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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

BEAU ALAN CORNISH,

Defendant and Appellant.

D059517

(Super. Ct. No. FSB701232)

APPEAL from an order of the Superior Court of San Bernardino County,
Annemarie G. Pace, Judge. Affirmed as modified.

A jury convicted defendant Beau Cornish of one count of second degree murder (Pen. Code,¹ §§ 187/189, count 1) and one count of evading an officer, causing serious bodily injury (Veh. Code, § 2800.3, subd. (a), count 3). The jury also found true the enhancements, appended to each count, that Cornish caused great bodily injury in connection with the offenses (§ 12022.7, subd. (a)).

¹ All further statutory references are to the Penal Code unless otherwise specified.

On appeal, Cornish argues the court was obligated sua sponte to instruct on voluntary manslaughter under *People v. Garcia* (2008) 162 Cal.App.4th 18 (*Garcia*). Cornish also asserts on appeal that the great bodily injury enhancement appended to count 3 must be stricken. The People concede that enhancement must be stricken, and we agree.

I

FACTS

A. Prosecution Case

Shortly past midnight on April 15, 2007, San Bernardino County Deputy Sheriff Busto drove to a residence in response to a 911 call. As Busto parked his car, he saw Cornish run from the house, jump over a fence, and get into a car. Busto walked to the car and saw Cornish fumbling with his keys and trying to start the car. Busto identified himself and ordered Cornish out of the car. Cornish, ignoring Busto, continued trying to start the car while reaching under the seat with his left hand. Busto, concerned Cornish was disregarding him and might be reaching for a weapon, broke the window with his baton and sprayed pepper spray inside. However, Cornish managed to start the car and drive away.

San Bernardino County Deputy Sheriff Briscoe arrived as Cornish began driving away; Briscoe turned on his car's lights and siren and pursued him. Busto returned to his car and joined the pursuit of Cornish. Cornish drove at high rates of speed, ignoring all stop signs and red lights, and reached speeds around 110 miles per hour after turning onto

Yucaipa Boulevard. He drove past the on-ramp to west Interstate 10, made a wide right turn and entered the off-ramp from east Interstate 10. Cornish crossed over all of the traffic lanes and drove against traffic in the center median next to the fast lane. The deputies followed Cornish onto the freeway but quickly lost him and, after .7 miles, terminated their pursuit.

A short distance later, a motorist traveling east on Interstate 10 managed to swerve to avoid colliding with Cornish, then going approximately 90 miles per hour in the fast lane against traffic. Soon thereafter, Cornish collided with a car driven by Mr. Gonzalez. The passenger sides of the cars took the brunt of the impact and the collision was so violent that Gonzalez's car was pushed backwards and up onto the K rail. Gonzalez suffered severe injuries and his passenger, Mr. Aveles, was killed. Cornish fled but was later apprehended.

B. Defense Case

Cornish testified he was at the residence for a legitimate purpose. He was in his car when someone yelled "[g]et the fuck out of the car" and threatened to break the window. He could not see who it was because his interior car light was on. Suddenly, the window shattered and he was pepper sprayed. He panicked and drove off.

Cornish knew it was the police confronting him but he still drove away. He wanted to reach a location where there were witnesses before he surrendered because he did not trust the police. He was affected by the pepper spray but could still see streets

and cars in the street. However, he knew he was driving at high speeds and was running stop signs while trying to get to a safe location.

When he reached the freeway, his eyes were still blurry. He intended to turn onto an access road that ran along the freeway but inadvertently turned onto the freeway off-ramp. After about 45 seconds he realized he was going against traffic on a freeway. He was able to avert one collision but then hit Gonzalez's car. He did not intend to kill anyone.

II

ANALYSIS

The trial court instructed the jury on murder, the degrees of murder, and involuntary manslaughter. Cornish did not request any additional lesser included offense instructions. However, on appeal he contends that the court was required sua sponte to instruct the jury on voluntary manslaughter under *Garcia, supra*, 162 Cal.App.4th 18. He argues the trial court erred in not sua sponte instructing the jury that an unintentional killing without malice, committed during the commission of a felony, can constitute voluntary manslaughter. He argues that, because there was sufficient evidence from which the jury could have found the death (occurring during the commission of a felony) was nevertheless unintentional and without malice, there was a gap in the instructions. Cornish therefore asserts that, to fully instruct the jury on the applicable law and all lesser included offenses supported by substantial evidence, the trial court was required sua sponte to instruct the jury on the theory of voluntary manslaughter as allegedly approved

in *Garcia, supra*, 162 Cal.App.4th 18, e.g., that an unintentional killing without malice, committed during the commission of a felony, constitutes voluntary manslaughter.

Because the language in *Garcia* on which Cornish relies can only be understood in the context of the law governing the instructional obligations in the arena of murder, we begin with an overview of the applicable law.

A. The Duty to Instruct

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." " (*People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*)). " 'The duty to instruct, sua sponte, on general principles closely and openly connected with the facts before the court also encompasses an obligation to instruct on defenses' " (*People v. Lopez* (1992) 11 Cal.App.4th 1115, 1120) "supported by substantial evidence [and] not inconsistent with the defendant's theory of the case." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) Substantial evidence, in this context, is evidence from which a jury of reasonable persons could conclude the lesser offense, but not the greater, was committed. (*Breverman*, at p. 162.)

B. Murder and Manslaughter

Murder is the unlawful killing of a human being with malice. (§ 187, subd. (a).) Malice may be either express or implied. It is express when the defendant manifests "a

deliberate intention unlawfully to take away the life of a fellow creature." (§ 188.) It is implied when " ' "the killing proximately resulted from 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." ' ' " (*People v. Dellinger* (1989) 49 Cal.3d 1212, 1218.)

When the defendant unlawfully kills another while acting with a specific culpable form of intent—either because he intends to kill or because he intends to perform an act he knows presents a danger to the life of another but acts in conscious disregard for that danger—the killing is ordinarily deemed to constitute second degree murder because the requisite malice is present. However, when the defendant unlawfully kills another while acting *without* the culpable form of intent that the law labels as "malice," the killing is deemed the less culpable form of homicide, i.e., the crime of manslaughter (§ 192), a lesser included offense of murder. (*Breverman, supra*, 19 Cal.4th at p. 154; *People v. Verdugo* (2010) 50 Cal.4th 263, 293.)

Traditionally, *voluntary* manslaughter is an unlawful killing that was *intentional* but done *without* malice. (*People v. Moye* (2009) 47 Cal.4th 537, 549.) A defendant lacks malice and is guilty of voluntary manslaughter in " 'limited, explicitly defined circumstances: either when the defendant acts in a "sudden quarrel or heat of passion" (§ 192, subd. (a)), or when the defendant kills in "unreasonable self-defense." . . . [citations].' " (*People v. Lasko* (2000) 23 Cal.4th 101, 108.) Thus, an *intentional* killing is reduced from murder to manslaughter if 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.' ' ' ' (*Breverman, supra*, 19 Cal.4th at p 163.) A killing is *also* reduced from murder to manslaughter if the defendant "kills in 'unreasonable self-defense'—the unreasonable but good faith belief in having to act in self-defense." (*People v. Blakeley* (2000) 23 Cal.4th 82, 88-89 [effect of unreasonable self-defense to reduce killing from second degree murder to voluntary manslaughter also applies when defendant did not intend to kill but did act with implied malice].)

Involuntary manslaughter is an *unintentional* killing committed during the commission of an unlawful act *not* amounting to a felony, or committed in the commission of a lawful act that might produce death, in an unlawful manner or without due caution and circumspection, or committed during the commission of a noninherently dangerous felony, but that does not include acts committed in the driving of a vehicle. (§ 192; *People v. Burroughs* (1984) 35 Cal.3d 824, 835-836 (*Burroughs*), disapproved on other grounds in *People v. Blakely, supra*, 23 Cal.4th at p. 89.)

A third form of manslaughter is vehicular manslaughter. This statutory form of manslaughter is committed when the defendant kills another as the result of driving a vehicle during the commission of an unlawful act, not amounting to a felony, with gross negligence (§ 192, subd. (c)(1)); or driving a vehicle in the commission of a lawful act

that might produce death, in an unlawful manner, without gross negligence (§ 192, subd. (c)(2)).

C. Cornish's Proposed "New Category" of Voluntary Manslaughter

Relying principally on *Garcia, supra*, 162 Cal.App.4th 18,² Cornish argues that in addition to the "heat of passion" and "imperfect self-defense" forms of voluntary manslaughter, there is a third category of voluntary manslaughter potentially applicable as a lesser included offense to murder. He argues this third form of voluntary manslaughter exists when a person kills unintentionally and without implied malice during the commission of a felony. Because Cornish asserts a jury could have found these elements were present, he contends the trial court erred by not instructing the jury on this third category of voluntary manslaughter. (*Breverman, supra*, 19 Cal.4th at pp. 153, 162 [trial court must instruct on all theories of lesser included offenses].)

In *Garcia*, the victim and the defendant were involved in a confrontation. The victim moved toward (or "lunged" at) the defendant, who was holding a shotgun. The defendant, concerned the victim might try to take the shotgun, swung at the victim with the butt of the gun to make the victim back up, and the gun struck the victim in the face. This caused the victim to fall and hit his head on the sidewalk, and later die from the

² Cornish's opening brief notes that a related issue is pending before the California Supreme Court in *People v. Bryant* (2011) 198 Cal.App.4th 134, review granted November 16, 2011 (S196365). However, the issue in *Bryant* is whether "voluntary manslaughter [may] be premised on a killing without malice that occurs during the commission of an inherently dangerous assaultive felony." (See <http://www.courts.ca.gov>.) *Bryant* will not control here because Cornish's killing occurred during the commission of a crime that was *not* an inherently dangerous felony. (See *People v. Howard* (2005) 34 Cal.4th 1129, 1135-1139.)

injuries sustained in the fall. (*Garcia, supra*, 162 Cal.App.4th at pp. 22-23, 25.) The defendant asserted he did not mean to hit the victim in the face or to kill him. The jury was instructed on the crimes of murder and the lesser included offense of voluntary manslaughter, and the jury acquitted the defendant of murder but found him guilty of voluntary manslaughter. (*Id.* at pp. 23-26.)

On appeal, the defendant in *Garcia* claimed the trial court committed prejudicial error by refusing to instruct the jury on *involuntary* manslaughter as a lesser offense of murder. The defendant argued that instruction was required because there was substantial evidence the killing "was committed without malice and without either an intent to kill or conscious disregard for human life and, therefore, was neither murder nor voluntary manslaughter." (*Garcia, supra*, 162 Cal.App.4th at p. 26.) The argument in *Garcia* was limited to whether evidence showing an unintentional killing without implied malice during commission of an inherently dangerous felony could support an instruction for *involuntary* manslaughter. *Garcia* rejected that claim, stating an "unlawful killing during the commission of an inherently dangerous felony, even if unintentional, is *at least* voluntary manslaughter." (*Id.* at p. 31, italics added.) The italicized language was dictum and contained no specification of the circumstances, if any, under which the killing might be voluntary manslaughter and under which it would be a greater offense. (*Ibid.*)

D. *Garcia* Does Not Support Cornish's Claim of Reversible Error

We conclude *Garcia* does not support Cornish's claim that the trial court committed reversible error by not sua sponte instructing on voluntary manslaughter. First, the facts in *Garcia* bear no resemblance to those presented here. In *Garcia*, the defendant inflicted a single blow to a person approaching him under circumstances arguably supporting either heat of passion and/or imperfect self-defense, and the *Garcia* jury was instructed on both of these mitigating elements. Although those mitigating circumstances can warrant a voluntary manslaughter instruction under well-developed rules for negating "malice" for an otherwise intentional killing, neither heat of passion nor imperfect self-defense is present in Cornish's case to warrant a voluntary manslaughter instruction.

Second, *Garcia's* statement that an unintentional killing without malice in the course of committing an inherently dangerous assaultive felony is "at least" voluntary manslaughter was dictum. The *Garcia* court was called on *only* to determine if the offense could have been *involuntary* manslaughter, and *Garcia* correctly held it could not because *involuntary* manslaughter is apparently limited to a killing occurring during the commission of a nonfelony or noninherently dangerous felony (§ 192; *Burroughs, supra*, 35 Cal.3d at pp. 835-836; *People v. Butler* (2010) 187 Cal.App.4th 998, 1007), and neither of those circumstances applied in *Garcia*.

Finally, even assuming *Garcia* properly created some new theory of voluntary manslaughter, we are convinced Cornish suffered no prejudice by the absence of an

instruction on this inchoate theory of voluntary manslaughter. "The erroneous failure to instruct on a lesser included offense generally is subject to harmless error review" under the standards promulgated by *People v. Watson* (1956) 46 Cal.2d 818, 836-837. (*People v. Rogers* (2006) 39 Cal.4th 826, 867-868; *Breverman, supra*, 19 Cal.4th at pp. 177-178.) "Such posttrial review focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration." (*Breverman*, at p. 177.)

Here, the murder instructions given to the jury instructed that the presence of malice was required for a murder conviction, and explained malice could be express (requiring an intent to kill) or implied. On implied malice, the court instructed that Cornish "acted with implied malice if, one, he *intentionally* committed an act; two, the natural and probable consequences of the act were dangerous to human life; three, at the time he acted he *knew* the act was dangerous to human life; and four, he deliberately acted *with conscious disregard* for human life." (Italics added.) The court also instructed the jury on involuntary manslaughter, and explained:

"When it comes to the distinction between second degree murder (implied malice) and involuntary manslaughter, when a person commits an unlawful killing but *does not intend to kill* and *does not act with conscious disregard for human life*, then the crime is involuntary manslaughter.

"The difference between second degree murder (implied malice) and involuntary manslaughter depends on whether the person was aware of the risk to life that his or her actions created and *consciously disregarded that risk*. An unlawful killing caused by a willful act done with full knowledge and awareness that the person is endangering the life of another, and done in conscious disregard of

that risk, is second degree murder. An unlawful killing resulting from a willful act committed *without intent to kill* and *without conscious disregard of the risk to human life* is involuntary manslaughter. [¶] . . . [¶]

"In order to prove second degree murder, the People have the burden of proving beyond a reasonable doubt that the defendant acted with conscious disregard for human life (implied malice). If the People have not met this burden, you must find the defendant not guilty of second degree murder. (Italics added.)

The jury was properly instructed on the requisite objective and subjective components of implied malice. Importantly, the italicized language demonstrated the jury was also instructed that, if those elements were *not* shown beyond a reasonable doubt, it should acquit Cornish of second degree murder but that it could still find him guilty of involuntary manslaughter if it found he committed a willful act but (1) lacked the intent to kill and (2) did not consciously disregard the risk to human life.

The prosecution conceded in closing argument that Cornish did not intend to kill, and therefore there was no express malice, but argued the evidence showed implied malice second degree murder. The prosecution argued Cornish intentionally evaded police, knowing his conduct was dangerous, and that he acted with conscious disregard of that risk. Defendant conceded in argument that he committed involuntary manslaughter, arguing he acted willfully but without an intent to kill and without a conscious disregard for human life, and the absence of those elements showed he was not guilty of second degree murder.

The jury, presented with the evidence in this case, rejected Cornish's argument that he was unaware his conduct posed a danger to human life or that he did not consciously

disregard that danger, because it found he was guilty of implied malice second degree murder *rather* than involuntary manslaughter. Because the jury was presented with the option of finding that Cornish did not act with implied malice but rejected it, we are convinced it is not reasonably probable that the addition of some form of instruction derived from *Garcia*, which would have been based on the identical elements already contained in the involuntary manslaughter instructions, would have resulted in a more favorable verdict. (See, e.g., *People v. Elliot* (2005) 37 Cal.4th 453, 475 [harmless error when " "the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions" ' "].) Cornish has not adequately explained how an instruction on the *Garcia* theory of voluntary manslaughter would have changed the results of this case. He argues that if the jury had properly been instructed that it could find him guilty of voluntary manslaughter based on an unintentional killing *without* implied malice, there is at least a reasonable chance the jury would have chosen that option. However, the jury was given the option of finding Cornish did not intend to kill and acted without malice, i.e. involuntary manslaughter, but rejected that Cornish was guilty of the lesser crime and found he acted in conscious disregard of the danger to human life. An instruction based on *Garcia* would not have changed that result.

Based on these circumstances, we conclude there is no reasonable probability a different jury verdict would have been rendered had the trial court instructed under

Garcia, and consequently, any error in the trial court's failure sua sponte to instruct on voluntary manslaughter was harmless.

DISPOSITION

The judgment is reversed to the extent it imposed an enhancement under section 12022.7, subdivision (a), attached to count 3, and on remand the court shall strike the enhancement appended to count 3. In all other respects, the judgment is affirmed.

McDONALD, J.

WE CONCUR:

HALLER, Acting P. J.

McINTYRE, J.