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

THE PEOPLE,

Plaintiff and Respondent,

v.

BILLY JAMES RAY,

Defendant and Appellant.

C068698

(Super. Ct. No. 10F04298)

Defendant Billy James Ray was convicted of second degree murder. The trial court sentenced him to a determinate term of one year in prison plus a consecutive indeterminate term of 15 years to life.

Defendant contends:

(1) the trial court erred in failing to fully instruct the jury on lesser included offenses, because (a) it did not give the “heat of passion” manslaughter instruction sua

sponte, and (b) it did not instruct the jury that killing with a conscious disregard for life can also be manslaughter; and

(2) there was insufficient evidence to support his murder conviction.

Regarding defendant's contention that the trial court erred in not giving the "heat of passion" manslaughter instruction sua sponte, we conclude the claim has no merit because there is no evidence of sufficient provocation.

As for defendant's contention that the trial court erred because it did not instruct the jury that killing with a conscious disregard for life can also be manslaughter, we conclude the jury was adequately instructed that a killing committed with a conscious disregard for human life is reduced to voluntary manslaughter if defendant acted in imperfect self-defense.

Finally, we conclude defendant's second degree murder conviction is supported by substantial evidence. There is evidence from which the jury could reasonably conclude defendant was guilty of second degree murder.

We will affirm the judgment.

BACKGROUND

Troy Wheeler and his girlfriend Julie Morris were the parents of a young girl. Morris's friend, Mike McMillan, developed romantic feelings for Morris (although she did not return them), and when she was present McMillan would ask his nephew, defendant, to leave. McMillan "never wanted [defendant] around." As a result, defendant was angry with Morris.

McMillan invited Morris and Wheeler to spend the weekend at his residence. They smoked methamphetamine and then Wheeler and his daughter went to sleep. While they were sleeping, Morris and McMillan bought food at a market. When they returned to the residence, Morris consumed some gamma-hydroxybutyric acid (GHB).

Defendant arrived with his friend Jenelle Cobb. At some point, defendant smoked methamphetamine with Morris and McMillan. Defendant told Morris that he "wasn't

doing good, that he was tripping out.” Defendant said he “had been up for four days, and that people . . . stole his phone.”

Morris took additional GHB and went to sleep around midnight. Later, Morris and Wheeler woke up to loud noise like something was being knocked down or thrown. McMillan and defendant were arguing. McMillan wanted defendant to lie down and go to sleep, but defendant said it was really hot in the room. McMillan said Morris and Wheeler were in the living room where the cooler was located and that defendant should just go to bed. After arguing loudly for five to 10 minutes, McMillan told defendant to leave.

Wheeler screamed, “what the fuck is going on . . . my family is out here.” Wheeler went to the couch to put on his shoes.

Defendant emerged from McMillan’s bedroom and obtained a knife from the kitchen counter. Defendant asked Wheeler, “what the fuck are you putting your shoes on for, homeboy? I’m in one of those moods. I feel like stabbin’ a motherfucker.”

Wheeler said he did not want any problems and swung his arms in an up and down motion, “[m]uch like a windshield washer.” But defendant quickly stabbed Wheeler in the heart, threw the knife, told Morris he was sorry, and left.

Morris put pressure on Wheeler’s stab wound and performed CPR. At Morris’s request, McMillan called 9-1-1 and Sacramento County Sheriff’s Deputy William Griggs responded to the call. When he arrived he saw another deputy performing CPR on Wheeler, who was bleeding profusely. Shortly after Griggs arrived, Wheeler was pronounced dead.

Detective Stanley Swisher subsequently arrived at the scene. He found a serrated knife in the kitchen with blood, food and hair on it. Wheeler was lying next to the couch in the living room. Shoes were near Wheeler’s head and left leg and a pair of socks was near his body.

An autopsy revealed that Wheeler had a single stab wound to his left chest area. The knife perforated Wheeler's heart and caused his death. There were no defensive wounds on Wheeler's body. Wheeler's blood tested positive for methamphetamine.

Detective Tom McCue was present during the apprehension of defendant. There were no visible signs of a fight or a struggle anywhere on defendant's body.

Cobb testified that, on the day of the incident, she went to McMillan's house with defendant. She explained that Wheeler was upset and got into an argument with Morris about drugs.

Mark Maher testified that he was at McMillan's house on the day of the incident. He observed Wheeler take a metal pipe and strike his own hand with it.

Defendant also testified at trial. He admitted stabbing Wheeler. He said he got into a heated argument with his uncle. Defendant had been consuming drugs for three days and "was coming down off it." He walked down the hallway and Wheeler jumped up saying "what the fuck" like he was angry. Defendant asked Wheeler "why you putting on your shoes," and then Wheeler started to approach him. Defendant "felt intimidated" so he "grabbed a knife." He "had been up for three days" and "wasn't about to get in a scuffle" with Wheeler.

Defendant testified that, earlier in the day, he had seen Wheeler with a pipe in his hand. He had also known Wheeler to have pocket knives and brass knuckles. When defendant grabbed the knife, he was planning to use it to protect himself if something were to occur. He stabbed Wheeler but claimed he "was just trying to scare him, to like let him know [to] back off." Defendant fled from the house, jumped a fence, and hid in some bushes about a half mile away.

Defendant denied that he intended to kill Wheeler. He acknowledged he was angry when he left his uncle's room, but he claimed he did not transfer that anger to Wheeler; rather, he was "getting over it." Defendant denied that he had said he "fe[lt] like stabbing somebody or words to that effect."

Defendant recalled McMillan telling him to relax and go to sleep. Defendant did not want to sleep because the bedroom was really hot. McMillan told defendant to leave, and defendant became angry. Part of the anger was because McMillan treated defendant differently when Morris was around.

Defendant admitted that, when he talked to officers, he could not explain why he had stabbed Wheeler. He was mad as a result of the argument with his uncle, but he was not mad at Wheeler. He took Wheeler's jumping up and his exclaiming "what the fuck" as "a sign of immediate aggression."

In rebuttal, Detective McCue testified that, in the statement defendant gave him on the day of the stabbing, defendant never mentioned that Wheeler had rushed him or had advanced on him. Instead, defendant said Wheeler was "slowly rising from the couch" before defendant stabbed him.

Additional facts are included in the discussion as relevant to defendant's contentions on appeal.

A jury found defendant guilty of second degree murder (Pen. Code, §§ 187, subd. (a), 189)¹ and found he personally used a knife in the commission of the offense (§ 12022, subd. (b)(1)). The trial court sentenced him to a determinate term of one year in prison plus a consecutive indeterminate term of 15 years to life.

DISCUSSION

I

Defendant contends the trial court erred in failing to fully instruct the jury on lesser included offenses, because (a) it did not give the "heat of passion" manslaughter instruction sua sponte, and (b) it did not instruct the jury that killing with a conscious disregard for life can also be manslaughter. We address each argument in turn.

¹ Undesignated statutory references are to the Penal Code.

A

Defendant argues the trial court had a sua sponte duty to give the “heat of passion” manslaughter instruction, but his claim lacks merit.

“ ‘ “It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury’s understanding of the case.” [Citation.] That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.] The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given. [Citations.] Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense. [Citation.]’ [Citations.]” (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155 (*Breverman*)).

Heat of passion voluntary manslaughter is a lesser included offense of murder. (*Breverman, supra*, 19 Cal.4th at p. 154.) But in order to be entitled to an instruction on heat of passion, there must be evidence that the defendant’s “reason was actually obscured as the result of a strong passion aroused by a ‘provocation’ sufficient to cause an ‘ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.’ ” [Citations.]” (*Id.* at p. 163.) In this case, there was no such evidence.

There was evidence that, prior to the stabbing, defendant argued with McMillan, who told him first to go to bed and then to leave the house. There was also evidence that

Wheeler jumped up saying “what the fuck” like he was angry, and then started to approach defendant. But none of this evidence, or any other evidence in the record, would have provoked an ordinary person of average disposition to act rashly or without due deliberation and reflection, and from this passion rather than from judgment. (*Breverman, supra*, 19 Cal.4th at p. 163.) Indeed, defendant does not identify any specific evidence that, in his view, constitutes a provocation sufficient to prompt a rash response from an ordinary person of average disposition. There was no duty to instruct on heat of passion manslaughter.

B

Defendant also claims the trial court erred because it did not instruct the jury that killing with a conscious disregard for life can also be manslaughter. The Attorney General’s brief does not address this argument.

Defendant’s argument is based on *People v. Rios* (2000) 23 Cal.4th 450 (*Rios*), in which the California Supreme Court said in a footnote: “In *Blakeley* and *Lasko*, we recently stated that specific intent to kill is not a necessary element of voluntary manslaughter. ([*People v.*] *Blakeley* [(2000)] 23 Cal.4th [82,] 88; [*People v.*] *Lasko* [(2000)] 23 Cal.4th [101,] 108.) However, we meant only to make clear that voluntary manslaughter, but no lesser offense, is *also* committed when one kills unlawfully, and with *conscious disregard for life*, but lacks malice because of provocation or imperfect self-defense. (*Blakeley, supra*, 23 Cal.4th at pp. 90-91; *Lasko, supra*, 23 Cal.4th at pp. 108-110.)” (*Rios, supra*, 23 Cal.4th at p. 461, fn. 7; original emphasis.) In other words, a killing committed with conscious disregard for life is reduced to voluntary manslaughter if defendant acted in imperfect self-defense.

That is how the trial court instructed the jury. It instructed the jury with CALCRIM No. 520, directing that defendant acted with implied malice, and hence was guilty of second degree murder, if among other things he “deliberately acted with conscious disregard for human life.” But it also instructed the jury with CALCRIM

No. 571, directing that a killing that would otherwise be murder is reduced to voluntary manslaughter if defendant acted in imperfect self-defense. In other words, a killing that would otherwise be second degree murder with implied malice -- because defendant deliberately acted with conscious disregard for human life -- is reduced to voluntary manslaughter if defendant lacked malice because he acted in imperfect self-defense. The instructions accurately conveyed the meaning articulated in the *Rios* footnote. (*Rios*, *supra*, 23 Cal.4th at p. 461, fn. 7.)

As defendant recognizes, this court reached an identical conclusion in *People v. Genovese* (2008) 168 Cal.App.4th 817, at pages 831-832. Defendant offers no reason to reconsider our conclusion in that case, and we decline to do so.

In any event, it is not reasonably probable defendant could have fared any better had the same point been made in a separate instruction such as CALCRIM No. 572 [voluntary manslaughter]. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

II

Defendant next contends the evidence was not sufficient to support his second degree murder conviction and, at most, supports a conviction of voluntary manslaughter.

“On appeal, the test of legal sufficiency is whether there is substantial evidence, i.e., evidence from which a reasonable trier of fact could conclude that the prosecution sustained its burden of proof beyond a reasonable doubt. [Citations.] Evidence meeting this standard satisfies constitutional due process and reliability concerns. [Citations.] [¶] While the appellate court must determine that the supporting evidence is reasonable, inherently credible, and of solid value, the court must review the evidence in the light most favorable to the [judgment], and must presume every fact the jury could reasonably have deduced from the evidence. [Citations.] Issues of witness credibility are for the jury. [Citations.]” (*People v. Boyer* (2006) 38 Cal.4th 412, 479-480.)

“If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be

reconciled with a contrary finding.” (*People v. Albillar* (2010) 51 Cal.4th 47, 60, citing *People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

“Section 187, subdivision (a), defines murder as ‘the unlawful killing of a human being, or a fetus, with malice aforethought.’ . . . Murder is divided into first and second degree murder. (§ 189.) ‘Second degree murder is the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. [Citations.]’ [Citation.]” (*People v. Chun* (2009) 45 Cal.4th 1172, 1181.) “Ill will toward, or hatred of, the victim are not prerequisites of malice as that term is used in the statutory definition of murder. [Citations.]” (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 103.)

Malice may be express or implied. Express malice exists “when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature.” (§ 188.) “Malice is implied when the killing is proximately caused by “an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.” ’ [Citation.] In short, implied malice requires a defendant’s awareness of engaging in conduct that endangers the life of another -- no more, and no less.” (*People v. Knoller* (2007) 41 Cal.4th 139, 143.)

In this case, there was evidence from which the jury could reasonably conclude defendant was guilty of second degree murder. Morris testified that, prior to the stabbing, defendant asked Wheeler, “what the fuck are you putting your shoes on for, homeboy? I’m in one of those moods. I feel like stabbin’ a motherfucker.” Wheeler responded that he did not want any problems and swung his arms like a windshield washer. But defendant “went after him quick” and stabbed him “straight in the heart.” In his statement to Detective McCue, defendant never mentioned that Wheeler had rushed him or had advanced on him; instead, defendant said Wheeler had been “slowly rising

from the couch” before defendant stabbed him. Defendant acknowledged he had “swung the knife.”

There was sufficient evidence of express and implied malice. Although the prosecutor relied on the theory of implied malice, there was sufficient evidence for the jury to infer -- from defendant’s statement that he felt “like stabbin’ a motherfucker” and from his swiftly stabbing Wheeler “straight in the heart” as Wheeler slowly rose from the couch -- that defendant acted with express malice, i.e., that he intended to kill Wheeler. (See, e.g., *People v. Smith* (2005) 37 Cal.4th 733, 741-742 [express malice may be inferred where defendant purposely fires a lethal weapon at another human at close range without legal excuse].) In addition, there was sufficient evidence for the jury to deduce that, even if defendant did not intend to kill, he acted “deliberately with conscious disregard for life” when he swung the knife and stabbed Wheeler. (*People v. Watson* (1981) 30 Cal.3d 290, 296.)

Defendant disagrees, relying on evidence that the “stabbing followed an argument with his uncle” that “was fueled in large part by a long-time loathing for the uncle, and was an over-reaction to a few harsh words and sudden movement” by Wheeler. On appeal, defendant claims he was angry because his uncle told him to leave, treated him differently when Morris was around, gave preference to Morris even though she took advantage of him, and had an unwanted sexual encounter with Morris. But in his trial testimony, defendant insisted that although he was angry when he left his uncle’s room, he did not transfer that anger to Wheeler; rather, he was “getting over it.” The jury was entitled to take defendant at his word on this point. The fact the jury was not compelled to do so does not warrant reversal of the judgment. (*People v. Albillar, supra*, 51 Cal.4th at p. 60.)

Defendant argues Morris was biased against defendant and her trial testimony was “skewed” to nullify self-defense. He points out that on the day of the incident, Morris told deputies that defendant grabbed the knife from a kitchen drawer after Wheeler said

“what the fuck is going on” and after defendant responded “I’m in a crazy mood, Mother Fucker, and I’ll just stab you right now.” At trial, however, Morris said defendant “went straight to the counter where there was a knife on the counter,” evidently before Wheeler jumped up and asked what was going on. Defendant claims Morris changed her testimony “to incite the jury” and that her testimony was intended to distort the fact that what defendant did was in response to Mr. Wheeler’s words and actions.

The jury heard both versions of events. As the trier of fact it was entitled to weigh Morris’s credibility and resolve the conflict in favor of her trial testimony. The fact the jury could have resolved the conflict in favor of Morris’s prior statement to the officers does not warrant reversal of the judgment. (*People v. Albillar, supra*, 51 Cal.4th at p. 60.)

Defendant’s second degree murder conviction is supported by substantial evidence.

DISPOSITION

The judgment is affirmed.

MAURO, J.

We concur:

RAYE, P. J.

MURRAY, J.