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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE REFUGIO TELLEZ,

Defendant and Appellant.

C067476

(Super. Ct. No. SF112270A)

Defendant Jesse Refugio Tellez stabbed his wife to death in their neighbor's front yard while she held their three-year-old son in her arms. The jury trial was bifurcated into a guilt phase and a sanity phase. In the guilt phase, the jury found defendant guilty of first degree murder (Pen. Code, § 187)¹ and child endangerment (§ 273a, subd. (a)). The jury also found that defendant personally used a knife during the commission of the crimes. (§ 12022, subd. (b)(1).) In the sanity phase, the jury found that defendant was legally sane when he committed

¹ Undesignated statutory references are to the Penal Code.

these crimes. Thereafter, the trial court found that defendant had a prior conviction for first degree burglary, a serious felony offense (§§ 667, subds. (a)-(i), 1170.12), and sentenced him to state prison for an indeterminate term of 50 years to life plus a consecutive determinate term of 18 years.

Defendant's contentions on appeal are limited to the guilt phase of the trial. He claims the trial court prejudicially erred by declining his request to instruct the jury on (1) involuntary manslaughter based on mental illness, and (2) involuntary manslaughter based on unconsciousness caused by voluntary intoxication. We conclude that the evidence was insufficient to support an instruction on involuntary manslaughter based on mental illness or based on unconsciousness caused by voluntary intoxication. And even if there was error in failing to give the requested involuntary manslaughter instructions, we conclude that any error was harmless. By finding defendant guilty of first degree premeditated murder and rejecting the lesser included offenses of second degree murder and voluntary manslaughter, the jury necessarily concluded that neither his mental problems nor his voluntary intoxication prevented him from forming the intent to kill his wife and premeditate her death. Accordingly, we affirm the judgment.

FACTS

A.

Background

Defendant and Tevanie Tellez² married in 1997. Their daughter Adrianna was born the same year. Their son Phillip was born in 2006. Defendant and Tevanie argued "quite a bit" during the marriage. Defendant "drank heavily" and was quick to lose his temper, both when he was drinking and while sober. Defendant was verbally abusive to Tevanie. He regularly told her to "go fuck herself," called her demeaning names in Spanish, and told her that "she had an ugly rat's nest in her hair."

Defendant was also physically abusive and threatened Tevanie's life. In 2003, when Adrianna was six years old, she witnessed defendant throw a beer bottle at her mother. As Adrianna explained, while her parents were "screaming and arguing," defendant "lost his temper really bad" and threw the bottle at her mother. Tevanie ducked and the bottle shattered against a wall. On another occasion, around the same time period, defendant told Tevanie's brother, Kevin Lantz, that he would kill Tevanie if she ever left him. Defendant was "calm and serious" when he made the threat.

During the summer of 2008, defendant and Lantz had a conversation in defendant's driveway while defendant loaded his vehicle with provisions. Phillip was in the vehicle. As Lantz

² Due to shared surnames, we refer to the parties by their first names.

explained: "[H]e told me directly that I need to watch out, we are all going down, and he's not gonna be around for it. And he got kind of irate and started saying my sister was a snitch." Defendant then took two-year-old Phillip to Mexico without telling Tevanie or anyone else in the family where they were going.

About a month later, Tevanie discovered where defendant had taken their son. Lantz drove Tevanie and Adrianna to Mexico to see Phillip, stayed for a couple days, and then brought Adrianna back to California. Tevanie decided to stay in Mexico with defendant and Phillip. About two months later, Lantz brought Adrianna back to Mexico to stay with her parents and brother while defendant and Tevanie made plans to bring the entire family back to California. When Lantz and Adrianna arrived, they noticed that Tevanie had a black eye and the side of her face was also bruised.

About a month later, Tevanie brought Adrianna and Phillip back to California and stayed with Lantz until defendant also returned from Mexico. The family then moved into a duplex on South Veach Avenue in Manteca.

About a month before the murder, defendant asked Adrianna what she would do if her mother died and defendant went away. Defendant was not drunk when he asked her the question. Nor had he and Tevanie been arguing. Around the same time period, a mail carrier heard defendant and Tevanie arguing in the carport. When he approached, he saw defendant with his hands around Tevanie's neck. The mail carrier asked if Tevanie was okay.

Defendant removed his hands and went inside the duplex. Tevanie responded: "[E]verything is good, don't worry about it, it's all right." On another occasion, the mail carrier saw Tevanie with a black eye. And on other occasions, he saw bruises on her arm.

B.

The Murder

Defendant murdered Tevanie during the early morning hours of July 2, 2009. He stabbed her to death while she held three-year-old Phillip in her arms and while 12-year-old Adrianna screamed for help.

The events leading to the murder began the day before. Tevanie's cousin, Cervantez, brought his son over to defendant's duplex. Cervantez's son, Little Jeramie, was about a year older than Phillip. That afternoon, defendant told Cervantez that he "wanted to get out of the house" and the men left to go to a sports bar. A few hours later, after sharing a couple pitchers of beer, defendant and Cervantez returned to the duplex. About 30 minutes later, they again decided to leave. This time, they drove to a house in Lathrop where Cervantez was staying.

At the house, defendant and Cervantez each drank a 32-ounce beer. According to Kenneth Fink, the owner of the house, defendant "had a pretty good buzz on" and was "slurring his words," but was not "falling down" drunk. According to James Bergen, another resident of the house, defendant was "calm, just sitting there talking," but did appear to be intoxicated and annoyed Bergen by "talking nonsense." As Bergen explained, "out

of nowhere," defendant asked him if he had ever killed a cow and then described how it felt and sounded to stab a cow.³ Bergen confirmed that defendant was not "having a hard time walking" while he was at the house.

Around midnight, defendant and Cervantez returned to the duplex. Phillip and Little Jeramie were already asleep. Cervantez decided to allow his son to spend the night and went to a friend's house.

As soon as Cervantez left, defendant and Tevanie got into an argument in their bedroom. Adrianna, who was playing on the computer in the living room, heard them argue for about 20 minutes. Tevanie then came out of the bedroom and lay on the couch in the living room. Defendant went into the kitchen, grabbed a knife from the sink, walked back to the bedroom, and stabbed the bedroom door with the knife. Defendant then turned and walked towards Tevanie, who pleaded for him to stop and then ran out of the duplex. At this point, Adrianna ran after her mother, catching up with her halfway down the driveway. Tevanie screamed for help. Defendant followed with the knife, saying: "Don't do this, Tevanie." By the time Tevanie and Adrianna reached the end of the driveway and turned left on South Veach Avenue, defendant was no longer following them.

³ This was not the first time defendant had made such statements. Several years earlier, defendant told Lantz that the liver and kidneys make "a popping sound" when they are stabbed.

Meanwhile, Oran Alicea was drinking a 40-ounce bottle of malt liquor in the back yard of a friend's house a few houses away from defendant's duplex. He heard Tevanie's screams and decided to ride his bike down the street to investigate. Alicea caught up to Tevanie and Adrianna after they made a left turn onto Lupton Street. Tevanie was "trembling" and "crying." Alicea, still drinking his beer, asked her what was going on. Tevanie answered: "My husband's drunk. He's gonna kill me." Alicea then accompanied Tevanie and Adrianna back to the duplex. On the way, defendant rode past them on a mountain bike. Tevanie pointed him out to Alicea and said: "Don't look, don't say nothing." Alicea did not confront defendant and noticed that he was "wiggling out" and "breathing heavy." At the duplex, Tevanie called 911. She told the operator: "[M]y husband is drunk on a bicycle and he came in the house intoxicated and grabbed a knife out of the kitchen, put it in the door, and was being like very obnoxious and I'm scared for my life and I ran three blocks."

Police arrived a short time later. Tevanie was still "extremely scared, upset, a little bit shaking." Adrianna and Phillip were holding onto her. Tevanie told police that defendant was "extremely intoxicated" and had a knife, but that she did not want him arrested for anything other than being drunk in public. Police searched the area for about 30 minutes, but did not find defendant. They left after Tevanie declined their offer to drive her and the children to another residence where Tevanie's mother was staying. Tevanie and Phillip then

went to sleep in Tevanie's bed. Adrianna stayed up for awhile playing on the computer in the living room. At some point, defendant came back to the duplex, went into the bedroom and changed his clothes, and then left again. As he was leaving, Adrianna asked him to stay. Defendant kissed her forehead, told her that he would never hurt her, and left. Adrianna then joined her mother and brother in bed. Little Jeramie was still on the couch, having slept through the ordeal.

Around 2:30 a.m., Adrianna awoke to the sound of her mother screaming. As she lifted her head, she saw her mother run out of the bedroom holding Phillip in her arms, pleading: "Stop, Jesse." Defendant followed. Tevanie ran out of the duplex with Phillip. Adrianna ran past her father, grabbed Little Jeramie from the couch, and caught up with her mother and brother halfway down the driveway. When she looked back, Adrianna saw her father following them with the same knife in his hand. He walked quickly, "[l]ike he knew what he was doing." Defendant caught up to Tevanie and Phillip in a neighbor's yard. Tevanie repeated: "Stop it, Jesse." Adrianna remained in the street with Little Jeramie and screamed: "He's killing my mommy. He's killing my mommy."

Defendant stabbed Tevanie three times. With the first stab, defendant plunged the knife into Tevanie's chest, slicing completely through the heart and also piercing the left lung. This was a fatal injury that required a large amount of force to inflict. Defendant also stabbed Tevanie between the chest and abdomen, penetrating the spleen and hitting the spine. This was

also a fatal injury, but because the first stab wound penetrated the heart and disrupted the flow of blood through Tevanie's body, it produced little loss of blood. This wound also required a large amount of force to inflict. The final stab wound was to the lower abdomen. The knife passed through the colon and intestines and penetrated the liver. Again, by the time this wound was received, Tevanie's blood pressure was too low for there to be more than a minimal amount of bleeding.

Steve Bardin lived at the corner of South Veach Avenue and Lupton Street and heard Adrianna screaming while he and some friends were smoking methamphetamine in the garage. Angela Carr, who was visiting another person who lived at the house, also heard the screams while she was trying to sleep. Carr ran outside to see what was going on. Bardin and another man grabbed baseball bats and also ran outside. As they approached defendant, he was "straddled over" Tevanie. Carr yelled: "Oh, my God, I really think he's killing her. He is, he's killing her." At this point, Bardin and the other man passed Carr. Defendant stood up and stumbled over Tevanie. Bardin swung his bat at defendant, but missed and hit a garbage can that was on the side of the street. Defendant backed up, turned around, slowly walked down his driveway, and disappeared through a fence gate.

Another neighbor brought a phone and some towels to Carr, who was applying pressure to Tevanie's wounds and repeating: "Stay with me, just stay with me, you're going to be okay." Carr called 911. Bardin took the children across the street.

Police and paramedics arrived a short time later. Tevanie had a faint pulse, but was nonresponsive. She was taken to the hospital and pronounced dead on arrival.

Meanwhile, defendant threw the knife on top of a neighbor's roof, returned to the scene, and was taken into custody without incident. He did not have any trouble walking to or getting in the patrol car. Defendant was transported to the Manteca Police Department and placed in a holding cell. He smelled like alcohol, but did not have any trouble getting out of the patrol car, standing on his own, or walking to the holding cell. While in the cell, defendant was "mumbling" to himself for a while and also spent some time sitting quietly. At one point, defendant stood up, started walking toward the officer charged with watching him, clenched his fists, and told the officer "just to shoot him, you know, just to shoot him, and then he pointed right at his forehead." The officer told defendant to sit down. Defendant complied. About 45 minutes to an hour after defendant arrived at the police department, he was taken to the hospital to have his blood drawn. He did not have any trouble walking to the patrol car, getting into or out of the car, or following instructions while at the hospital.

C.

The Defense

At trial, defendant did not dispute that he stabbed Tevanie to death in front of their children. Instead, he argued that he did not possess the requisite mental state to be found guilty of first degree murder. In support of this defense, Eugene

Nguyen, M.D., testified concerning certain medications defendant was taking for depression, anxiety, and insomnia. Defendant also adduced evidence that he was drinking and acting "weird" the night he killed his wife. Notwithstanding this evidence, which will be discussed in greater detail in the discussion that follows, the jury found defendant guilty of first degree murder.

DISCUSSION

I

Duty to Instruct on Lesser Included Offenses

Defendant contends the trial court prejudicially erred by declining his requests to instruct the jury on involuntary manslaughter based on mental illness and unconsciousness caused by voluntary intoxication. We begin with some general principles of law that guide our review of these contentions.

In a criminal case, the jury "may find a defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged." (§ 1159.) Because of this, "even absent a request, and even over the parties' objections, the trial court must instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 118; *People v. Barton* (1995) 12 Cal.4th 186, 194-195.) Thus, in a murder case, "[i]f the evidence presents a material issue of whether a killing was committed without malice, and if there is substantial evidence the defendant committed involuntary manslaughter, failing to instruct on involuntary manslaughter would violate the

defendant's constitutional right to have the jury determine every material issue." (*People v. Abilez* (2007) 41 Cal.4th 472, 515 (*Abilez*).)

Our review is de novo. We must independently determine whether the trial court should have given instructions on the lesser included offense of involuntary manslaughter in this case. (*People v. Turk* (2008) 164 Cal.App.4th 1361, 1367 (*Turk*); see *People v. Manriquez* (2005) 37 Cal.4th 547, 584.)

II

Involuntary Manslaughter Based on Mental Illness

We now turn to defendant's assertion that the trial court prejudicially erred by declining his request to instruct the jury on involuntary manslaughter based on mental illness. We conclude that such an instruction was not supported by the evidence. Further, even if failing to give such an instruction was error, we conclude that any such error was harmless.

"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).'" (*People v. Rogers* (2006) 39 Cal.4th 826, 884, quoting *People v. Saille* (1991) 54 Cal.3d 1103, 1117.)

Defendant argues that the following evidence supports the giving of an involuntary manslaughter instruction in this case. Dr. Nguyen testified that he began seeing defendant in September 2008. At the time, defendant complained of back pain, anxiety, depression, and insomnia. Defendant stated that he had

experienced "sadness for many years," with the symptoms worsening in the previous two months due to a death in the family and the fact that defendant's prior job, which he quit in July 2008, required him to transport dead bodies at the morgue. Dr. Nguyen diagnosed defendant with a "major depressive disorder" and "generalized anxiety disorder." Defendant was prescribed Lexapro, an antidepressant, at a daily dosage of 10 milligrams. At the end of this initial visit, defendant presented Dr. Nguyen with a claim for disability benefits.

In October 2008, defendant returned to Dr. Nguyen's office for a follow-up appointment. During the visit, Dr. Nguyen learned from Tevanie that defendant had been drinking heavily while the family was in Mexico the previous summer and that his drinking continued when they came back to California. Defendant also told Dr. Nguyen that his symptoms of depression and anxiety had not improved since taking the Lexapro. Dr. Nguyen increased the dosage to 20 milligrams and added alcohol abuse to defendant's diagnosis. About three weeks later, defendant returned to Dr. Nguyen's office still complaining of being "withdrawn, anxious, and isolated." Dr. Nguyen noted that these symptoms were consistent with post-traumatic stress disorder triggered by defendant's prior work at the morgue. Defendant also complained of fatigue, chills, and insomnia. Dr. Nguyen continued the dosage of Lexapro at 20 milligrams.

In November 2008, defendant returned to Dr. Nguyen's office and stated that he felt less anxious about working with dead bodies at the morgue, but that he still did not feel that he

could return to work. Defendant complained of chills, night sweats, and insomnia. He also stated that he returned to drinking heavily after cutting back for some period of time. Dr. Nguyen reduced the Lexapro dosage to 10 milligrams and also prescribed Antabuse for defendant's alcoholism. About two weeks later, defendant returned and explained that he had not taken the Antabuse, but that he had reduced his alcohol consumption to one or two beers per day. He was feeling "more anxious and irritable," which Dr. Nguyen thought may be caused by the decrease in alcohol consumption. Dr. Nguyen continued the Lexapro dosage at 10 milligrams and also prescribed Ativan at a dosage of one milligram every eight hours as needed for the anxiety.

In January 2009, Dr. Nguyen saw defendant and did not change the prescriptions. The following month, defendant returned and stated that his depression had been worse over the previous three days. He also complained of neck pain and admitted to resuming his prior level of alcohol use. Dr. Nguyen again increased the dosage of Lexapro to 20 milligrams. Defendant continued to complain about insomnia. Dr. Nguyen prescribed Lunesta and added "[i]nsomnia due to a mental disorder" to defendant's diagnosis.

In March 2009, defendant returned to Dr. Nguyen's office and stated that "his depressive symptoms were improving," but he still complained of "fatigue, along with his prior symptoms." Dr. Nguyen continued defendant on 20 milligrams of Lexapro. The following month, defendant told Dr. Nguyen that his level of

anxiety had increased, but that he had started seeing a psychiatrist. Dr. Nguyen decreased the dosage of Lexapro to 10 milligrams and added Hydroxyzine, an antihistamine medication that is also used to treat anxiety. Dr. Nguyen encouraged defendant to continue seeing the psychiatrist. This was the last time Dr. Nguyen saw defendant. A few days later, someone contacted Dr. Nguyen's office requesting that he change defendant's Lexapro prescription to Paxil, a less expensive antidepressant. Dr. Nguyen prescribed 20 milligrams of Paxil.

At no point during Dr. Nguyen's treatment of defendant did he complain of hallucinations, exhibit symptoms of psychosis, or state that he had suicidal or homicidal thoughts. However, Dr. Nguyen did testify that suicidal and homicidal tendencies could be a symptom of depression, and an abrupt stoppage of the medications defendant was taking could result in reoccurrence of depression, anxiety, and irritability. Dr. Nguyen also testified, hypothetically, that a person with defendant's psychiatric symptoms and alcohol dependence, who recently lost his job, cars, and house, and who was arguing with his wife over money, could possibly "overreact to stress and apprehension" causing "impulsive behavior."

Defendant also relies on the testimony of Adrianna, who recalled her father "moaning" and "letting out his feelings" in his bedroom about two weeks before the murder. She described this behavior as "different" because defendant usually kept his feelings inside. Adrianna also testified that her father's behavior changed dramatically after he returned from Mexico.

When she spoke to a defense investigator about defendant following her mother with the knife, she said: "My dad wasn't my dad." At trial, she explained that this was because defendant called out to Tevanie in a "calm but serious" voice, which she described as "weird."

Finally, defendant relies on the events leading up to the murder, from the time defendant left with Cervantez to drink at the sports bar to the time he stabbed his wife in his neighbor's yard, which we have already described in detail.

We agree with the Attorney General that this evidence, even viewed in a light most favorable to defendant (*People v. Stewart* (2000) 77 Cal.App.4th 785, 795-796), is insufficient to support an instruction on involuntary manslaughter based on mental illness. While the evidence indicates that from September 2008 through April 2009, defendant was being treated for depression, anxiety, and insomnia, possibly attributable to his prior job at the morgue that he quit a year before the murder, it does not support a finding that any of these conditions prevented him from harboring malice on the day he stabbed his wife to death.

While Dr. Nguyen testified that homicidal tendencies *could* be a symptom of depression, and an abrupt stoppage of the medications defendant was taking *could* result in reoccurrence of depression, there is no evidence that defendant abruptly stopped his medication. Indeed, defendant did not complain of homicidal thoughts during his visits with Dr. Nguyen. Nor does the theoretical possibility that defendant "overreact[ed] to stress and apprehension" or acted "impulsive[ly]" exculpate defendant

from liability for murder, or at the very least, heat of passion voluntary manslaughter. Again, in order for an instruction on a lesser-included offense to be required, there must be "substantial evidence the defendant is guilty *only of the lesser.*" (*People v. Birks, supra*, 19 Cal.4th at p. 118, italics added.)

Finally, the evidence that defendant was emotional two weeks before the murder, and acted "weird" the night of the murder, does not rise to the level of requiring an involuntary manslaughter instruction. The fact that defendant let out his emotions two weeks before the murder does not suggest an inability to harbor malice. Nor does any of defendant's allegedly strange behavior the night of the murder. For example, repeating Tevanie's name in a calm voice while following her with the knife is consistent with a deliberate intent to kill her while simultaneously desiring to avoid waking up the neighbors. Moreover, the conversation about the sound that escapes from a cow when the animal's organs are stabbed is evidence that defendant was thinking about killing his wife while at the house in Lathrop. This is evidence that he had the intent to kill, not the opposite. And while the statement was strange, it was not out of character for defendant, who made a similar statement to Lantz years earlier. Nor does the fact that defendant rode a bike while "wiggling out" and "breathing heavy" after chasing Tevanie with a knife the first time mean that he was unable to form the intent to kill about two hours later when he finished the job. Indeed, in the meantime,

defendant returned home, changed his clothes, kissed Adrianna, and told her that he would never hurt her. The facts of this case did not warrant an instruction on involuntary manslaughter.

In any event, we find any error in failing to instruct on involuntary manslaughter based on mental illness would be harmless. As was the case in *People v. Rogers, supra*, 39 Cal.4th 826, "[i]n addition to being fully instructed on first degree premeditated murder, the jury also was instructed on the lesser included offenses of implied malice second degree murder and heat-of-passion voluntary manslaughter, both of which require higher degrees of culpability than does the offense of involuntary manslaughter. The jury rejected the lesser options and found defendant guilty of first degree premeditated murder. Under the circumstances, there is no reasonable probability that, had the jury been instructed on involuntary manslaughter, it would have chosen that option." (*Id.* at p. 884.)

Moreover, here, the jury was also instructed with CALCRIM No. 3428, which provided: "You have heard evidence that the defendant may have suffered from a mental 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 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 with the required intent or mental state. For murder the mental state required is malice aforethought. For first degree murder the additional mental state required is premeditation and deliberation. For

the lesser included offense of voluntary manslaughter the intent required is a specific intent to kill. For the lesser included offense of attempted child abuse likely to produce great bodily injury or death the intent required is specific intent. If the People have not met this burden, you must find the defendant not guilty." Thus, by finding defendant guilty of first degree premeditated murder, the jury must have concluded that his mental problems neither prevented him from forming the intent to kill his wife nor from premeditating her demise.

III

Involuntary Manslaughter Based on Voluntary Intoxication

We also reject defendant's claim that the trial court prejudicially erred by declining his request to instruct the jury on involuntary manslaughter based on unconsciousness caused by voluntary intoxication.

"A trial court must instruct the jury 'sua sponte on involuntary manslaughter based on unconsciousness' whenever 'there is evidence deserving of consideration that the defendant was unconscious due to voluntary intoxication.'" (*Turk, supra*, 164 Cal.App.4th at p. 1371, quoting *People v. Halvorsen* (2007) 42 Cal.4th 379, 418; see also *Abilez, supra*, 41 Cal.4th at pp. 515-516.)

As our Supreme Court explained: "When a person renders himself or herself unconscious through voluntary intoxication and kills in that state, the killing is attributed to his or her negligence in self-intoxicating to that point, and is treated as involuntary manslaughter. 'Unconsciousness is ordinarily a

complete defense to a charge of criminal homicide. [Citation.] If the state of unconsciousness results from intoxication voluntarily induced, however, it is not a complete defense. [Citation.] . . . [I]f the intoxication is voluntarily induced, it can never excuse homicide. [Citation.] Thus, the requisite element of criminal negligence is deemed to exist irrespective of unconsciousness, and a defendant stands guilty of involuntary manslaughter if he voluntarily procured his own intoxication.' [Citation.] Unconsciousness for this purpose need not mean that the actor lies still and unresponsive: section 26 describes as '[in]capable of committing crimes . . . [¶] . . . [¶] . . . [p]ersons who *committed the act* . . . without being conscious thereof.' [Italics omitted.] Thus unconsciousness "can exist . . . where the subject physically acts in fact but is not, at the time, conscious of acting." [Citations.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 423-424.)

As was the case in *Abilez, supra*, 41 Cal.4th 472, "[t]he evidence here shows defendant had consumed some unknown amount of alcohol, but there was no evidence he was so intoxicated that he could be considered unconscious." (*Id.* at p. 516.) After returning from a night of drinking with Cervantez, defendant got into an argument with Tevanie, grabbed a knife from the kitchen, stabbed it into the bedroom door, chased her out of the duplex, and then abandoned the pursuit. He apparently had the presence of mind to stay away from the duplex while the police were there. He then returned, changed his clothes, and left again, but not before telling Adrianna that he would never hurt her.

He spoke clearly and was not slurring his words when he told her this. Then, defendant came back to finish what he had started earlier in the night. He chased Tevanie down the street with the knife, “[l]ike he knew what he was doing,” and stabbed her to death. Defendant then left the scene, threw the knife on a neighbor’s roof, and returned a short time later to surrender himself to police. While he smelled of alcohol, he had no trouble walking or following directions. Like *Abilez*, “[n]othing in these facts even hints that defendant was so grossly intoxicated as to have been considered unconscious.” (*Ibid.*)

Nevertheless, defendant relies on *People v. Ray* (1975) 14 Cal.3d 20 (*Ray*), disapproved on another ground by *People v. Lasko* (2000) 23 Cal.4th 101, 110, in which our Supreme Court held that “an instruction on involuntary manslaughter is required if there is evidence that the accused is unable to entertain an intent to kill even though he has not lapsed into unconsciousness.” (*Ray, supra*, 14 Cal.3d at pp. 28-29; see also *People v. Webber* (1991) 228 Cal.App.3d 1146, 1162.)

We agree with the Court of Appeal’s decision in *Turk*, which explained that the *Ray* holding “was premised on then existing law regarding malice aforethought and the doctrine of diminished capacity” (*Turk, supra*, 164 Cal.App.4th at p. 1373), and no longer applies following the 1981 abolition of that doctrine and the 1995 amendment to section 22, subdivision (b). (*Turk* at p. 1376.) As the court explained: “Prior to 1981, voluntary intoxication could negate malice, both express and implied,

and/or intent to kill. [Citation.] Therefore, voluntary intoxication, even short of unconsciousness, could result in either voluntary manslaughter, where the defendant's intoxication negated malice, or involuntary manslaughter, where the defendant's intoxication negated both malice and intent to kill. [Citation.] After the 1981 abolition of the diminished capacity doctrine, voluntary intoxication could no longer reduce a killing from murder to voluntary manslaughter. [Citation.] However, prior to the 1995 amendment to section 22, subdivision (b), voluntary intoxication could still negate malice, both express and implied, and could also negate intent to kill. [Citation.] Thus, prior to 1995, voluntary intoxication could still result in a conviction for involuntary manslaughter. [Citation.]" (*Ibid.*)

The court continued: "It is no longer proper to instruct a jury, as Turk suggests, that 'when a defendant, as a result of voluntary intoxication, kills another human being without premeditation and deliberation and/or without an intent to kill (i.e., without express malice), the resultant crime is involuntary manslaughter.' This instruction is incorrect because a defendant who unlawfully kills without express malice due to voluntary intoxication can still act with implied malice, which voluntary intoxication cannot negate, in the wake of the 1995 amendment to section 22, subdivision (b)." (*Turk, supra*, 164 Cal.App.4th at p. 1376.)

Here, defendant asked the trial court to instruct the jury with CALCRIM No. 626, which would have correctly informed the

jury that voluntary intoxication causing *unconsciousness* is required in order to reduce murder to involuntary manslaughter. However, because defendant "agrees there is no evidence that [he] was 'unconscious' within the meaning of section 26," he argues on appeal that the trial court should have determined whether he, because of voluntary intoxication, lacked the capacity to form the intent to kill. But the question, as explained in *Turk, supra*, 164 Cal.App.4th at page 1376, is not whether defendant lacked the capacity to form the intent to kill. One can lack the capacity to harbor express malice and still have the capacity to harbor implied malice. The question is whether defendant's voluntary intoxication rendered him unconscious of his actions. That is the instruction defendant requested. And as he acknowledges, it was not supported by the evidence.

In any event, even if the trial court should have instructed on involuntary manslaughter based on voluntary intoxication, the error is harmless. "The jury was properly instructed on first degree murder, second degree murder and voluntary manslaughter. As in *People v. Rogers, supra*, 39 Cal.4th at page 884: 'The jury rejected the lesser options and found defendant guilty of first degree premeditated murder. Under the circumstances, there is no reasonable probability that, had the jury been instructed on involuntary manslaughter, it would have chosen that option.'" (*Abilez, supra*, 41 Cal.4th at p. 516.)

DISPOSITION

The judgment is affirmed.

_____ HOCH _____, J.

We concur:

_____ BUTZ _____, Acting P. J.

_____ DUARTE _____, J.