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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.

ALAN JAMES MIRACLE,

Defendant and Appellant.

E053908

(Super.Ct.No. SWF027955)

OPINION

APPEAL from the Superior Court of Riverside County. Mark Mandio, Judge.

Affirmed.

Kimberly J. Grove, 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, Melissa Mandel, and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

Troy Yocham, the victim, was shot multiple times with a .22-caliber semi-automatic rifle as he opened the door of his motor home in the early hours of the morning to quiet his barking dogs. Defendant, Alan James Miracle, whose truck was seen near the murder scene shortly before the time of the murder, who owned a .22-caliber rifle and had recently argued with the victim over an unpaid debt, was arrested for the homicide. He was tried and convicted by a jury of first degree murder by lying in wait (Pen. Code,¹ §§ 187, subd. (a), 189, 190.2, subd. (a)(15)), involving the discharge of a firearm. (§ 12022.53, subd. (d).) He was sentenced to life without possibility of parole and appealed.

On appeal, defendant argues that reversal is required because the trial court failed to fully instruct the jury, sua sponte, regarding the elements of the lesser included offense of unpremeditated second degree murder. We affirm.

BACKGROUND

Troy Yocham, the victim, lived in a motor home on Lost Road in Wildomar. The motor home is situated on a 40-acre parcel owned by Axel Paulsen, a friend of Yocham's. Defendant lived in a fifth-wheel trailer behind the residence of a long time friend, Nancy H., and her teenage son, Shawn. Defendant owned a .22-caliber rifle, which he kept in a soft leather case. The gun had been left to defendant when his father died, was important to defendant, and was seen in the days leading up to the murder.

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

A few days prior to the murder, Shawn heard defendant and the victim arguing because the victim owed defendant \$300. On January 11, 2009, the night before the murder, Shawn and a few of his friends played poker. Defendant, apparently drunk, joined the game. He behaved “sketchy,” paranoid and jumpy, as if under the influence of methamphetamine. During the card game, defendant asked the boys what they would do with a dead body.

The game broke up at approximately 11:00 p.m. when Nancy complained they were interfering with her sleep. The defendant left for his trailer. About that time, John Licavoli received a telephone call from defendant regarding \$40 that defendant owed Licavoli. About an hour or two after the card game ended, Shawn heard defendant’s truck leave the property.

Defendant arrived at Licavoli’s trailer looking tired and confused. Defendant and Licavoli ingested some methamphetamine that defendant had brought, but the meth was old and wet, having the consistency of oatmeal. Defendant was angry about the poor quality of the meth and complained about someone owing him \$300, but he was rambling so Licavoli couldn’t understand who owed the money or provided the methamphetamine. Defendant was with Licavoli for approximately two to three hours. The wet methamphetamine made Licavoli ill so he went to bed. The defendant left.

At approximately 4:30 a.m. on the morning of January 12, 2009, Bruce Williams was driving to work via Crab Hollow Circle.² He saw a white truck which appeared to be abandoned. Just past the white truck, Williams saw a Rottweiler dog run across the street in front of him. Williams knew the dog belonged to the occupant of the trailer near there, and that the dog was usually tied up near the trailer. A little further, Williams observed a Caucasian male sitting on the side of the road, drinking something from a silver or white can. He could not identify the person.

At approximately 4:45 a.m. on January 12, 2009, Robert Smith drove down Crab Hollow Circle on his way to work. En route, he observed a white Ford F250 pickup truck with a utility bed, parked on the side of the road. The truck was parked approximately 50 yards uphill from Yocham's trailer.³ Thinking that the truck might be abandoned, Smith got out and took down the license number so he could report it to the Sheriff's office. With his flashlight, Smith looked inside the cab of the truck where he observed a soft rifle case leaning against the seat on the passenger side. In the bed of the truck was a

² Exhibit 5, a map of the crime scene, shows Lost Road, which bounds the property where the victim's motor home was situated, in relation to Crab Hollow Circle. Lost Road runs from the southwest to the northeast in a more northerly direction, while Crab Hollow Circle runs relatively east-west, forming a T-intersection where it meets Lost Road.

³ The prosecutor showed Smith People's exhibits 7 (an overhead view of the crime scene), 9, and 10, additional views of the crime scene, showing the location of Yocham's trailer. From the testimony, we have extrapolated the location of the truck in relation to the trailer.

fifth wheel hitch for pulling a trailer. Smith reported the truck to Deputy Bikul of the Riverside Sheriff's Office.

Craig Chavers had moved in with Yocham, three days before the incident, and was staying with Yocham because he had nowhere else to stay while he tried to get clean of his methamphetamine use. The first night, Chavers took a half of a Seroquel tablet given to him by Yocham, which made him sleepy. A day and a half later, he took another half pill, ate some food, and went back to sleep. In the early evening of the night before the murder, when Chavers awoke again, Yocham gave him a beer, and Chavers ate some more food, before becoming drowsy again. Chavers slept on the floor of Yocham's motor home.

At approximately 5:00 a.m., Chavers became aware that Yocham was stepping over him. He heard Yocham open the door of the motor home and yell to his dogs to "shut [. . .] up." After yelling to quiet the dogs, the victim stepped back over Chavers and lay back down. Within minutes the dogs barked again, loudly and viciously. Chavers felt the victim step over him again as he went back down to the door and opened it. As the victim opened the door, Chavers heard several shots. After a few seconds, Chavers looked out the door and saw the victim lying on the ground on his back, with a wound on his chest. The victim's eyes were open and he was not moving. Chavers went back into the motor home to grab his shoes as well as the victim's cell phone. He tried to dial 911, but did not make a connection.

Chavers ran across the property towards Axel Paulsen's motor home and told Axel, whose girlfriend Shawna was there, that Yocham had been shot. The three of them headed back to the victim's motor home. Chavers gave Axel the cell phone. When they arrived back at the victim's motor home, they saw the body and realized Yocham was dead. Axel called 911.

The victim had sustained multiple gunshot wounds to his torso, legs and genitals. Multiple casings were found outside the trailer in a pattern indicating they were fired from a semi-automatic firearm. The pattern and trajectory of the shots suggested that the shooter was situated directly outside the door of the trailer and moved northward as the shots were fired. The blood found in the entrance to the trailer, bullets found in the door hinge, and injuries to the victim's body indicated that the victim had been shot while inside the trailer, as he was going out and that he fell out of the trailer. Bullets from some of the wounds were collected during the autopsy and subjected to testing.

Nick Serris lived next door to Dave Hachee and was acquainted with both the victim and the defendant. The defendant had previously helped Serris haul scrap metal with his truck. At approximately 5:00 a.m. of the morning of January 12, 2009, Serris was awakened from his sleep by someone knocking on his door. The person knocking on the door yelled that he needed to talk to Hachee or Serris because he needed an alibi. Serris did not answer the door, but instead waited till the person walked away, and then looked outside to see the defendant walking away. Serris also saw the defendant's white truck. Serris observed the defendant round the corner and stop at Dave Hachee's trailer.

Dave Hachee was also asleep when he heard someone knock on his door, and, like Serris, did not get up to answer the door. Then he heard a vehicle engine start up. Hachee peeked out the curtain and saw the service bed of a white Ford truck that resembled the defendant's truck.

Detectives investigated the location where Bruce Williams had seen the person sitting beside the road and collected a metal can found there. The can was submitted for fingerprint testing. The fingerprints found on the can matched the defendant's prints. Forensic testing was also conducted on the casings and bullets retrieved from the scene of the shooting. All expended casings were fired from the same weapon, and all bullets were fired from the same gun, but the bullets could not be tied to a particular gun.

Defendant was arrested on the evening of January 12, 2009, and his truck, which had been impounded, was searched using the keys found on defendant's person. The detective found some unfired .22-caliber Remington bullets in one of the side cabinets of the utility truck, and beer cans in the bed of the truck. The detective searched defendant's trailer but did not find the rifle or the gun case.

Defendant was formally charged with premeditated murder by lying in wait. (§§ 187, subd. (a), 190.2, subd. (a)(15).) It was further alleged that he had personally discharged a firearm in the commission of the homicide. (§ 12022.53, subd. (d).) Defendant was tried by a jury. The jury returned a verdict of first degree murder with a true finding that the murder was committed by lying in wait, and a true finding that

defendant personally discharged a firearm causing the death. Defendant was sentenced to life without the possibility of parole, and appealed.

DISCUSSION

Defendant argues that the trial court failed to fully instruct the jury on the elements of the lesser included offense of second degree murder. We disagree.

A trial court has a sua sponte duty to instruct the jury on the general principles of law relevant to the issues raised by the evidence, which duty encompasses instructions on lesser included offenses that are supported by the evidence. (*People v. Taylor* (2010) 48 Cal.4th 574, 623; *People v. Rogers* (2006) 39 Cal.4th 826, 866.) A court must generally instruct the jury on lesser included offenses whenever the evidence warrants the instructions, whether or not the parties desire them. (*People v. Beames* (2007) 40 Cal.4th 907, 926.) The sua sponte duty to instruct on lesser included offenses, unlike the duty to instruct on defenses, arises even against the defendant's wishes, and regardless of the trial theories or tactics the defendant has actually pursued. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) Once the trial court has adequately instructed the jury on the law, it has no duty to give clarifying or amplifying instructions absent a request. (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1331, citing *People v. Mayfield* (1997) 14 Cal.4th 668, 778.)

The court read CALCRIM Nos. 520 and 521⁴, which instructed the jury on the elements of murder, explained that malice may be express or implied, directed the jury to decide whether the degree of murder was first or second degree, and provided instructions on first degree murder theories of premeditation and deliberation, as well as

⁴ CALCRIM No. 521 provides the following: “The defendant has been prosecuted for first degree murder under two theories: (1) ‘the murder was willful, deliberate, and premeditated’ and (2) ‘the murder was committed by lying in wait.’ [¶] Each theory of first degree murder has different requirements, and I will instruct you on both. [¶] You may not find the defendant guilty of first degree murder unless all of you agree that the People have proved that the defendant committed murder. But all of you do not need to agree on the same theory. [¶] Deliberation and Premeditation [¶] The defendant is guilty of first degree murder if the People have proved that he 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 acts that caused death. [¶] The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time. [¶] Lying in Wait [¶] The defendant is guilty of first degree murder if the People have proved that the defendant murdered while lying in wait or immediately thereafter. The defendant murdered by lying in wait if: [¶] 1. He concealed his purpose from the person killed; [¶] 2. He waited and watched for an opportunity to act; [¶] AND [¶] 3. Then, from a position of advantage, he intended to and did make a surprise attack on the person killed. [¶] The lying in wait does not need to continue for any particular period of time, but its duration must be substantial enough to show a state of mind equivalent to deliberation or premeditation. [¶] A person can conceal his or her purpose even if the person killed is aware of the person’s physical presence. [¶] The concealment can be accomplished by ambush or some other secret plan. [¶] The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder.”

lying in wait. It also instructed the jury on the lesser included offense of voluntary manslaughter based upon heat of passion. These instructions adequately covered the elements of both first and second degree murder.

Defendant notes that former CALJIC No. 8.30 informed jurors that second degree murder occurs when there is manifested an intention unlawfully to kill a human being but the evidence is insufficient to establish deliberation and premeditation. The current versions of CALCRIM Nos. 520 and 521 do not contain this specific statement. While the CALCRIM instructions could be improved, the instructions are not deficient. (*People v. Hernandez, supra*, 183 Cal.App.4th at pp. 1333-1334 [despite lack of express statement of how provocation can negate premeditation and deliberation, there is no reasonable likelihood the jury did not understand the concept that provocation may reduce murder to second degree].)

Currently, CALCRIM No. 521 is the instructional equivalent of former CALJIC No. 8.30. CALCRIM No. 521, as given here, defined generic murder, explained the types of mental states (express or implied malice) required for generic murder and informed the jury that a “decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated.” The instructions adequately informed the jury that the absence of premeditation and deliberation precludes a finding of first degree murder. The court properly instructed the jury on all the elements and degrees of murder using the CALCRIM instructions.

Defendant also argues that the court failed to instruct the jury that provocation may reduce first degree murder to second degree. (CALCRIM No. 522.) The People argue that CALCRIM No. 522 is a pinpoint instruction which need not be given in the absence of a request. We agree with the People.

CALCRIM No. 522, like its predecessor, CALJIC No. 8.73, explains the effect of provocation on the degree of murder. While provocation may support a finding that there was no premeditation or deliberation, it is only relevant to the extent it bears on the question of whether defendant premeditated and deliberated; as such, it is a pinpoint instruction. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 30-33, disapproved on other grounds in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752.) However, it is not necessary to prove provocation in order to negate premeditation or deliberation, which is an affirmative element to be proven by the People.

Provocation is not a complete defense to the crime of murder because deliberate intent is not an essential element of murder; it is only an essential element of one class of first degree murder, and is not at all an element of second degree murder. (*People v. Middleton, supra*, 52 Cal.App.4th at pp. 32-33, citing *People v. Valentine* (1946) 28 Cal.2d 121, 131-132; see also *People v. Saille* (1991) 54 Cal.3d 1103, 1115.) For instance, provocation would not be a defense to first degree felony murder. It is therefore not a general legal principle relevant to second degree murder such as would require a sua sponte instruction.

We acknowledge that a sua sponte instruction on provocation and second degree murder must be given where the evidence of provocation would justify a jury determination that the accused had formed the intent to kill as a direct response to the provocation and had acted immediately to carry it out. (*People v. Johnson* (1993) 6 Cal.4th 1, 42; see also *People v. Rogers, supra*, 39 Cal.4th at p. 879.) But where there is no evidence of provocation, there is no duty to instruct sua sponte on the provocation that would reduce first degree murder to second degree murder. (*People v. Perez* (1992) 2 Cal.4th 1117, 1129-1130.)

Here, there was no evidence of provocation which would be sufficient to reduce the degree of the murder. The facts that the victim *may* have owed the defendant money or *may* have sold defendant “wet meth” sometime prior to the shooting do not constitute provocation which could lead a jury to determine that the accused acted in direct response to the provocation and acted immediately to carry it out. Thus, there was no sua sponte duty to instruct on that theory. As such, an instruction relating to provocation as it pertains to first and second degree murder (CALCRIM No. 522) must be requested by the defense. (*People v. Rogers, supra*, 39 Cal.4th at pp. 878-879; *People v. Middleton, supra*, 52 Cal.App.4th at pp. 32-33.)

Here, defendant did not request the pinpoint instruction. Nor did the defense present any evidence of provocation, relying instead on the theory that there was no proof the defendant was the shooter. At trial, defense counsel acknowledged the inconsistency of arguing that, on the one hand, the defendant did not shoot the victim, but if he did, he

was only guilty of manslaughter. He argued that the heated argument between defendant and the victim days before the shooting, and the bad drugs ingested by defendant and Licavoli in the hours before shooting supported a conviction of voluntary manslaughter.

However, the only evidence of the argument between defendant and the victim indicated that it took place a few days before the incident and there was no direct evidence that defendant obtained the “wet meth” from the victim. There was insufficient evidence to support an instruction on the theory of provocation.

There was no instructional error.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

MILLER
J.