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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JONATHAN LAMAR PERRY,

Defendant and Appellant.

C068456

(Super. Ct. No. 08F05978)

A jury convicted defendant Jonathan Lamar Perry of second degree murder (count 1; Pen. Code, § 187, subd. (a); undesignated statutory references that follow are to the Penal Code), assault resulting in the death of a child under age eight (count 2; § 273ab), and felony child abuse (count 3; § 273a, subd. (a)). The victim in counts 1 and 2 was J.A.; the victim in count 3 was C.A.

The trial court sentenced defendant to an aggregate state prison term of 29 years to life, consisting of four years (the midterm) on count 3 plus 25 years to life on count 2. The court imposed but stayed a sentence of 15 years to life on count 1. (§ 654.)

Defendant contends the trial court erred as to count 1 by failing to instruct the jury sua sponte on voluntary manslaughter as a lesser included offense to murder, on the theory that the crime was committed during an unintentional, nonmalicious felonious assault that resulted in death. We affirm the judgment.

FACTS AND PROCEEDINGS

In June 2008 (all dates are in 2008 unless otherwise specified), defendant moved into the two-bedroom apartment of his girlfriend, Tiffany L. Tiffany had two sons, four-year-old J.A. and three-year-old C.A., and an 18-month-old daughter. Tiffany worked five days a week and also attended community college; defendant, who was unemployed, watched the children.

Tiffany saw defendant disciplining the boys by hitting them on the bottom with a belt and told him not to do that; she wanted him to use time-outs instead. She did not see him punch or shove them.

Sometime in June, defendant told Tiffany that J.A. was complaining of chest pain after C.A. had hit him. Tiffany took J.A. to his pediatrician, Dr. Dorothy Wilborn, on June 17. Dr. Wilborn found a centimeter-long bruise on J.A.'s sternum and soft tissue swelling on his chest measuring four inches by five inches. Dr. Wilborn told Tiffany that these injuries could have been caused only by an adult and would have to be reported to Child Protective Services (CPS). Dr. Wilborn did so.

When Tiffany asked defendant if he had hit J.A., defendant denied it. Tiffany believed him.

About a week later, a CPS caseworker came to the residence at a time when defendant was not home. The caseworker told Tiffany that it would be better if defendant did not watch the children. Tiffany was sure defendant knew of the CPS involvement, either because Tiffany told him about the visit or because the caseworker had been there

before and left a card which defendant gave Tiffany. (Tiffany pleaded no contest to one count of felony child endangerment arising out of the events of this case.)

On July 19, Tiffany took C.A. to a Kaiser urgent care facility because his face was discolored. She was told to take him to a Kaiser hospital, which she did after stopping at the apartment to tell defendant what was happening. C.A. was admitted to the hospital, and Tiffany stayed there with him, contacting defendant and the children by telephone that day and the next. Defendant did not mention any problems with J.A.

An examination of C.A. on July 21 revealed three broken ribs and a hemorrhage in the area of the adrenal gland. These injuries, which were two to four weeks old, could have resulted only from child abuse, possibly a single punch to the chest or stomach area by defendant. During defendant's interview with law enforcement on July 22 (see below), he admitted he had punched C.A. in the stomach a few times, most recently a week to 10 days earlier.

Around 3:47 a.m. on July 21 defendant called 911, giving a false first name. The taped call was played for the jury, and a transcript was introduced in evidence. Defendant said J.A. had had a seizure, and was now unconscious and not breathing. At the direction of the 911 operator, defendant administered CPR until the paramedics arrived around 3:50 a.m. They transported J.A. to the hospital, where he died.

Around 5:50 a.m. on July 21, Sacramento Sheriff's Detective Brian Shortz came to Tiffany's apartment. He saw that the shower/tub was wet. He also saw numerous apparent blood spots in the bathroom and on the wall of the hallway leading to it, all around 30 inches off the floor (corresponding to J.A.'s height). Towels with apparent blood spots were on the floor of the master bedroom and inside the master bedroom closet. Defendant was wearing a white T-shirt with dark brownish-red stains.

According to defendant's recorded statement to Detective Shortz, defendant claimed J.A. had suffered a seizure after midnight, but then said he was all right and stayed up watching television while defendant went to bed. When defendant checked on

him 10 minutes later, he was not breathing and did not have a pulse; defendant started CPR. Defendant also said he had showered around 10:00 or 11:00 p.m. and J.A. had not had an injury that needed to be cleaned up in the shower; however, Detective Shortz thought the shower had been used later than that, and the bathroom floor was soaking wet.

In a statement at a sheriff's substation later that day, defendant denied harming J.A. He claimed that when J.A. had a seizure, he bit his tongue, causing it to bleed.

At 8:12 p.m. on the same day, defendant left a voicemail message for Detective Shortz, also played for the jurors who were provided with a transcript. Defendant now said he had given J.A. a "whuppin" for urinating on himself earlier in the day. When J.A. cried, this "aggravat[ed]" defendant. J.A. ignored defendant's orders to stop crying and to go to bed. Defendant therefore pushed J.A. into a wall, against which he hit the back of his head, then fell forward, hitting the front of his head on the floor. Defendant admitted pushing J.A. twice. He also admitted punching J.A. in the chest or stomach once.

After hearing the message, Detective Shortz arrested defendant on July 22 and brought him in to a sheriff's substation, where defendant waived his *Miranda* rights and gave a videotaped statement. At that time, Detective Shortz determined that defendant was six feet four inches tall and weighed 300 pounds.

Defendant now said J.A. was up past midnight on July 21; when defendant tried to get him to go to bed around 1:00 or 2:00 a.m., J.A. defied him. Defendant shoved J.A. against the wall, using his fists and arms. J.A. hit the back of his head on the wall, then fell forward and hit the front of his head on the floor. Even after this, J.A. remained defiant, so defendant punched him in the stomach, then shoved him against the wall again, once more causing him to hit his head; this time defendant caught him before he fell to the floor. Defendant made J.A. take a shower then put him to bed while defendant lay down and watched television. Twenty or 30 minutes later, defendant checked on him

and found he was not breathing; defendant administered CPR for 20 minutes. He waited 30 minutes (or possibly “an hour or two”) after discovering J.A.’s condition before calling 911.

An autopsy showed that J.A. died from blunt force head injuries, in particular a skull fracture on the rear left side, probably caused when his moving head struck a stationary surface such as a floor or wall. The skull fractures caused J.A.’s brain to swell such that vital structures herniated in an area of the brain that controls respiration and heart beat, thus killing him. J.A. also suffered brain hemorrhages and multiple cerebral bruises in the front and temporal lobes and the right occipital lobe of his brain.

The forensic pathologist who conducted the autopsy testified that “it takes a lot of force to break a skull. It usually requires a fall from a significant height.”

In addition, J.A. suffered a laceration of the liver, probably caused by a punch, kick, or other impact, and had healing rib fractures; these injuries were a secondary cause of death. J.A.’s injuries (aside from the healing rib fractures) were consistent with being thrown into a wall twice and punched once in the chest or stomach; they probably could not all have resulted from a single push against a wall.

At the time of his death, J.A. was three feet, seven inches tall and weighed 42 pounds.

Defendant testified on his own behalf. He stated that his mother and his uncles disciplined him when he was a child by spanking (with a belt, spoon, and shoes) and by punching in the chest or stomach. During potty training, in particular, his uncles used their hands and fists on him as “tough love,” and it worked well. Such discipline never caused injuries requiring medical attention.

When defendant had to discipline Tiffany’s children, he used the methods he had learned during his childhood. He never meant to harm the children and never thought his conduct could do so; it was just supposed to cause them transitory pain. He denied hitting either of the boys with a closed fist before July 21.

Defendant claimed that no one told him anything he was doing before July 21 was abusive. He denied that Tiffany told him of Dr. Wilborn's opinion about the cause of C.A.'s injury, though he admitted that Tiffany said she had talked to CPS.

Defendant stated that on July 20, J.A. had a potty training accident and urinated on the living room floor; defendant spanked him and made him stand in the corner. In the early morning of July 21, J.A. urinated on himself, and then refused to go to bed. Feeling angry, defendant disciplined J.A. by shoving him against the wall. When J.A. bounced off the wall, his head struck the floor where it was covered only by a thin carpet. Still angry, defendant hit him in the stomach, and then pushed him against the wall again; his head again hit the wall, but defendant caught him before he fell to the floor again. Defendant did not recall how much force he used in the incident. J.A. had a seizure, bit his tongue, convulsed, and lost consciousness. Defendant tried to revive him by putting him in the shower and by giving CPR. Afterward, he hid the bloody towels he had used on J.A. in the closet in the hope the police would not find them.

Defendant admitted he was stressed and angry when he pushed and struck J.A. He knew that someone his size could do great damage to someone smaller.

Outside the jury's presence, the trial court and the parties stated for the record that no voluntary manslaughter instruction had been requested or would be given as to count 1. The jury was instructed on involuntary manslaughter as a lesser included offense to murder on that count, on the theory that defendant committed the lawful act of disciplining a child but did so with criminal negligence.

DISCUSSION

Defendant contends, relying chiefly on *People v. Garcia* (2008) 162 Cal.App.4th 18 (*Garcia*), that the trial court should have instructed sua sponte on voluntary manslaughter as to count 1 because defendant's testimony supported the theory that he

committed an unintentional killing without malice during the commission of an inherently dangerous felony.

In *Garcia* where the defendant testified that with the butt of a shotgun he “hit [the victim] in an automatic response to [the victim]’s lunge at the shotgun and did not aim for [the victim]’s face and did not intend to kill the man,” the trial court instructed the jury on voluntary manslaughter as a lesser included offense to murder. (*Id.* at p. 22.) The defendant also requested instructions on involuntary manslaughter, asserting that his testimony showed he killed without malice and without an intent to kill or a conscious disregard for human life. (*Id.* at p. 25.) But the trial court denied this request because the defendant had admitted to killing in the course of an inherently dangerous felony. (*Id.* at p. 26.) The appellate court upheld this ruling, holding that “an unlawful killing during the commission of an inherently dangerous felony, even if unintentional, is at least voluntary manslaughter.” (*Id.* at p. 31.) Since a voluntary manslaughter instruction was given in *Garcia*, the appellate court had no occasion to decide whether the trial court would have erred by failing to instruct sua sponte.

A decision published in August 2011, after the trial in this case, held that the trial court erred by failing to instruct sua sponte on “the *Garcia* theory of voluntary manslaughter” because substantial evidence showed that the defendant killed the victim while engaged in an inherently dangerous felony (assault with a deadly weapon) but did not subjectively appreciate that her conduct endangered the victim’s life. (*People v. Bryant* (2011) 198 Cal.App.4th 134, 153, review granted Nov. 16, 2011, S196365 (*Bryant*); see *id.* at pp. 153-155.) The court noted that this theory of voluntary manslaughter was already “at issue in a case currently pending before the Supreme Court. (See *People v. Cravens* (Aug. 18, 2010, D054613 [nonpub. opn.], review granted Nov. 23, 2010, S186661.)” (*Bryant, supra*, 198 Cal.App.4th at p. 153, fn. 19.)

In this matter, we need not join the conversation regarding the legal viability of a charge of voluntary manslaughter based upon an unlawful but unintentional killing occurring during the commission of an inherently dangerous felony.

In *People v. Moon* (2005) 37 Cal.4th 1 (*Moon*), the California Supreme Court decided that, applying the accusatory pleading test for lesser included offenses, the crime of joyriding was a lesser included offense of driving or taking a vehicle in violation of Vehicle Code section 10851. Nonetheless, a sua sponte duty on the part of the trial court to instruct on joyriding did not arise in that matter because “the evidence defendant intended to deprive [the victim] of her car permanently was overwhelming, and the evidence he merely intended to drive it temporarily and then return it to her was virtually nonexistent.” (*Id.* at p. 27.)

“Only by unreasonably rejecting the evidence could a jury have reached the conclusion that defendant intended to return the car to its owner. Accordingly, . . . there being only insubstantial evidence he intended to deprive [the victim] of her car only temporarily, we conclude the trial court did not err . . . in failing to instruct sua sponte on joyriding as a lesser included offense.” (*Moon, supra*, 37 Cal.4th at p. 27.)

So too here. In an attempt to avoid a finding of implied malice and thereby to defend against the charge of murder, defendant denied that he knew his acts relating to J.A. were dangerous to human life. He testified that he had been disciplined in the same manner when he was a child without serious harm.

The evidence that he in fact knew his acts were dangerous to human life was overwhelming. At the time of J.A.’s death, defendant stood six feet, four inches tall and weighed 300 pounds. J.A. was three feet, seven inches tall and weighed 42 pounds. Defendant admitted that he knew that someone his size could do great damage to someone smaller.

Defendant also admitted that, on July 20, he was angry at J.A. and shoved him against a wall and J.A. bounced off of the wall and fell, hitting his head on the floor

which was covered only by a thin carpet. Even after causing that, still angry, defendant hit the child in the stomach and then pushed him against the wall again. Defendant admitted at trial that he was angry and stressed when he pushed and struck J.A.

The forensic pathologist found a skull fracture during the course of J.A.'s autopsy which could occur only through the application of "a lot of force." The defendant also lacerated J.A.'s liver consistent with his having punched J.A. in the chest or stomach.

Tiffany testified that she had to take J.A. to a doctor approximately a month prior to his death after he complained of chest pain. The doctor found injuries that could only have been caused by an adult.

Two days before J.A.'s death, Tiffany took C.A. to the hospital where an examination revealed three broken ribs and a hemorrhage in the area of the adrenal gland which injuries could only have been the result of child abuse, possibly a single punch to the chest or stomach area. During the course of an interview with law enforcement, defendant admitted that he had punched C.A. a week or 10 days earlier.

In sum, there was overwhelming evidence that defendant knew at the time of his acts that those acts were dangerous to human life and only insubstantial evidence that he did not. Only by unreasonably rejecting the evidence could this jury have found that defendant did not know that his abuse of four-year-old J.A. was dangerous to J.A.'s life. The court did not err by failing to instruct, *sua sponte*, on the lesser included offense of voluntary manslaughter.

DISPOSITION

The judgment is affirmed.

HULL, J.

We concur:

RAYE, P. J.

BLEASE, J.