Filed 8/1/12 P. v. Carrillo-Garcia CA3

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Plumas)

THE PEOPLE, Plaintiff and Respondent, v. REYES CARRILLO-GARCIA, Defendant and Appellant.	C063650 (Super. Ct. No. 0835256)

On Mother's Day 2008, three mothers awoke to a horrific tragedy. Broken hearted, 18-year-old defendant Reyes Carrillo-Garcia stabbed his ex-girlfriend, Jennifer Carrigan, eight times and her new boyfriend, Steven Furtado, 35 times in Jennifer's bedroom. The prosecution argued the murders were premeditated and committed while lying in wait for his unsuspecting victims; the defense argued he was guilty of voluntary manslaughter, not murder. The jury convicted him of two counts of first degree murder with the special circumstance of lying in wait.

On appeal defendant claims his confession was involuntary and his lawyer was ineffective for failing to request an

instruction encouraging the jury to consider provocation in determining the degree of the murders. He also alleges a series of instructional errors. To preserve his right to a federal appeal, he raises three arguments he acknowledges are nonmeritorious in California. The grief occasioned by this case is unfathomable; the legal issues, however, are straightforward and without merit. We affirm.

FACTS

Because there is no question that defendant stabbed and killed the two young victims, we need not recount much of the grisly forensic evidence. We provide a brief chronology of the events leading up to, and following, the stabbings as relevant to the instructional issues raised on appeal.

Defendant and Carrigan had had an off-and-on relationship with each other since they were 13 years old. When they broke up, Carrigan would date other boys. In March 2008 she met Furtado at an interscholastic honors band event and they began seeing each other. Defendant told a friend that he would kill Furtado if he ever hurt Carrigan. On one occasion defendant was seen driving his car slowly by a house where Furtado was staying with a friend, and on another, sitting on his bike looking toward Carrigan’s house at 10:45 p.m. By May, Carrigan’s mother acquiesced in her daughter’s request to let Furtado spend the night.

Meanwhile, defendant and Carrigan continued to work together at a grocery store. The evidence about their relationship at the time is ambiguous. Defendant, as well as

some others, reported they were still having sexual relations. They spent time together. Indeed, during a senior “skip day,” a tradition where participating students stay out all night “partying” because they do not have to be at school until noon the next day, Carrigan got drunk and passed out in defendant’s car. Some witnesses testified they were cuddling and acting normal together. But defendant became angry when he read text messages on Carrigan’s phone that Furtado had sent to her. He threw the phone, stating, “This is bullshit.” At that time, defendant had no prior arrests, convictions, or juvenile adjudications.

On May 10, 2008, neither defendant nor Carrigan attended their senior prom. Carrigan planned to spend the night with Furtado. She and Furtado were watching television together in Carrigan’s bedroom when her mother said goodnight and locked the front door.

Defendant attended a party with his cousin and some friends. He played beer pong and, to at least one witness, seemed to be in good spirits. (2 RT 461-462, 524-525) He opened beer bottles for other guests with a knife that had a three- to six-inch-long blade. But he left without saying goodbye and drove to Carrigan’s house. He gave three different accounts of what happened after he arrived. We will describe his interviews with the police in discussing our first issue in part I, *post*. Suffice it to say, he ultimately confessed to entering the home and stabbing the victims. The forensic

evidence, including fingerprints and blood evidence, left no doubt he was the perpetrator of the bloody carnage.

Defendant claims to have little recollection of what transpired thereafter. He went into the bathroom and put bandages on the cuts on his fingers. Apparently he left the house, but discovering he did not have his car keys, he climbed back in through Carrigan's window. He took keys to Carrigan's and Furtado's cars and moved them down the street.

The corpses were rearranged. A clean knife was put in Furtado's hand. A blanket covered a pattern of blood on the carpet in the living room. Carrigan's mother awoke on Mother's Day morning unaware that anything had happened. Because the doors to her daughter's room were closed, the bloody carpet was covered, and the cars had been moved, she assumed Carrigan had reported for her 7:00 a.m. shift and Furtado had left. She did not discover the bodies until close to noon, after receiving a call that her daughter had not come in to work as scheduled.

Defendant called his cousin to help him retrieve his car keys from the trunk of his car. Eventually, he drove home and slept for a few hours before his friend came to the house and told him something had happened to Carrigan. The police arrived at his house shortly after the bodies were discovered.

Stepping out onto his front porch, defendant admitted to Detective Jeremy Beatley that he had driven over to Carrigan's house, parked in a parking lot behind a nearby Chinese restaurant, and planned to go into Carrigan's house to talk to her. He told the detective, however, that he changed his mind

when he saw Furtado's car and decided to leave. His departure was delayed when he discovered he had locked his keys in the trunk, and he called family members to assist him. He agreed to a follow-up interview at a nearby sheriff's substation. The admissibility of the statements he made during those subsequent interrogations raises the threshold issue on appeal.

I

The Motion to Suppress

Defendant contends the trial court improperly admitted the statements he made to Sergeant Greg Hagwood on May 11 and May 12 because they were the result of police coercion and therefore involuntary. He does not argue any deficiencies in his *Miranda* advisements.[1] But he does insist that Hagwood, taking full advantage of defendant's age and inexperience, coerced him with implied promises of leniency and implied threats that his failure to cooperate would work against him. The trial court found the statements were voluntary and denied the motion to suppress. The record supports the court's ruling.

The Interrogations

The first interrogation at the substation began approximately five minutes after defendant arrived. For the first half hour, defendant repeated the story he had given earlier; that is, he had gone to Carrigan's house but he had not gone in. For the next half hour, the sergeant urged defendant

---

[1] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*).

to be more forthcoming. He described the evidence the killer had left at the scene and suggested it would be good for defendant to confess, better for him to do so before the prosecutor arrived and the forensic evidence independently established his guilt, and best for him to provide a mitigating explanation for the killings such as that he had acted emotionally without intending to kill.

Rather than relying on the scientific evidence, the sergeant told defendant: "I think there's a more kind of, kind of human way to understand. You know it makes a difference in the way, in the way of how things work out. It makes a big difference. But this is our time here right now I think to deal with it in a, in a compassionate and kind of a personal way that makes sense." The sergeant warned defendant the district attorney was "on his way up right now" and "[i]ts [*sic*] better now to say I did it, it wasn't meant to happen it wasn't supposed to happen I didn't want to happen emotions things but, but it did and its [*sic*] an opportunity for you to tell me that you know its [*sic*] not what you wanted to happen but it did . . . ." He then assured defendant, "[W]e can talk to the District Attorney and say he feels horrible he didn't, he didn't want that to happen he's, that he's honest and he's remorseful and please consider that when you have to make the decisions," and a confession "mean[s] a lot."

Defendant asked to speak to his mother. Once again, the detective tried to leverage his contact with the district attorney to persuade defendant to talk. He stated: "Let's get

through this then I'll let you talk to your mom for a long time, you can sit privately with her for a while. Let's tend to our business and let's get through this. The District Attorney when he called on my cell phone he was on his way, I want to be able to go to him and say listen we got a nice kid here, we've got a nice kid in a bad situation. I don't want to go to him and say prove it through the science, prove it through the blood and the fingerprints . . . . [¶] . . . [¶] [W]hen you've done it the weight of the world will be lifted off your shoulders and I want to show the people that your, that your, that you were heartbroken, that your [*sic*] sad, that your [*sic*] devastated that you've [*sic*] did not want it to happen that way. I want the people making the decisions to understand that. I don't want it to be some cold situation that just involves evidence [be]cause it's all there."

Defendant relented and confessed. "I went over there thinking that I was going to talk to her be fine [*sic*] and I thought that he was raping her so my first reaction I just freaked out and grabbed the closest thing that was to me and tried to defend her and he got in the way and things that I don't remember the rest."

The sergeant prodded further, but then allowed defendant the opportunity to consult with his mother. When the sergeant returned, defendant continued to insist that he could not remember more about what had happened. As the interrogation continued, defendant at last recalled "me and him [Furtado] falling down we like lost our balance and fell on top of her"

and then next remembered walking from Carrigan's house to his car, and realizing he had locked his keys in the trunk. He did not remember moving the Carrigan and Furtado cars. Nor did he remember changing or getting rid of his clothes.

The same sergeant interrogated defendant the following day. Tired and frustrated, he told defendant, "I don't want to hear that I don't remember ok." He again told defendant he had to "knock this off you got to, you got to level with me here, you have got to level with me here this, this, this crap that we have been going down is, is just bs you've got to knock this off."

Defendant's memory improved. He now remembered going into the bedroom and seeing Carrigan and Furtado naked, and Furtado trying to fight with him. "I remember getting into a fight and like we fell down and we got back up and then I think he like grabbed my face and I fell backwards into the uh little couch that was sitting there." He remembered "walking out of the room and looking back and I saw them both lying down." He also remembered putting Band-Aids on his cuts, changing his clothes, and moving the cars.

Voluntariness

"'A finding of coercive police activity is a prerequisite to a finding that a confession was involuntary under the federal and state Constitutions. [Citation.] A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence. [Citation.] Although coercive police

activity is a necessary predicate to establish an involuntary confession, it "does not itself compel a finding that a resulting confession is involuntary." [Citation.] The statement and the inducement must be causally linked. [Citation.]' [Citation.]" (*People v. McWhorter* (2009) 47 Cal.4th 318, 347 (*McWhorter*).)

In determining whether defendant's confession was voluntary, we must examine all the surrounding circumstances, including both the characteristics of the accused and the details of the interrogation. We conduct an independent review of the trial court's ruling where, as here, the facts are undisputed. (*McWhorter*, *supra*, 47 Cal.4th at pp. 346-347.)

Defendant, who maintains he was particularly susceptible to influence because he was only 18 years old and naive about the criminal justice system, contends the police coerced his confession with repeated promises of leniency. Not so. As aptly pointed out by the Attorney General, two Supreme Court cases with remarkably similar interrogations found the confessions were voluntary.

In *People v. Holloway* (2004) 33 Cal.4th 96, the interrogator suggested that the killings might have been accidental or resulted from a fit of rage and that these circumstances could "'make[] a lot of difference.'" (*Id*. at p. 116.) Similarly, the sergeant here also suggested to defendant that mitigating circumstances could "make[] a difference." Thus, he reinforced the message that defendant might not have intended to kill, but that his emotions got out

of control. Here, as in *Holloway*, the interrogator's suggestions "fall far short of being promises of lenient treatment in exchange for cooperation. The detectives did not represent that they, the prosecutor or the court would grant defendant any particular benefit if he told them how the killings happened." (*Ibid*.) Rather, the interrogators' admonitions did no more than tell defendant the benefit that might "'"flow[] naturally from a truthful and honest course of conduct"' [citation] . . . ." (*Ibid*.)

The interrogator in *People v. Carrington* (2009) 47 Cal.4th 145 (*Carrington*) employed the same techniques. He too tried to convince his suspect that it would behoove her to explain any mitigating circumstances and suggested, "'What if she scared you? She confronted you. Or maybe there was someone else with you.'" (*Id*. at p. 170.) Like the sergeant, the interrogator in *Carrington* encouraged the suspect to tell the truth and take the weight off her shoulders. (*Ibid*.) And he promised that if the suspect cooperated during the interview, the officers "'would try to explain this whole thing with, with Los Altos P.D. as [best] we can.'" (*Id*. at p. 169.)

None of these exhortations crossed the impermissible line and rendered the police conduct coercive. The officer's statement that "he would help defendant in explaining 'this whole thing' to the Los Altos police did not constitute a promise of leniency . . . ." (*Carrington*, *supra*, 47 Cal.4th at p. 170.) Nor did the assurances that the police were attempting to understand the defendant's motivation coerce her to confess;

rather “they merely suggested possible explanations of the events and offered defendant an opportunity to provide the details of the crime.” (*Id*. at p. 171.)

The sergeant used the very same interrogation techniques in trying to persuade defendant to tell the truth. Neither his repeated references to the district attorney, his attempts to get a better understanding of defendant’s motives and to extract mitigating circumstances, nor his encouragement to defendant to lighten his load constituted coercion, even when considering defendant’s age and lack of experience with the criminal justice system. Although defendant, to his credit, had no criminal record and was a very young adult, there is nothing in the record to suggest he was particularly vulnerable, did not understand English, or was mentally or emotionally compromised. Given the utter lack of coercive police interrogation and no evidence defendant’s statements were not voluntary, we conclude the trial court properly admitted the statements he made during his interrogation.

Personal Presence

Defendant attended the morning hearing on the motion to suppress, but following the lunch recess, his lawyer informed the court that defendant did not feel well and wished to return to the jail. The court informed defendant that he had a right to be personally present at all stages of the proceedings. Defendant stated that he understood but wanted to return to the jail, and he waived his “right to be personally present.” On appeal, he contends he did not intelligently and knowingly waive

his right to be present because the court failed to advise him that the proceedings could be postponed until he felt better.

The question posed is not whether defendant had the right to be present, for clearly he did, but whether his waiver was valid in the absence of an express advisement the proceedings could be postponed. We conclude his argument is without merit for at least two reasons.

First, Penal Code section 1043 provides that a felony defendant "shall be personally present at the trial" (§ 1043, subd. (a)), but that the trial may continue in the defendant's absence if (1) the defendant persists in disruptive behavior after being warned (§ 1043, subd. (b)(1)); (2) the defendant in a noncapital case is voluntarily absent (§ 1043, subd. (b)(2)); or (3) the defendant waives his right to be present pursuant to Penal Code section 977 (§ 1043, subd. (d)). Relying on *People v. Davis* (2005) 36 Cal.4th 510, a capital case, defendant ignores section 1043's provision that proceedings can continue in a noncapital case if a defendant is "voluntarily absent." (§ 1043, subd. (b)(2).) There is no question that defendant voluntarily absented himself from the afternoon hearing on the motion to suppress.

Second, we reject the notion that his waiver was not knowing and intelligent because the court did not advise him that the proceedings could be continued. The Supreme Court rejected a similar argument in *People v. Weaver* (2001) 26 Cal.4th 876 (*Weaver*). Although, as here, the court informed the defendant that he had a constitutional right to be present

during the proceedings, the defendant claimed his subsequent waiver was not knowing and intelligent because the court did not advise him of the importance of his personal presence. The Supreme Court responded: "Defendant cites no authority for his argument that we must apply a heightened waiver standard under the circumstances, or that the trial court had a sua sponte duty to admonish him of the importance of his decision to absent himself from the courtroom. Defendant was represented by counsel, and he himself chose, for his own reasons, to leave the courtroom. We find nothing improper about the procedure used, and we conclude defendant's waiver of his state and federal constitutional right to be present at this phase of his capital trial was both voluntary, knowing and intelligent." (*Id*. at p. 967.)

Similarly, the trial court properly advised defendant that he had the right to be present at the suppression hearing. Defendant cites no authority, and we have found none, to support an expanded duty to advise a criminal defendant of the possibility of seeking a continuance. Applying the logic of *Weaver*, we too refuse to apply a heightened waiver standard whereby a trial court, akin to a fortune teller and guidance counselor, must foresee the myriad of speculative consequences that might result from a defendant's election not to attend and counsel him about the mechanisms that might be available to him to accommodate his special requests.

There is no evidence in the record before us to suggest that defendant did not knowingly and intelligently waive his

right to be present for the afternoon hearing. Indeed, there is no evidence that defendant did not know he could request a continuance. All we have is the speculative notion that defendant, who purportedly did not feel well, did not know he could ask for the hearing to be postponed. Thus, defendant would have us presume an invalid waiver based not on any evidence he did not knowingly and intelligently waive his right to be present, but on the court's failure to give an express advisement. In the absence of any authority imposing such a duty, or any compelling reason to do so, we conclude defendant's argument is without merit.

II

Inadequacy of Counsel

Defendant argues he was deprived of the effective assistance of counsel based on his lawyer's failure to request a pinpoint instruction on provocation. He does not cite any cases in which the failure to request a pinpoint instruction constituted ineffective assistance of counsel. He acknowledges he must demonstrate that his lawyer's representation fell below an objective standard of reasonableness and that there is a reasonable probability the result of the proceeding would have been different in the absence of the lawyer's deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 686 [80 L.Ed.2d 674].) We conclude he fails to demonstrate the requisite prejudice to sustain his ineffectiveness claim in light of the instructions the jury was given, the evidence at trial, and the jury's findings.

Defendant complains that his lawyer did not request an instruction in the nature of CALCRIM No. 522, which states: "If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder." The trial court need not instruct jurors that if they find provocation is not sufficient to reduce the homicide to manslaughter, they may consider the evidence of provocation in determining whether the murder is of the first or second degree. (*People v. Rogers* (2006) 39 Cal.4th 826, 878 (*Rogers*).) In the absence of a sua sponte obligation to instruct on the relationship between provocation and the degree of murder, defendant shifts the responsibility to defense counsel to request a comparable pinpoint instruction.

We first must consider the probability that the missing pinpoint instruction would have achieved a different outcome in this case by examining the package of instructions the jury was given on murder and manslaughter. Indeed, they were instructed to decide whether defendant had committed murder and, if so, whether it was murder in the first or second degree. They could find defendant guilty of first degree murder under either of two theories: 1) the murder was willful, deliberate, and premeditated, or 2) the murder was committed by lying in wait.

The court explained: "The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted willfully if he intended to kill. The defendant acted deliberately if he carefully weighed the considerations for and

against his choice and, knowing the consequences, decided to kill. The defendant acted with premeditation if he decided to kill before committing the act that caused death."

Alternatively, the court told the jurors they could find defendant guilty of murder in the first degree if they found he was lying in wait for his victims. The jurors were instructed: "The defendant murdered by lying in wait if: [¶] 1. He concealed his purpose from the person killed; [¶] 2. He waited and watched for an opportunity to act; [¶] AND [¶] 3. Then, from a position of advantage, he intended to and did make a surprise attack on the person killed. [¶] The lying in wait does not need to continue for any particular period of time, but its duration must be substantial enough to show a state of mind equivalent to deliberation or premeditation." The court expressly explained to the jurors that "[a]ll other murders are of the second degree."

Thus, the jurors became well acquainted with the distinctions between first and second degree murder and the pivotal requirement for both theories of first degree murder that the perpetrator's mental state must include either deliberation or premeditation, or, in the case of lying in wait, a mental state "equivalent" to deliberation or premeditation.

The court also explained the nuances of voluntary manslaughter and the role of provocation in reducing a potential murder to manslaughter because of a sudden quarrel or heat of passion. The killing is voluntary manslaughter if: "1. The defendant was provoked; [¶] 2. As a result of the provocation,

the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; [¶] AND [¶] 3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment."

The instruction emphasized that "[w]hile no specific type of provocation is required, slight or remote provocation is not sufficient." Furthermore, "[i]t is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment."

Defendant insists that these instructions, when taken together, leave a critical link missing. In defendant's view, the jury may have found either that defendant was not subjectively provoked or that a person of average disposition would not have been provoked and therefore found there was not an adequate provocation as necessary for voluntary manslaughter. Nevertheless, defendant contends the jury should have been forewarned that it could consider the same provocation to reduce the murder from first to second degree. More to the point, defendant concludes that had the jury been given such a pinpoint instruction, there is a reasonable probability he would not have been convicted of first degree murder. We disagree.

At the outset, we note that the instructions, as given, accurately distilled the general principles of law governing first and second degree murder and voluntary manslaughter. Thus, this case is not analogous to the case cited by defendant, *People v. Valentine* (1946) 28 Cal.2d 121, where the combination of instructions, taken as a whole, obliterated the distinctions between first and second degree murder. (*Id*. at p. 134.) Here defendant does not argue the instructions were erroneous, only that his lawyer did not provide constitutionally adequate representation by failing to direct the jury's attention to the subtle nuance that provocation could also impact his ability to premeditate and deliberate. Would that fine-tuning of the instructions have made a difference?

Let us consider the evidence. The prosecution presented a compelling case. Unlike the quintessential heat-of-passion scenario where an unsuspecting spouse encounters his or her partner having a sexual relationship with a lover, defendant and Carrigan had broken off their relationship several months before the killings, defendant knew she had a new boyfriend, and defendant even knew the new boyfriend was planning to spend the night with Carrigan. He hid his car in a nearby parking lot, changed into black clothing, entered the house without knocking or alerting any of the occupants, and, armed with a knife, burst into Carrigan's bedroom while she was having sex with her new boyfriend.

Defendant contends he did not have time to premeditate or deliberate the killing because, as he entered the house, he

heard Carrigan making noises he interpreted as rape. While this provocation may not have been objectively reasonable, he argues the jury might have found it was sufficient to support his theory that he neither premeditated nor deliberated the killings. He contends the pinpoint instruction, on these facts, was essential.

As the Attorney General points out, the jury found true the special circumstance that defendant was lying in wait for his victims. The jury's finding demonstrates that the jury must have also necessarily found that the murders were of the first degree based on a theory of lying in wait within the meaning of Penal Code section 189. Defendant insists, however, that because lying in wait requires sufficient time to premeditate or deliberate, the failure to give the pinpoint instruction means the jury did not necessarily resolve the pivotal factual question, i.e., whether the provocation reduced his ability to premeditate or deliberate.

Defendant underestimates the jury, overstates the potential impact of the pinpoint instruction, and divorces theory from reality. Because the jury was properly instructed on the difference between first and second degree murder, including the elements of premeditation and deliberation, it was equipped to acquit him of first degree murder if it was not satisfied he had the requisite mental state and whether provocation or any other factor robbed him of the ability to premeditate or deliberate. While theoretically a focus on provocation might direct the jury's attention to the finer nuances of premeditation or

deliberation, there is no reasonable probability that a pinpoint instruction would have caused the jury to doubt his premeditation or deliberation here.

The jury found that defendant was lying in wait, thus rejecting the notion that suddenly hearing noises from the bedroom triggered his passionate and spontaneous rage. Moreover, hiding his car, changing into dark clothing, and sneaking into the house knowing his ex-girlfriend's lover was spending the night was powerful evidence that his malevolent intention preceded the so-called provocation of hearing her in distress. On this evidence, and given the jury's findings, it simply is not reasonably probable that the pinpoint instruction would have caused the jury to reevaluate its verdict of murder in the first degree. As a result, defendant suffered no prejudice from his lawyer's failure to request the instruction, and therefore, his inadequacy claim fails.

III

Sua Sponte Instructions

Involuntary Manslaughter. While acknowledging he was responsible for the killings that occurred during a knife assault, defendant contends he neither premeditated nor harbored malice. He was suffering from acute stress disorder triggered by his belief that his former girlfriend was being raped by Furtado and his fear that Furtado would attack him; he did not have the intent to kill. In defendant's view, there is substantial evidence that he stabbed the victims without malice, and the trial court had a sua sponte obligation to instruct the

jury on involuntary manslaughter. There is no sua sponte obligation to instruct on involuntary manslaughter where, as here, the defendant committed the killing during the course of an inherently dangerous assaultive felony. "[A]n unlawful killing during the commission of an inherently dangerous felony, even if unintentional, is at least voluntary manslaughter." (*People v. Garcia* (2008) 162 Cal.App.4th 18, 31 (*Garcia*).) Because the Supreme Court has disapproved the principles underlying *People v. Cameron* (1994) 30 Cal.App.4th 591 (*Cameron*), a case cited by defendant, *Garcia* is controlling and the court had no duty to instruct on involuntary manslaughter.

In *Garcia*, *supra*, 162 Cal.App.4th 18, the defendant complained that the trial court improperly failed to instruct his jury on involuntary manslaughter. The Court of Appeal upheld the ruling. It held that "[a]n unlawful killing during the commission of an inherently dangerous felony, even if unintentional, is at least voluntary manslaughter." (*Garcia*, at p. 22.) Because Garcia had assaulted his victim with a deadly weapon, an inherently dangerous felony, the trial court properly concluded the evidence would not support a conviction for involuntary manslaughter and therefore did not err in not instructing the jury on involuntary manslaughter as a lesser included offense of murder. (*Ibid*.)

In *Cameron*, the binding principle was that voluntary manslaughter required an intent to kill, and thus in the absence of an intent to kill, the killing, a fortiori, had to have been an involuntary manslaughter. (*Cameron*, *supra*, 30 Cal.App.4th at

p. 604.) However, in *People v. Lasko* (2000) 23 Cal.4th 101 and its companion, *People v. Blakeley* (2000) 23 Cal.4th 82, the Supreme Court held that voluntary manslaughter did not require an intent to kill. Thereafter, *Garcia* held that an unlawful and unintentional killing during the commission of an inherently dangerous felony is at least voluntary manslaughter. Our case fits neatly within the *Garcia* template.

By defendant's own admission, he stabbed his victims. On appeal, he does not argue otherwise. Thus, like his counterpart in *Garcia*, he committed an assault with a deadly weapon, an inherently violent felony. The statutory definition of involuntary manslaughter, as pertinent here, is the unlawful killing of a human being without malice "in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (Pen. Code, § 192, subd. (b).) Because Carrigan's and Furtado's deaths did not occur either in the commission of a dangerous misdemeanor or a lawful act in an unlawful manner or without due caution and circumspection, they do not fall within the statutory definition of involuntary manslaughter. Rather, as the court in *Garcia* concluded, the unlawful killings occurred, even if unintentionally, during the course of an inherently dangerous felony, and therefore they constituted at least voluntary manslaughter. The trial court did not err by failing to instruct sua sponte on involuntary manslaughter.

Unconsciousness. Defendant also asserts the trial court had a sua sponte obligation to instruct the jury on the complete defense of unconsciousness, despite the fact the defense was completely at odds with the defense he presented at trial. The court had no obligation to instruct on a defense that was inconsistent with the defendant's theory of the case. (*Rogers*, *supra*, 39 Cal.4th at p. 887.)

Defendant offered expert testimony that after his arrest he was in shock and unable to remember what had happened. The expert explained that in traumatic situations there can be "a splitting of consciousness or association." A second expert opined that defendant suffered "acute stress disorder" and was unable "to form the specific intent for the offenses for which he is charged."

Defendant did not argue at trial, however, that he was unconscious. To the contrary, he emphasized that he was not seeking an acquittal. He fully accepted responsibility for committing manslaughter. Defense counsel told the jury: "[B]efore I begin, I'm asking for a conviction on this case because my client's guilty. I'm asking for a conviction of manslaughter in two counts, use of a knife, two allegations. That's what I'm asking for. I'm not asking for a verdict of innocent. I've never asked for it. Never will. I'm not asking that Mr. Carrillo shed responsibility for this. Won't do it. He's not going to walk out of this courtroom a free man. We haven't pled insanity. We haven't pled any other defense other than what I want is manslaughter."

Later he continued: “I’m not asking for an innocent verdict, like I said. Responsibility is responsibility.” He reiterated, “I want manslaughter convictions.”

The expert testimony was offered to support defendant’s theory that he was guilty of manslaughter, not murder. His theory was consistently and clearly expressed. Thus, it was reasonable for the court to conclude that the complete defense of unconsciousness would have been inconsistent with his defense and his concession that he was not entitled to an acquittal. In these circumstances, the trial court had no obligation to instruct the jury on the defense of unconsciousness.

IV

Lying in Wait

Defendant raises three issues just “to preserve [them] for federal habeas corpus review.” He acknowledges that California case law involving various aspects of lying in wait does not support his arguments. We need not consider his arguments in the face of an even more fundamental flaw. The jury found that the murders were committed with deliberation and premeditation and that he committed multiple murders within the meaning of Penal Code section 190.2, subdivision (a)(3). Thus, any potential error in the jury’s finding of the lying-in-wait special circumstance is harmless in light of its simultaneous finding of the multiple-murder special circumstance.

We need only point out that the California Supreme Court has rejected each of his arguments involving various aspects of lying in wait.

In *People v. Russell* (2010) 50 Cal.4th 1228, the Supreme Court held: "Because lying in wait and deliberate and premeditated theories of murder are simply different means of committing the same crime, juror unanimity as to the theory underlying its guilty verdict is not required. Defendant presents us with no compelling reason to reconsider our sound prior reasoning to that effect." (*Id*. at p. 1257.) Under compulsion of *Russell*, defendant's first argument, that the court committed reversible error by failing to instruct the jury to unanimously agree on whether the murders were premeditated or committed by lying in wait, fails.

Next, defendant claims the special circumstance of lying in wait is unconstitutionally vague under the due process clause of the Fourteenth Amendment. The California Supreme Court upheld the constitutionality of the former version of the lying-in-wait special circumstance. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1310.) Prior to 2000 the special circumstance of lying in wait applied to a first degree murder in which the defendant "intentionally killed the victim while lying in wait." (Pen. Code, § 190.2, former subd. (a)(15).)

In 2000 the electorate amended the lying-in-wait special circumstance with the inconsequential change that a defendant who "intentionally killed the victim by means of lying in wait" commits first degree murder. (Pen. Code, § 190.2, subd. (a)(15).) The Fourth District Court of Appeal held that the current version of the lying-in-wait special circumstance, like its predecessor, is not constitutionally vague. (*People v.*

Superior Court (Bradway) (2003) 105 Cal.App.4th 297, 300-301, 311 (*Bradway*).)

Similarly, the California Supreme Court held that the special circumstance of lying in wait provides a sufficiently principled distinction between different classes of murderers and thus comports with the Eighth Amendment. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.) The current version of the lying-in-wait special circumstance continues to comport with the Eighth Amendment. (*Bradway*, *supra*, 105 Cal.App.4th at p. 311.)

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

HULL, J.

MURRAY, J.