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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.

JOHN SUCHAN CHONG,

Defendant and Appellant.

E053299

(Super.Ct.No. SWF028437)

OPINION

APPEAL from the Superior Court of Riverside County. Dennis A. McConaghy, Judge. Affirmed.

Mark David Greenberg, 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, Jennifer Jadovitz and Garrett Beaumont, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant John Suchan Chong guilty of one count of first degree murder (Pen. Code, § 187, subd. (a)),¹ and three counts of premeditated attempted murder (§§ 664, 187, subd. (a)). As to all four counts, the jury found true the allegations defendant personally and intentionally discharged a firearm causing great bodily injury or death. (§ 12022.53, subd. (d).) The trial court sentenced defendant to prison for a determinate term of 40 years and an indeterminate term of 96 years to life. Defendant contends the trial court erred because it should have instructed the jury on voluntary manslaughter being a lesser included offense of murder, when the killing was committed without malice during the commission of an inherently dangerous felony. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. PROSECUTION’S CASE

Jongpil Yun and his wife of 35 years, Chuneui Yun, were living together at Kkottongnae Retreat Camp, in an unincorporated area near Temecula, in April 2009. Kkottongnae translates to Flower Village; it is a Korean Catholic retreat. Jongpil Yun’s Catholic name was Benedict, and Chuneui Yun’s Catholic name was Scholasica. The Catholic names were used in the trial court, so we use them here as well.

Benedict and Scholasica were volunteers at Flower Village. Benedict helped maintain the buildings, and Scholasica helped the nuns with kitchen tasks. Defendant, Joseph Kim (Joseph), and Juliana Kim (Juliana), were also volunteers who resided at

¹ All subsequent statutory references will be to the Penal Code, unless otherwise indicated.

Flower Village during April 2009. Benedict had an acquaintance-level relationship with defendant, Joseph, and Juliana.

At approximately 7:00 p.m. on April 7, 2009, defendant came to Benedict and Scholasica's residence; defendant had not been invited to the residence, but Benedict asked defendant to come inside and sit at a table because Benedict thought defendant wanted to talk. Defendant did not say anything, but sat down inside the house. Defendant then took a gun from his waist area, and aimed it toward Scholasica. Benedict was standing less than two feet away from Scholasica. Defendant said, "I'm going to spend rest of my life in prison, so you rather die in my hand or you be crippled in my hand." (Sic.)

Scholasica began praying in "tongue." Benedict did not say anything. Defendant said, "I don't think you repented." Defendant then said, "Either you die or be crippled. Choose one of those." Scholasica told Benedict not to respond to defendant. Benedict said to Scholasica, "Let's give our last prayer." Scholasica continued praying in tongue. Benedict asked Scholasica to stop praying in tongue and to pray "regular." Defendant was pointing the gun at Scholasica's face. Benedict waived his hands in front of his chest, but did not touch the gun or defendant. Defendant shot Benedict once on the right portion of his chest. Defendant was standing one or two feet away from Benedict when he fired the gun.

After being shot, Benedict fell face forward onto the ground. While on the ground, Benedict heard another shot. Scholasica fell down next to Benedict, on his left side. Benedict never saw Scholasica move after she was shot. Benedict heard

defendant walk outside the house. Defendant did not say anything before leaving. Benedict crawled to a telephone in a bedroom and called 911. After being shot, Benedict never saw Scholasica alive.

Joseph and Juliana (the Kims) lived less than a five minute walk from the house of Benedict and Scholasica (the Yuns). Defendant's home was between the Kims' and the Yuns' homes. The Kims lived in a trailer. On the evening of April 7, 2009, Joseph was reading the Bible in his room and Juliana was praying in the living room. Joseph heard a noise outside the bedroom, so he opened the bedroom door. Joseph saw defendant and Juliana in the living room. Defendant was holding a gun. Defendant was kicking Juliana and stomping on her "[a]ll over her body," while wearing "military shoes." Joseph said to defendant, "[W]e didn't do anything wrong. Why are we here making this scene[?]"

While kicking and stomping on Juliana, defendant said, "'You bitch,'" and "'You two, the lady was killed. And you, you both were close friends.'" Defendant continued, "'And you were always calling names and speaking bad about me.'" Defendant said, "'Now, I killed two of you, and I'll kill you too.'" Defendant placed the gun near the left side of Juliana's face, near her temple. Defendant threatened to "pluck" out Juliana's eyes. Juliana prayed. Defendant shot the gun, but the bullet missed Juliana.

Joseph used his head to hit defendant's nose, i.e. he head-butted defendant's face. Joseph tried to take the gun from defendant.. The gun was still in defendant's hand, pointed at Joseph's stomach; defendant pulled the trigger and another shot was fired.

The bullet missed Joseph, because Joseph was pushing the gun to his left side. The two men continued to struggle over the gun. Another shot was fired toward a window, but it was unclear who pulled the trigger because the men were both trying to take control of the gun. Joseph continued to head-butt defendant's nose area and he bit defendant's hand so that it was bleeding profusely.

Joseph managed to take the gun from defendant, and he handed it to Juliana. Joseph told Juliana to throw the gun away. Juliana left the trailer to get help. The two men continued struggling with one another on the living room floor. Defendant picked up a dumbbell and repeatedly struck the right side of Joseph's head. Joseph tried to take the dumbbell away from defendant, but could not. Joseph tried to run away, but defendant would not let him go. Eventually, both men were exhausted. Defendant was lying across the trailer's entrance doorway. Joseph went outside.

Paula Schultze (Schultze) lived at Flower Village Retreat Camp with her husband; they rented trailer space from the camp. Schultze lived near the Kims and was friends with them. At approximately 7:00 p.m. on April 7, 2009, Juliana pounded on the side of Schultze's motor home and screamed, "Help, help." Schultze opened the door, and Juliana screamed, "Come help. Help. He's going to kill us all." Juliana was hysterical and terrified. Schultze saw a gun in Juliana's hand. Schultze followed Juliana to her trailer. Schultze saw a man lying down on the porch and "blood everywhere." Joseph was at the trailer, and he was shaking and terrified. The Kims had blood on them, and Joseph's head was "bashed in." Schultze yelled for her husband to call 911. Schultze took the gun from Juliana, and hid it under a bush.

Schultze asked Joseph what happened. Joseph said defendant was ““trying to kill us.”” Joseph rolled defendant over, and told Schultze to take the dumbbell, which was underneath defendant. Schultze took the dumbbell and hid it under the bush with the gun. After hiding the dumbbell, Schultze and the Kims started screaming for help. Eventually a SWAT team arrived.

When Riverside County Sheriff’s Investigator James Merrill arrived at the camp, he found Scholasica in her home with a bullet wound on her forehead. At the Kims’ trailer, Investigator Merrill found evidence of three shots being fired. It appeared one bullet went into a wall, a second went into the kitchen, and a third went through a window. Investigator Merrill found the gun was registered to defendant. The three bullets at the Kims’ house were .32-caliber Smith & Wesson. At defendant’s house, Investigator Merrill found two boxes of .32-caliber Smith & Wesson bullets; one of the boxes was missing some bullets.

On April 11, 2009, Riverside County Sheriff’s Deputy Sonia Gomez was assigned the task of securing defendant at the hospital, in order to ensure he did not escape. Defendant gave Officer Gomez a letter, and asked her to deliver it to a nun. The letter was not written in English. Officer Gomez filed the letter into evidence. Defendant asked Officer Gomez if she “had tape.” Officer Gomez told defendant she did not understand what he was asking about, and that she did not have tape. Defendant said, ““Okay. I shoot him and wife.”” Defendant explained, ““They were mean people.”” Defendant continued, ““I go to jail. I’m old and I will die there.”” Defendant asked Officer Gomez to rip up the letter he gave her.

Dr. Joanna Rice was a forensic pathologist for the Riverside County Sheriff's Coroner. Dr. Rice performed the autopsy on Scholasica. She found a gunshot wound on Scholasica's forehead. It appeared to Dr. Rice that the gun was two to five feet from Scholasica when she was shot. Rice did not find any wounds on Scholasica's body indicating she had been in a fight.

B. DEFENSE CASE

Defendant testified at trial. The following is defendant's version of the events. Defendant was born in Korea in 1938. He came to America when he was 38 years old. Defendant was married in 1965, but separated from his wife in 1995. For a 10-year period, defendant was traveling back and forth between America and Korea due to "a little family issue involving [his] daughter." While in Korea, defendant volunteered for the Catholic Church. Defendant joined Flower Village in Korea in 1998. He moved into the Flower Village near Temecula in 2001.

Defendant was not hired as a handyman by Flower Village, but he repaired things around the camp when he noticed they were broken. Defendant enjoyed living at Flower Village and planned to spend the rest of his life there. He always prayed for the best for Flower Village, "[s]ometimes more than for [him]self." Flower Village was a place for people to live who were "poor, who have no place to go, with nothing to eat," and there was also a retreat camp at the Temecula location. It made defendant feel good to be living at a place that helped people, because he believes God intended people to live with a spirit of helping others. The Temecula location of Flower Village was 128 acres with four Korean Catholic families living at the camp. The Kims and the Yuns

were two of the four families. Defendant was approximately 71 years of age during trial, and the Yuns were in their early 50s, which made the Yuns “[a] lot younger” than defendant.

At some point, Joseph began working at Flower Village only three or four hours per day, when he was supposed to be working full time; the nuns pointed out this issue to Joseph. Defendant heard the Kims respond by calling the nuns names, and Joseph “stomping his feet against the door of the office.” Defendant felt the Kims were not at Flower Village to serve people. Defendant scolded the Kims for their poor treatment of the nuns. Defendant also felt the Yuns were not at Flower Village for the purpose of serving people, because he heard from others that they would get drunk.

Defendant began to dislike the Kims and the Yuns, and his dislike of them lasted for several years. Some of the nuns left Flower Village because of the Kims and the Yuns. Once the nuns left, the Kims and the Yuns began conspiring against defendant. The Kims and the Yuns would tell people that defendant was not a good person, and blame him when things went wrong, for example, when the telephones were disconnected. It hurt defendant’s pride that the Kims and the Yuns were accusing him of things he did not do. Some of the nuns recommended defendant find another place to serve, but others told defendant not to leave.

Defendant became angry with the Yuns because they were constantly bragging about themselves, and treating defendant poorly. Also, in Korean culture elders are supposed to be greeted with respect. Initially, the Yuns would say, “Hello, sir,” to defendant, but eventually they would pass by him without a greeting. Defendant felt

disrespected, which made him feel bad. Defendant was suffering from stress and medical problems while having trouble with the Kims and the Yuns. Defendant began to feel that he should leave Flower Village, but he wanted to spend the rest of his life there.

A person from the retreat had a house near Hemet, in the mountains. While at the house, defendant heard a gunshot. The people at the house told defendant there was a police academy shooting range nearby. Later, defendant decided to purchase a gun so that he could practice shooting for stress relief. Defendant purchased a gun in December 2008.

Defendant stored the gun in a desk at his home. The gun was unloaded when it was in the desk. Around 5:00 on the evening of the shootings, defendant took the unloaded gun out of his desk. Defendant loaded the gun at his home or while walking to the Yuns' home. Defendant had bullets in his pocket while walking to the Yuns' home. Defendant had bullets in his pocket to show the Yuns he had real bullets. Defendant did not know why he needed bullets in the gun and in his pocket.

Before going to the Yuns' home, defendant visited a person named Chuck. Defendant told Chuck he was going to Benedict's house to threaten him, and Chuck "could call the police later about that." Defendant then went to the Yuns' home. Defendant never intended to kill the Yuns and the Kims. Defendant went to the Yuns' home to intimidate and threaten them so they would leave Flower Village. Defendant thought the Yuns would be scared, and move away.

When he arrived, defendant knocked on the door. Benedict invited defendant inside. Once inside, defendant pulled out his gun, pointed it at Benedict, and asked “whether they would die or repent and leave.” Scholasica said, “I would rather die.” The Yuns did not show any signs of being scared. Defendant did not expect that response, because he thought the Yuns would be afraid. Defendant did not know what to do, because he had only planned on the Yuns being scared. Suddenly, Benedict turned and lunged toward defendant. Defendant thought Benedict might hurt him, so he fired the gun, although Benedict did not touch defendant. Scholasica also moved towards defendant, so he shot her as well. Neither of the Yuns were holding a weapon. Defendant said he would not have shot the Yuns if they had not moved towards him. It did not occur to defendant to try to find help for the Yuns.

After shooting the Yuns, defendant walked to the Kims’ home. Defendant did not intend to kill the Kims; he only planned to intimidate them so they would leave. Although the plan did not work with the Yuns, he thought it might work with the Kims. Defendant described himself as “totally out of [his] mind.” Defendant knocked on the Kims’ door. Juliana opened the door, and then sat down inside. Defendant told Juliana, “I have just killed the people.” Defendant did not recall kicking and stomping on Juliana, but he remembered hopping around repeatedly screaming he had killed people. Defendant shot the gun to Juliana’s left side, in order to scare her. Defendant planned to shoot the gun to scare the Kims, but not to kill them. Defendant said he was only two feet away from Juliana, so if he wanted to kill her, then he could have shot her, but he only wanted to scare her.

After defendant shot the gun, Joseph began walking towards defendant. Joseph grabbed defendant's hand, which was holding the gun. Joseph hit defendant's head, causing defendant to fall down. As the two men struggled over the gun, a second shot was fired, but defendant did not pull the trigger. Defendant struggled with Joseph over the gun because defendant did not want to let go of the gun. Defendant did not hear a third gunshot. Joseph took the gun from defendant. Joseph struck defendant with a dumbbell several times. Defendant took the dumbbell from Joseph and struck Joseph with it. Eventually, defendant lost consciousness, and when he woke up he was in the hospital.

C. JURY INSTRUCTIONS

Defendant requested the trial court instruct the jury on heat of passion voluntary manslaughter and imperfect self-defense manslaughter. Defendant argued the Yuns provoked or assaulted defendant when they moved towards him. The trial court concluded the evidence did not support either theory of voluntary manslaughter. The trial court explained that voluntary manslaughter instructions were not appropriate when victims tried to defend themselves from a person who entered the victims' home, pointed a gun at the victims, and threatened to the kill the victims.

The prosecutor said it was the shots at the Kims that constituted the attempted murders, not the kicking or strikes with the dumbbell. The trial court believed the situation with the Kims was the same as the Yuns—that they were trying to defend themselves from being killed, and there was no evidence of defendant being provoked or defendant believing he was in imminent danger.

The prosecutor reminded the trial court that it had a sua sponte duty to instruct on involuntary manslaughter if the evidence supported such a finding. The prosecutor asserted the evidence did not support a finding of involuntary manslaughter, but he believed “that’s likely the main reason why defense counsel put [defendant] on the stand was to somehow try and say he committed the act without malice.” The prosecutor believed “the safe thing to do” would be giving the involuntary manslaughter instruction. The trial court agreed to give the instruction for Scholasica’s murder. The prosecutor said there is not a crime of attempted involuntary manslaughter, so the instruction would not concern the three attempt counts.

For the murder charge, the trial court instructed the jury on first degree murder, second degree murder, and the lesser included offense of involuntary manslaughter. As to the three attempt counts, the trial court only instructed on attempted murder and premeditation.

DISCUSSION

Defendant contends the trial court erred by not sua sponte instructing the jury on voluntary manslaughter being a lesser included offense of murder, when the killing is committed without malice during the commission of an inherently dangerous felony.² We disagree.

² Our Supreme Court granted review in *People v. Bryant* for the purpose of determining whether the offense of voluntary manslaughter may be premised on a killing without malice that occurs during the commission of an inherently dangerous felony, i.e., is there an offense of felony-manslaughter. (*People v. Bryant* (2011) 198 Cal.App.4th 134, review granted Nov. 16, 2011, S196365.)

“It is well established that even in the absence of a request, the trial court has a sua sponte duty to instruct on lesser included offenses when there is substantial evidence the defendant is guilty only of the lesser offense.” (*People v. Cook* (2001) 91 Cal.App.4th 910, 917.) We apply the de novo standard of review when analyzing whether the trial court should have given a lesser included offense instruction. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.)

To support his theory that felony-manslaughter is a crime, defendant relies on *People v. Garcia* (2008) 162 Cal.App.4th 18, 31, in which the appellate court wrote, “[A]n unlawful killing during the commission of an inherently dangerous felony, even if unintentional, is at least voluntary manslaughter”—as opposed to involuntary manslaughter.

While the People argue felony-manslaughter is not an offense in California, for the sake of efficiency, we will assume, without deciding, that the law supports a conviction for voluntary manslaughter where the killing is committed without malice during the commission of an inherently dangerous felony. Accordingly, we examine whether there is substantial evidence defendant is guilty only of the lesser offense.

Defendant testified he only planned to assault the victims. Defendant stated he shot the Yuns due to being afraid of the unarmed Yuns moving toward him. Defendant said he shot toward Juliana to scare her, and a shot occurred during the struggle with Joseph because they were fighting over the gun. Thus, according to defendant the shootings occurred due to unforeseen circumstances during the planned assaults.

Given defendant's testimony and the assumption that felony-manslaughter is an offense, the trial court erred by not instructing on the crime of felony-manslaughter, because defendant described a killing and attempted killings that were committed without malice during the commission of inherently dangerous felonies. However, a failure to instruct on a lesser included offense is harmless if the factual question posed by the omitted instruction was necessarily resolved by the jury on other properly given instructions or, if an examination of the record establishes no reasonable probability that the error affected the outcome of the case. (*People v. Sakarias* (2000) 22 Cal.4th 596, 620-621.) Defendant encourages this court to apply the federal harmless beyond a reasonable doubt standard, because he asserts his constitutional rights have been implicated by the error. We will apply the federal standard, since the error is harmless even under this stricter standard. (See *id.* at p. 621 [presenting the federal standard].)

The question of whether defendant planned to murder the victims or whether the killings were an incidental part of the assaults was presented to, and resolved by, the jury. (See *People v. Sakarias, supra*, 22 Cal.4th at p. 621.) The jury was asked whether the murder was first degree, second degree, or involuntary manslaughter. The jury found defendant guilty of first degree murder. The jury was instructed that a first degree murder finding meant defendant "acted willfully, deliberately, and with premeditation. The defendant acted willfully if he intended to kill. The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with premeditation if he decided to kill before completing the act that caused death."

The jury resolved the manslaughter issue as it pertains to Scholasica, because the jury found defendant committed the killing willfully, deliberately, and with premeditation. The jury rejected the notion that defendant only intended an assault. The jury found defendant had deliberated over the murder and intended to kill. If the jury believed defendant only meant to assault Scholasica and the murder was incidental, it would have rejected the first degree murder finding. Thus, the failure to give the felony-manslaughter instruction was harmless beyond a reasonable doubt because the jury already resolved the factual issue—the jury found defendant premeditated Scholasica’s murder.

As to the three attempted murders, the jury found they were “willful, deliberate and premeditated, within the meaning of Penal Code section 664/187, subdivision (a).” The jury was instructed: “The defendant acted willfully if he intended to kill when he acted. The defendant deliberated if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant premeditated if he decided to kill before acting.”

The jury’s findings on the special premeditation allegations resolve the felony-manslaughter issue. The jury found defendant deliberated over the attempted murders, and knew what he was doing—defendant wanted to murder the victims, he did not want to merely assault the victims. Given the jury’s findings, the trial court’s error of not instructing on felony-manslaughter was harmless, because the jury already resolved the factual issues against defendant.

Defendant argues the error was not harmless because the jury was not given all of its options, and could have concluded defendant had a “different state of mind.” Defendant’s argument would be more persuasive if he had been convicted of second-degree murder and the jury had not made the special premeditation findings as to the three attempted murders, but that is not the situation before us. The jury was given options, and found defendant carefully weighed the considerations for and against the shootings, and chose to go forward knowing the consequences. Given the jury’s findings concerning premeditation and deliberation, the factual issue of whether defendant only intended an assault has been resolved. The jury found defendant carefully weighed the decision to kill—not the decision to assault. Thus, we find defendant’s argument to be unpersuasive.

DISPOSITION

The judgment is affirmed.

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MILLER
J.

We concur:

HOLLENHORST
Acting P. J.

KING
J.