider how the statement would, or could, have been understood by a reasonable juror in the context of the entire argument. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) A prosecutor may fairly comment on and argue any reasonable inferences from the evidence. (*Ibid.*) But a prosecutor may not suggest the existence of facts outside of the record by arguing matters not in evidence (*People v. Benson* (1990) 52 Cal.3d 754, 794-

795); mischaracterize the evidence (*People v. Hill* (1998) 17 Cal.4th 800, 823); appeal to the jury's sympathy, passion, or prejudice (*People v. Fields* (1983) 35 Cal.3d 329, 362); or suggest the jury should consider a defendant's possible punishment (*People v. Holt* (1984) 37 Cal.3d 436, 458). While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." (*Berger v. United States* (1935) 295 U.S. 78, 88 [55 S.Ct. 629].)

Here, the prosecution committed no misconduct. Nothing in the prosecutor's comments suggested defendant's conduct could support a conviction for first-degree murder. On the contrary, the prosecutor repeatedly stated the evidence could not support such a conviction. She explained first degree murder not to insinuate more than enough evidence existed to convict defendant of second-degree murder or suggest such a conviction would be less than he deserved, but to distinguish between malice aforethought and premeditation and deliberation so as to clarify those challenging concepts for the jury. Nothing in the prosecutor's remarks was inaccurate, deceptive or unfair, and nothing could reasonably have been construed or applied by the jury in an objectionable fashion.

Even if the prosecutor's comments constituted misconduct, we can discern no basis for concluding defendant was prejudiced. The comments were isolated and fleeting, and any improper influence was cured by the court's instructions on the elements of murder and manslaughter.

DISPOSITION

The judgment is affirmed.

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We concur:

CHANEY, J.

MALLANO, P. J.

JOHNSON, J.