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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD ANTHONY ZUBIATE, JR.,

Defendant and Appellant.

E053077

(Super.Ct.No. RIF140327)

OPINION

APPEAL from the Superior Court of Riverside County. Edward D. Webster, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Cliff Gardner, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Gil Gonzalez and Jennifer A. Jadovitz, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendant Richard Anthony Zubiato, Jr., was convicted of one count of felony murder (Pen. Code,<sup>1</sup> §§ 187, subd. (a), 211, 459, and 190.2, subd. (a)(17)(A) & (G)), one count of kidnapping with intent to commit a felony, i.e., robbery (§§ 209, subd. (b)(1), 289), one count of carjacking (§ 215, subd. (a)), and one count of witness intimidation (§ 136.1, subd. (c)(1)). The jury found true the allegation attached to each count that defendant personally used a weapon, a knife, during the commission of the offense. (§§ 12022, subd. (b)(1), 1192.7, subd. (c)(23).) Defendant was sentenced to state prison for two consecutive life terms for the murder and kidnapping offenses, one year on each of the weapons-use enhancements attached to those offenses, and a concurrent four-year term on the witness intimidation offense. The sentence imposed on the carjacking offense was stayed. On appeal, he contends the trial court erred in failing to instruct on involuntary manslaughter.

## I. FACTS<sup>2</sup>

In the evening of November 8, 2007, Mohammad Shkoukani (the victim), owner of a television repair shop (the repair shop) in Palm Square Mall in Riverside, was killed. That same night, around 8:20, Riverside Police Sergeant Edward Collins observed a male subject sitting on the curb across from a video store. Sergeant Collins continued on his way when, 10 minutes later, he heard a call about a possible shooting at the Stater Bros. Market in the 9200 block of Magnolia. Officers located a male victim in the Palm Square

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<sup>1</sup> All further references are to the Penal Code unless otherwise indicated.

<sup>2</sup> Because defendant does not raise any issues regarding his carjacking/kidnapping charges, the facts supporting those convictions are omitted.

Mall parking lot. Upon hearing bystanders say the suspect fled through the parking lot, Sergeant Collins and other officers drove around the area to search for the suspect.

Detective Greg Rowe and other officers also responded to the scene. Detective Rowe noticed a large amount of blood on the sidewalk in front of the entrance, in the doorway, and on the floor of the repair shop. A blood trail ran from the shop to a liquor store in the same area. According to Detective Rowe, the victim ended up in front of the Palm Liquor store.

On the night of the incident, Robert and Felix Fernandez were working at the Laundromat next door to the repair shop. Sometime around 8:00 p.m., they recalled seeing a man wearing a dark hooded sweatshirt. Robert noticed the victim arrive a few minutes later. Robert and Felix then heard some shouting and “roughhousing” and saw the victim walk across the parking lot. The victim fell down. Felix saw the man in the dark hooded sweatshirt run out of the repair shop toward Magnolia Avenue.

Around 9:00 p.m., Christina Corona Romero and her cousin stopped at the liquor store. As Romero walked toward the liquor store, the victim ran toward her and then fell to the ground. At the same time, she saw another man, who wore a black hooded sweatshirt, running toward Magnolia. He paused momentarily, then continued running toward Magnolia. The man had something in his hand that looked like a black case or cover. Romero tried to help the victim, who was choking; however, he stopped breathing and died.

Edgar Perez was working at the Video Center located next door to the repair shop. Around 9:00 p.m., while walking to the liquor store, Perez saw a man wearing a hooded sweatshirt and looking as if he was “running around for something.” Shortly after Perez returned to the video store, he heard a lady screaming and waving for help. The police arrived.

On November 8, 2007, Patricia Luck loaned her car to her brother, defendant. She was half asleep when she gave him the keys and had no idea if he was sober or on drugs. She could not recall what time he returned the car. However, when he finally returned, he said he had been at school looking for their younger brother. He also said he had been pulled over by police because of a murder investigation at Magnolia and Jackson. Luck did not believe this, because defendant did not have a driver’s license and if he had actually been pulled over, her car would have been towed.

Michelle Burke lived half a block from the Palm Square Mall. On November 10 and November 11, 2007, she found a hooded sweatshirt, a pair of men’s jeans, size large, and a belt in her garbage can. In the pocket of the jeans, Burke found a key chain and a blank check. The blank check belonged to someone named Patricia Luck. Burke called the police.

Detective Rowe went to Burke's house and collected the jeans. A search of her garbage can produced a black hooded sweatshirt, a cloth glove, and a black ski mask with the eyes cut out. Inside the ski mask, Detective Rowe found a black Chicago Cutlery steak knife with blood on it. Subsequently, police found similar knives at Luck's and defendant's father's apartments.<sup>3</sup> At the father's apartment, they also found a refrigerator magnet from the repair shop. Blood found on the jeans matched the victim's DNA, and defendant was a possible major donor of DNA found inside one of the jeans pockets. While the police were at Luck's apartment, she called defendant and told him they were present, and he told her not to say where he was and to hang up the phone.

During the investigation, Detective Rowe reviewed video surveillance tape from Luck's apartment complex. At 5:22 p.m., a subject, who appeared to be defendant, wearing dark jeans and a white sweatshirt, entered Luck's green Isuzu Rodeo and left the complex. At 10:35 p.m., the same individual returned wearing white or silver shorts and a white T-shirt. Defendant's father returned to the parking lot about the same time.

An autopsy of the victim's body showed he suffered 14 stab wounds, including one to his heart and his carotid artery. He died from multiple stab wounds causing a loss of blood.

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<sup>3</sup> Luck and defendant's father lived in the same apartment complex, which was about one to one and a half miles, or a five-minute drive, from the Palm Court Mall. Defendant was staying at his father's apartment between November 6 and November 11, 2007.

Defendant's father testified that defendant said he had done something terrible, that he was involved in a stabbing. In response, the father had told defendant to turn himself in to the police. The father did not know if defendant was high on marijuana when he returned home the night of the murder, but he "sensed" that defendant was probably high.

On December 7, 2007, Detective Rowe interviewed defendant. Defendant claimed that on the day of the murder, he was on a drug "binge," "trying to kill [him]self," and was drinking alcohol because of his mother's poor health. He started drinking whiskey and vodka, took "some Xanax," and then smoked "two 50 ports of . . . sherm" (phencyclidine, or PCP) and "did a little acid." All he could remember was that he needed money to buy more drugs. Eventually, defendant admitted that he entered the repair shop and demanded money from the man inside, presumably the victim. He also admitted that he used a knife to intimidate the victim. Defendant claimed the victim tried to grab him, and there was a scuffle. Defendant could not recall stabbing the victim; however, he admitted that he had a ski beanie with the eyes cut out.

## II. INVOLUNTARY MANSLAUGHTER INSTRUCTION

Defendant contends the trial court erred by failing to instruct the jury on involuntary manslaughter as a lesser included offense. He argues that because he had been drinking and doing drugs, he did not "form the specific intent needed for robbery/burglary felony murder . . . ."

Although defendant was charged with first degree murder based upon premeditation and deliberation and felony murder, i.e., murder committed during an attempted robbery or burglary, the prosecution proceeded solely on the theory of felony murder. The jury was instructed on felony murder only. There was no discussion of lesser included instructions, and regarding the underlying felony of attempted robbery (CALCRIM No. 460), there was no objection to the court's statement that the case was "first-degree murder or nothing."

During closing, the prosecutor argued that defendant killed the victim during a robbery/burglary and was guilty of murder under the felony-murder rule. Under this theory, the state was required to prove that defendant committed robbery or burglary, and that while doing so, he assaulted the victim with a knife, causing his death. According to defendant, there was never any dispute that he was responsible for the death of the victim and that his death occurred during an assault with a knife. Rather, defendant argued that he acted with neither the intent to permanently deprive the victim of his property nor the intent to commit a theft when he entered the repair shop. To prove his defense, defendant relied on his statement to police about his drug and alcohol use on the night of the crime, the testimony of his family members regarding his drug and alcohol addictions, and his father's testimony that after the crime, his father "sensed" that he was high on drugs. The jury was instructed that it could consider the intoxication evidence in deciding if defendant harbored a specific intent to deprive the victim of his property or to commit theft when he entered the building. Thus, defendant argues that "if the evidence . . . supported a theory that [he] stabbed [the victim] not during the commission of a robbery

or burglary—because intoxication prevented him from harboring the requisite intent to steal—but during the commission of the unlawful act of assault, instructions on unlawful-act manslaughter were required.” Furthermore, he argues that because the trial court found the evidence sufficient to raise intoxication as a defense to felony murder, the evidence was sufficient to support an instruction on involuntary manslaughter. We disagree.

“[W]e independently determine whether an instruction on the lesser included offense of involuntary manslaughter should have been given. [Citation.]” (*People v. Manriquez* (2005) 37 Cal.4th 547, 587.) A trial judge has no duty to instruct on a lesser offense unless substantial evidence supports such instruction. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008.) Involuntary manslaughter is a lesser offense of murder. (*People v. Lewis* (2001) 25 Cal.4th 610, 645.) But “[a] court is not obligated to instruct sua sponte on involuntary manslaughter as a lesser included offense unless there is substantial evidence, i.e., evidence from which a rational trier of fact could find beyond a reasonable doubt [citation] that the defendant killed his victim “in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection” (Pen. Code, § 192, subd. (b)).’ [Citations.]” (*Manriquez, supra*, at pp. 587-588.) No substantial evidence of involuntary manslaughter existed in this case.

Here, contrary to defendant’s claim that his “intoxication prevented him from harboring the requisite intent to steal,” the evidence shows that he repeatedly admitted he entered the repair shop to get money and that he brought the knife with him to intimidate

the victim. Moreover, he was in possession of a change of clothing, a glove, and a ski mask, and he disposed of the latter two, along with his bloody clothes, after the murder. He knew the victim and knew the victim owned the repair shop. He admitted knowing he “wanted to get [the victim’s] money.”

Other than his self-serving testimony that he had been doing drugs all day and was on a binge, attempting to kill himself, there is no evidence of the level of his intoxication. Rather, in his interview, when questioned how he was able to drive a car when he had consumed alcohol and pills, smoked sherm, and dropped acid, he said that it was “affecting [him], but it wasn’t . . . where [he] wanted to be.” He also said all the drugs and alcohol he had consumed that night were “nothing” compared to what he “usually” did.

“A defendant is entitled to [an instruction on voluntary intoxication] only when there is substantial evidence of the defendant’s voluntary intoxication and the intoxication affected the defendant’s ‘actual formation of specific intent.’ [Citations.] . . . Assuming th[e] scant evidence of defendant’s voluntary intoxication would qualify as ‘substantial,’ there was no evidence at all that voluntary intoxication had any effect on defendant’s ability to formulate intent.” (*People v. Williams* (1997) 16 Cal.4th 635, 677-678.) As the People aptly point out, defendant’s “alleged intoxication did not prevent him from harboring the requisite intent to steal.” There was no duty to so instruct.

III. DISPOSITION

The judgment is affirmed.

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HOLLENHORST

Acting P. J.

We concur:

MCKINSTER

J.

MILLER

J.