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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS ALEJANDRO FLORES,

Defendant and Appellant.

F061009

(Merced Super. Ct. No. SUF30166)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. Carol Ash, Judge.

Mark L. Christiansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Sally Espinoza, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Sometime between November 4 and 6, 2005, appellant/defendant Luis Alejandro Flores (defendant) cut the throat of his live-in girlfriend, Jackie Lua (Jackie),¹ placed her on a bed in their apartment, and then slit his own throat and lay next to her. He left behind notes indicating that he did it “for love.” Jackie bled to death. Defendant survived and dialed 911 for help. As paramedics treated the knife wound to his throat, defendant indicated he had cut Jackie’s throat and then his own.

Defendant was charged with the first degree murder of Jackie (Pen. Code,² § 187), with the special allegation that he personally used a dangerous or deadly weapon, a knife (§ 12022, subd. (b)). After a lengthy jury trial, defendant was found not guilty of first degree murder, but guilty of the lesser included offense of second degree murder, and the special allegation was found true. Defendant was sentenced to 15 years to life plus one year for the special allegation.

On appeal, defendant contends the court had a sua sponte duty to instruct the jury on unconsciousness as a complete defense to murder. Defendant also argues that his constitutional rights were violated when the court conducted a restitution hearing in his absence. We will affirm.

FACTS

In 2004, defendant met Jackie and they started dating. Defendant was 28 years old and worked as a substitute teacher in Winton. Jackie was 20 years old. During the next year, they broke up three or four times, but they reconciled on each occasion and lived together. Around October 2005, they moved into a one-bedroom apartment on K Street in Merced.

¹ We refer to the victim and some of the witnesses by their first names for the sake of clarity; no disrespect is intended.

² All further statutory references are to the Penal Code unless otherwise indicated.

Prescilla Guerrero, Jackie's close friend, testified that she was with Jackie on occasions when defendant would call her. Jackie said defendant called "just to check up on her, I guess, see what she's doing." Guerrero testified that about one week before the homicide, Jackie said that "she didn't want to be with [defendant] anymore, that she just wanted to break up on good terms with him." About two days before the homicide, Guerrero and Jackie had lunch, and Jackie received a cell phone call from defendant. Guerrero could hear defendant yelling over the phone. Based on Jackie's responses, Guerrero believed defendant was "upset that she had left and was yelling at her."

Roberto Lua, Jr. (Robert), Jackie's brother, testified that defendant and Jackie regularly took care of his 18-month old child when he had weekend custody, and the child was always well-cared for. Robert did not know about any violence between defendant and Jackie. Robert testified about a conversation he had with Jackie just a few days before the homicide. Jackie said that she was going to end her relationship with defendant because "they weren't getting along, and she didn't want to go with him no [sic] more."

Ryan Natasha Zurney, the mother of Robert's child, testified that when Jackie started to date defendant, "[s]he wasn't really allowed to talk to anybody, any of her friends too often." Jackie told Zurney that defendant did not like her talking to certain people. About two months before the homicide, Jackie told Zurney about an incident when defendant and Jackie argued in a car. Jackie said that defendant "was driving extremely fast down Bear Creek ... and he was threatening if he left her that he would drive the car into the creek and kill them both."

Zurney testified that Jackie never said she was afraid of defendant. On one or two occasions, however, Jackie said that defendant threatened to kill himself if she ever left him. Zurney believed Jackie was afraid of defendant once or twice, "because there were

a couple of times where she would catch him driving by her house many times while they were split up.”³

Roberto Lua, Sr. (Mr. Lua), the father of Jackie and Roberto Jr., testified that about five months before the homicide, defendant took Jackie to Mexico, though she did not want to go. Mr. Lua believed defendant kidnapped her. Jackie was afraid because they were so far from home, and she feared defendant would do something to her. After they returned, Jackie told her father that they stayed at a hotel and had an argument by the balcony. Jackie said defendant “picked her up and held her over the balcony and threatened ... to drop[] her if she would leave him.” A few weeks later, Mr. Lua confronted defendant about this incident. Defendant said “they were just playing around.” Jackie was present during this conversation and just smiled. Mr. Lua felt Jackie did not want to disagree with defendant.

Mr. Lua testified that a couple of months before the homicide, Jackie told him about the incident when she argued with defendant in the car. Jackie said defendant accelerated the car and, as they reached the creek, defendant said, “ ‘If you leave me, I’ll kill myself. I’ll go straight to the canal.’ ” Jackie said that defendant threatened to kill himself every time they argued. About a week before the homicide, Jackie told her father that they argued, and defendant again threatened to kill himself. Mr. Lua warned Jackie about defendant, but Jackie said “ ‘there’s no way he would do such a thing He loves me, and I love him.’ ”

On Thursday, November 3, 2005, defendant called his mother and wished her a happy birthday. They planned to visit with each other on Saturday, November 5, 2005, but she never heard from him that day.

³ A police detective testified he interview Zurney after the homicide, and Zurney never said that Jackie was afraid of defendant.

On Saturday, November 5, 2005, defendant and Jackie picked up Robert's 18-month old baby to watch the child for the weekend, as they had planned. Robert called them a few times to check on the baby, and there were no known problems.

The 911 call

Around 2:00 a.m. on Sunday, November 6, 2005, the Merced Police Department received a 911 call from the apartment where defendant and Jackie lived. The operator could only hear someone breathing in the background, but no one spoke or responded to the operator's questions.

At 2:02 a.m., Merced Police Detective Luis Solis arrived at the apartment. Solis entered through the unlocked front door. Solis found defendant and Jackie lying next to each other on a fold-out bed in the living room. The bed was extremely bloody, and defendant and Jackie were covered in both dry and fresh blood.

Jackie's throat had been severely cut with a knife. There were jagged edges on her neck, consistent with more than one cutting motion. She was not breathing and did not have a pulse. It appeared she had bled to death.

Defendant also had a throat wound, and it appeared his throat had been cut once. He was barely breathing. His eyes were closed, but Solis saw involuntary eyelid tremors. There were burn marks on defendant's right cheek, consistent with being inflicted from the apartment's electric stove coils. There were also wounds on his wrist. There was a cordless telephone under defendant's lower body.

One officer later described the apartment as one of the "bloodiest crime scenes" he had ever seen. There was blood all over the kitchen counters, walls, and on the floor. There were bloody footprints on the kitchen floor, indicating that someone had walked through the blood. There was blood in the bathroom sink and floor, and on the hallway and living room walls.

There were two Cutco-brand knives at the top of the fold-out bed. The knives were just above the pillows, a couple of feet away from the heads of defendant and

Jackie. One knife was large, and the other was a small paring knife. The small knife was on top of the large knife.

Robert's baby was found sleeping in the back bedroom. The child was not injured.

The notes

There were three notes in the apartment, all of which were covered with blood. One note was on the floor and stated: " 'Jackie Lua with me till death. I said it always.' " The other note was on a table near the fold-out bed and stated: " 'I did it for love. Forgive me, God. Mom, I love you with all my heart, Luis,' " and " 'Brother, I love you too.' " Both notes appeared to have been written by the same person, in the same ink color.

A third note was found on the living room floor, at the foot of the fold-out bed. It contained Jackie's cell phone number, in the same ink color as the other two notes. Defendant's fingerprint was found on that note.

Chief Bryan Donnelly's questions to defendant

The paramedics and other officers arrived at the apartment within minutes of Detective Solis's arrival. Battalion Chief Bryan Donnelly, the head of the fire department's emergency response team, found defendant and Jackie on the bed. Donnelly examined Jackie and pronounced her dead.

Donnelly testified that defendant had a laceration on the front of his neck. Defendant was "mildly" bleeding, and he was not moving. Defendant made a gurgling noise, and Donnelly realized he was still alive. Donnelly rolled defendant over, removed coagulated blood from the neck laceration, put a breathing tube into his throat, and administered oxygen. Defendant's eyes opened, he moved around, and he became responsive. Donnelly did not administer any sedatives or painkillers.

Donnelly testified he was concerned about defendant's condition and thought he might die at any time. Donnelly decided to ask defendant some questions because he

wanted to get information “on who had done this.” Defendant was not able to verbally respond, but he could nod and shake his head. Donnelly testified that defendant was cooperative and tried to respond as best as he could.

Donnelly asked defendant “if he knew who had done this to him,” and defendant nodded yes and blinked his eyes. Donnelly asked defendant if gang members had done this, and defendant shook his head no. Donnelly then asked defendant if he had done this. Defendant nodded affirmatively and blinked his eyes.

Detective Solis’s questions to defendant

Solis testified that he saw defendant nodding his head in response to Donnelly’s questions. Donnelly informed Solis about defendant’s responses.

Solis testified he also decided to ask defendant questions because defendant was seriously injured and might not survive. The paramedics continued to treat defendant as Solis talked to him. Solis tried to get defendant to write down responses to his questions, but defendant was not able to hold a pen. Instead, Solis asked defendant to blink rapidly for “yes,” and close his eyes for “no,” in response to his questions.

Solis asked another officer to turn on a tape recorder. Solis asked questions, and Donnelly gave verbal responses on the tape recording to report defendant’s eye and head movements. Solis asked defendant if he could hear him. Defendant rapidly blinked his eyes to indicate yes.

Solis asked defendant if he knew who had done this to him. Defendant rapidly blinked his eyes to indicate yes. Solis asked defendant if his name was “Luis.” Defendant rapidly blinked his eyes. Solis asked defendant if he “did this to himself.” Defendant rapidly blinked his eyes and also “nodded his head up and down.” Solis asked defendant if he called the police, and defendant again rapidly blinked his eyes.

Solis next asked defendant if his wife was next to him. Defendant shut his eyes, and shook his head from side to side, indicating no. Solis asked if the woman was his girlfriend. Defendant rapidly blinked his eyes and nodded his head up and down, to

indicate yes. Solis asked defendant if he cut his girlfriend's throat. Defendant rapidly blinked his eyes. Solis also asked defendant if he cut his own throat. Defendant again rapidly blinked his eyes.⁴

Defendant was transported to the hospital and survived the knife wound.⁵ He was charged with the first degree murder of Jackie.

The autopsy

The pathologist testified that Jackie's cause of death was exsanguination, or bleeding out, from a "complex cutting wound" to the front of her neck. Jackie had suffered "more than one cut" from a knife to "multiple structures of the neck," and "it all appeared to be cutting without stabbing." There could have been 8 to 15 cuts to her neck. There was "some scalloping to the edges of the wound and some other cuts in the base of the wound" that were consistent with "more than one cut." The wounds were consistent with being inflicted by the large knife found on the fold-out bed. It would have taken two or three minutes for someone to inflict all the knife wounds on Jackie. One cut hit the carotid artery, and she would have died within one to two minutes.

⁴ During pretrial motions, the court held defendant's blinks and nods, given in response to questions from Chief Donnelly and Detective Solis, were admissible because they were conducting an initial investigation of the crime scene, defendant was not subject to custodial interrogation, the warnings pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) were not required, and defendant was responsive and appeared to understand the questions.

⁵ Less than a week after the homicide, Detective Harry Markarian visited defendant in the hospital and interviewed him on two occasions. Markarian advised defendant of the *Miranda* warnings. Defendant still could not speak but he made gestures in response to some questions, but he was silent when asked other questions, and it was not clear whether he was coherent or alert. After a pretrial evidentiary hearing, the court granted defendant's motion to exclude these two interviews, and found defendant's responses were involuntary because defendant was "nonresponsive" and "barely coherent."

Jackie also suffered several contusions on her face, chest, and the front and back of her lower body. She had a large bruise on the left rear side of her head. The contusions were consistent with blunt force injuries. She did not have any defensive wounds, and there were no signs that she had struggled. Jackie's blood-alcohol level was 0.18 percent, which would have rendered a person intoxicated.

The pathologist reviewed photographs which showed defendant and Jackie laying next to each other on the fold-out bed, with defendant's arm around Jackie. The pictures were taken by the officers when they initially responded to the apartment. The pathologist testified defendant could not have inflicted the knife wounds on Jackie's neck if they had been in those positions because her neck was not exposed enough. The pathologist believed Jackie's body was moved and the positions were "posed" after she was stabbed.

Defendant's wounds

The pathologist examined the photographs of defendant's neck wound and testified it was inflicted by a single slice of a knife, consistent with being inflicted with the large knife found on the bed. The wound was six inches long from the right to left side of the throat. It would have allowed defendant to breathe but prevented him from being able to speak. Defendant also had knife lacerations on his wrist, which were consistent with being inflicted with the small paring knife found on the bed.

DEFENSE EVIDENCE

Defendant presented several witnesses who had known him for many years. These witnesses testified that they had seen defendant and Jackie together; that Jackie never seemed afraid of defendant; that defendant never acted controlling or domineering toward her; and that defendant never said he would kill himself if Jackie left him. These witnesses admitted that they were shocked by the homicide, and they did not know the details until they appeared at trial. One friend testified that he knew defendant and Jackie broke up several times, defendant would get very sad during those occasions, his friend

encouraged him to date other girls, but defendant was deeply in love with her and they always reconciled.

Defendant's trial testimony

Defendant testified that he dated Jackie for about one year before the homicide. In late March 2005, Jackie told defendant that she was pregnant. A few days later, Jackie went to the doctor and told defendant that she had miscarried.

Defendant testified that in May or June 2005, he proposed to Jackie and she accepted. They moved in with defendant's parents but only stayed there for one night. On that particular night, defendant and Jackie each drank a 40-ounce bottle of beer. Defendant testified that Jackie regularly drank that much beer. Defendant and Jackie argued because defendant wanted to go to sleep, but Jackie wanted to stay up late. Defendant walked out, drove to see Jackie's mother, and told her to come and get Jackie because "it was getting out of hand at my house." Defendant drove Jackie's mother back to his parents' house, and defendant went to bed. However, Jackie kept arguing with him, and she threw things at him in bed. Jackie eventually left with her mother.

Defendant testified that a few days after this incident, he went to Jackie's house and spoke to her parents. Defendant told her mother that he did not take care of Jackie because Jackie had a drinking problem, and she went out at night to drink. Jackie later called him and they reconciled. They lived in several different apartments that summer. They continued to argue, but they always reconciled.

Defendant testified he did not take Jackie to Mexico against her will, and he never threatened to throw her over the hotel balcony. Defendant testified they were "always drinking" during that trip, and Jackie asked what he would do if she left him. Defendant replied that he would push her off the balcony and " 'jump with you in my arms.' " Defendant testified he gave that response because he thought Jackie wanted to hear that. Jackie asked if he would really do that, and defendant laughed and said no.

Defendant also testified he never threatened to drive Jackie into a canal. Defendant testified that they were driving when Jackie asked what he would do if she left him. Defendant replied that he would drive into the creek. Defendant testified that Jackie grabbed the wheel. Defendant told her that he was just playing and would never do that, and to let go of the steering wheel because he was going to lose control.

Defendant admitted that he may have told Jackie that he would kill himself if she left him. Defendant claimed he never meant it, and he only said what she wanted to hear.

Defendant testified they were supposed to go to his mother's house on November 3, 2005, to celebrate his mother's birthday. They did not go, and defendant falsely told his mother that Jackie had to attend a meeting at work. The real reason, however, was that Jackie had to attend a DUI class.

Defendant testified that the day before the homicide, they took care of Robert's child, as they usually did on the weekends. Defendant planned to visit his mother on the weekend to belatedly celebrate her birthday.

Defendant's testimony about the homicide

Defendant testified about the events of the evening which led to the homicide. On Friday night, November 4, 2005, defendant and Jackie were at the apartment, and they each drank a 40-ounce beer. Defendant testified that Jackie wanted to drink more. Defendant warned her not to continue drinking because they were taking care of the baby.⁶ Jackie insisted that she wanted to continue drinking, and they argued. Defendant eventually agreed that they would buy more beer. They put the baby in the car, defendant drove to the store, and Jackie waited with the baby while defendant bought two more 40-ounce beers. Defendant admitted he bought alcohol for Jackie even though she was

⁶ Defendant testified that Robert's baby was with them on Friday night. However, Robert testified that defendant and Jackie picked up the baby on Saturday.

under age and he thought she had a drinking problem, but he only did it to end their arguments.

Defendant testified they returned to the apartment. Defendant did not finish his beer because he was sick with a fever and the flu, and he just wanted to relax. Jackie drank her beer, and she was angry because defendant did not want to party. Defendant told her that he wanted to go to sleep because he did not feel well. Jackie was upset and wanted to buy more beer. Defendant refused and told her to go to sleep because she was drunk. Jackie cursed him and they continued to argue.

Defendant told Jackie that he would sleep on the fold-out bed in the living room. He told her to sleep with the baby in the apartment's only bedroom so she could calm down. Jackie was still upset, but she agreed.

Defendant testified he opened the fold-out bed and Jackie went into the bedroom. About 20 minutes later, Jackie returned to the living room and started arguing with him again. Jackie got into the fold-out bed with defendant and kept yelling at him. Defendant got up, walked away from her, and went into the adjacent kitchen. Defendant could not remember if Jackie hit him that night.

Defendant testified that Jackie accused defendant of not being able to have sex with her because of a physical problem. Jackie said that was why she had sex with another man. Jackie repeatedly said that she preferred to have sex with the other man. Defendant testified he "started tripping out." He was not happy because he had "given up everything for her," and he did not understand "why she was upset."

"She kept saying a whole bunch of things and I couldn't hear anymore. Like, I couldn't just hear her anymore. Everything just came together in my head. I don't know what happened. Then I ended up with a knife in my hand."

Defendant testified he stood in front of Jackie in the living room "and then I remember getting my hand and cutting her." He used a knife from the kitchen. Defendant did not remember grabbing the knife. He did not remember what he was

thinking when he raised his arm and cut her throat. He realized that he was cutting her neck for a couple of seconds, but he could not stop. “[E]verything blew up in my head.”

“And it didn’t seem real – what was happening. Her body was, like, numb and stuff. My hand was all hot. I don’t know. And then when I seen that I was cutting her, I realized when I saw her face that it was just like a blank stare. I laid her down. I don’t know, but it like look like she was gone. And then – and then I cut myself too.”

Defendant testified he never wanted Jackie to die, he did not want to kill her, and he did not know why he cut her neck. He said he never hit her in the head, and there “was never a fight to defend herself from.”

Defendant agreed with his defense attorney’s description that he was in “a very hot-blooded rage” when he cut Jackie’s throat. Defendant testified he “was emotional” and he “didn’t understand what was going on. My blood was pumping fast and I felt hot.” The prosecutor pursued this point during cross-examination:

“[THE PROSECUTOR]. So you were in a hot-blooded rage. I guess that’s another way of saying you were really angry?”

“[DEFENDANT]. I don’t know.

“Q. Well, you remember a lot of things that [Jackie] told you, so now you don’t remember how you felt when she was saying that stuff to you?”

“A. I remember she was telling me a lot of things and I couldn’t hear her anymore. It started fading away. So many things were coming together in my head, and then I don’t know what happened. It felt like – like I blacked out”

Defendant testified that he cut his throat because Jackie was “gone, so I didn’t want [to] stay behind.” Defendant intended to kill himself and realized he could not talk. Defendant hugged Jackie and tried to tell her that he loved her, but he could not talk because of his own knife wound. Defendant kissed Jackie and lay next to her on the fold-out bed. He was bleeding and thought he was going to die.

Defendant testified it was dark outside and he passed out. He kept waking up and realized it was daylight. He got up from the bed and went to the kitchen and bathroom. He looked in the mirror to see if he was cut. He fainted and fell down several times. Defendant went into the bedroom and gave the baby some milk.⁷ He may have burned his face on the electric stove, but he did not remember how that happened. Defendant went back to the fold-out bed and passed out.

Defendant testified that sometime during the day (Saturday), he wrote the notes which were found in the apartment. He did not know the time but it was daylight outside. Jackie was lying dead on the bed.

Defendant testified that when he realized he was still alive, he used a small paring knife from the kitchen to slit his wrist because he wanted to die. It was starting to get dark outside. Defendant did not call 911 because he did not want anyone to come until he was dead.

Defendant testified that he was on the bed for a long time and realized that he was still alive. He was worried about the baby, and he finally called 911 so someone would pick up the child.

INSTRUCTIONS AND CLOSING ARGUMENTS

The instructional conference was primarily held off the record. However, the court noted that it would instruct the jury on the charged offense of first degree murder and the lesser included offenses of second degree murder and voluntary manslaughter. The voluntary manslaughter instructions were based on heat of passion, provocation, and

⁷ As noted *ante*, defendant testified that Robert's baby was with them on Friday night, but Robert testified that they picked up the baby on Saturday. In closing argument, the prosecutor pointed out this discrepancy and testified it was unbelievable that the baby could have been sleeping in the bedroom for over 24 hours, and then found unharmed on Sunday morning, while defendant and Jackie lay bleeding on the bed.

sudden quarrel. As we will discuss in section I, *post*, defense counsel did not request instructions on unconsciousness as a complete defense.

In closing argument, the prosecutor argued defendant was guilty of first degree murder and his trial testimony was not credible and refuted by the two notes he admittedly wrote after he killed Jackie. The prosecutor argued the notes corroborated the prosecution witnesses who testified that Jackie was afraid of defendant and that defendant had threatened to kill her if she left him. Defendant made multiple decisions and took several steps to kill her, which showed premeditation and deliberation: he went into the kitchen, he looked for a knife, he grabbed the knife, he went back into the living room, he raised his arm, and he cut her neck 8 to 15 times. He did not randomly stab her, but he methodically cut into her neck, and he knew what he was doing.

In his closing argument, defense counsel noted that defendant never denied that he killed Jackie, and the question was whether he was guilty of second degree murder or voluntary manslaughter. Defense counsel argued defendant's actions did not reflect a cold, calculated, premeditated, rational plan to kill Jackie, and the events of that night "bewildered [defendant], it bewilders him today. He still thinks about it." Counsel argued the killing was "a crime of passion" that occurred "in a moment of passion, in a moment of heat."

Defense counsel argued that a rash decision to kill did not constitute first degree murder. Counsel asserted that Jackie was drunk, she "nagged" defendant and challenged his manhood, but defendant was tired and sick with the flu. Defendant just wanted to sleep but Jackie kept nagging him.

"[Jackie's] barrage went on and on and on. And you heard the testimony that at some point – he didn't know, but at some point, it just went beyond him. At some point, whatever she was saying went and his head and his body did things he never understood; but before he had realized it, he had committed a horrible, horrible act, there was no premeditation.

“While he was killing, at the moment he killed, the barrage, the words, humiliation was still going on, still continuing. And he even lost track of exactly what words were at a certain point. It is not selective memory, ladies and gentlemen.

“When you’re in a mental state where you can still grasp what’s going on and you still have some control over your emotions, over your passions, you can remember. At some point when things go red, burning white, whatever happens in those situations, your mind blocks out more than it can take. And sometimes, sometimes, unfortunately, some of us will do something that you will regret for the rest of your life.

“And I’m telling you that this is what happened on this date in his life.”

Defense counsel extensively discussed voluntary manslaughter, heat of passion, provocation, and sudden quarrel. Counsel acknowledged that defendant couldn’t explain what was going on in his head and still couldn’t understand why he did it, but the killing resulted from an emotional outburst and constituted voluntary manslaughter. Jackie was drunk, defendant was in a weak condition because he was sick, and “[s]omething in him snapped.”

“And as he told you, his experience was like his body went numb and he almost came outside of himself, and what he did, the moment he killed Jackie, he turned the knife to himself and he doesn’t even remember exactly how, but he just remembered that – realized what he had done when he looked at Jackie’s lifeless eyes, and he no longer wanted to live.”

Defendant was convicted of second degree murder.

DISCUSSION

I. The court did not have a sua sponte duty to instruct on unconsciousness as a complete defense

Defendant argues the court had a sua sponte duty to instruct on unconsciousness as a complete defense to the charge of murder, pursuant to CALCRIM No. 3425. Defendant asserts his trial testimony raised substantial evidence to support the court’s sua sponte duty to give this instruction, because he testified that he could not remember why or what happened when he stabbed Jackie.

A. A court's sua sponte duty to instruct

“A court must instruct sua sponte on general principles of law that are closely and openly connected with the facts presented at trial. [Citations.]” (*People v. Ervin* (2000) 22 Cal.4th 48, 90.) This obligation requires instructions on lesser included offenses if there is substantial evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser. (*People v. Blair* (2005) 36 Cal.4th 686, 745.) “[A] trial court’s duty to instruct, sua sponte, or on its own initiative, on particular defenses is more limited, arising ‘only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant’s theory of the case.’ [Citations.]” (*People v. Barton* (1995) 12 Cal.4th 186, 195.)

“In this context substantial evidence means evidence which is sufficient to deserve consideration by the jury and from which a jury composed of reasonable persons could conclude the particular facts underlying the instruction existed. The trial court is not required to present theories the jury could not reasonably find to exist. [Citations.]” (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.) “In deciding whether defendant was entitled to the instructions urged, we take the proffered evidence as true, ‘regardless of whether it was of a character to inspire belief. [Citations.]’ [Citation.]” (*People v. Petznick* (2003) 114 Cal.App.4th 663, 677.) “[T]he test is not whether *any* evidence is presented, no matter how weak. Instead, the jury must be instructed when there is evidence that ‘deserve[s] consideration by the jury, i.e., “evidence from which a jury composed of reasonable [people] could have concluded” ’ that the specific facts supporting the instruction existed. [Citations.]” (*Ibid.*, italics in original.)

B. Unconsciousness

“Among those persons deemed incapable of committing a crime are individuals who ‘committed the act charged without being conscious thereof.’ [Citation.]

Unconsciousness, when not voluntarily induced, is a complete defense to a charged crime. [Citations.]” (*People v. Rogers* (2006) 39 Cal.4th 826, 887 (*Rogers*)).⁸

CALCRIM No. 3425 (formerly CALJIC No. 4.30) states the complete defense of unconsciousness:

“The defendant is not guilty of <insert crime[s]> if (he/she) acted while legally unconscious. Someone is legally unconscious when he or she is not conscious of his or her actions. [Someone may be unconscious even though able to move.]

“Unconsciousness may be caused by (a blackout[,]/ [or] an epileptic seizure[,]/ [or] involuntary intoxication[,]/ [or] sleepwalking[,]/ or <insert a similar condition>).

“The People must prove beyond a reasonable doubt that the defendant was conscious when (he/she) acted. If there is proof beyond a reasonable doubt that the defendant acted as if (he/she) were conscious, you should conclude that (he/she) was conscious. If, however, based on all the evidence, you have a reasonable doubt that (he/she) was conscious, you must find (him/her) not guilty.” (Original italics.)

“ ‘Unconsciousness does not mean that the actor lies still and unresponsive. Instead, a person is deemed “unconscious” if he or she committed the act without being conscious thereof.’ [Citations.]” (*Rogers, supra*, 39 Cal.4th 826, 887.) “To constitute a defense, unconsciousness need not rise to the level of coma or inability to walk or perform manual movements; it can exist ‘where the subject physically acts but is not, at

⁸ In contrast, voluntary intoxication is not a complete defense and can never excuse an unlawful homicide. If someone dies as a result of actions of a person who was unconscious due to voluntary intoxication, then the killing is involuntary manslaughter. (*People v. Ochoa* (1998) 19 Cal.4th 353, 423-424 (*Ochoa*)). While there is evidence that defendant drank at least one and part of a second 40-ounce beer before the homicide, defendant has not argued that the killing was the result of unconsciousness because of his voluntary intoxication, or that the court should have instructed the jury with involuntary manslaughter as a lesser included offense. Instead, defendant has limited his argument to the contention that the court should have given CALCRIM No. 3425, unconsciousness as a complete defense.

the time, conscious of acting.’ [Citation.]” (*People v. Halvorsen* (2007) 42 Cal.4th 379, 417.) “An unconscious act, as defined ‘within the contemplation of the Penal Code is one committed by a person who because of somnambulism, a blow on the head, or similar cause is not conscious of acting and whose act therefore cannot be deemed volitional.’ [Citations.]” (*People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1083.)

However, a defendant’s “own testimony that he could not remember portions of the events, standing alone, [is] insufficient to warrant an unconsciousness instruction. (*People v. Froom* (1980) 108 Cal.App.3d 820, 829-830 ... [evidence the defendant was forgetful and told a psychiatrist he ‘awakened’ after the crime was committed did not entitle the defendant to an unconsciousness instruction]; *People v. Heffington* (1973) 32 Cal.App.3d 1, 10 ... [there is no ‘ineluctable rule’ that a defendant’s inability to remember supplies an evidentiary foundation for an unconsciousness instruction]; cf. *People v. Coston* (1947) 82 Cal.App.2d 23, 40, [185 P.2d 632] [‘a defendant’s mere statement of forgetfulness, unsupported by any other evidence, is at most very little evidence of unconsciousness at the time of performing a particular act’].)” (*Rogers, supra*, 39 Cal.4th at p. 888.) While “a reviewing court” must “assume that [the defendant’s] selective recollection was natural, not feigned,” such testimony is “far short of a claim or description of coexistent unconsciousness,...” (*People v. Heffington, supra*, 32 Cal.App.3d at p. 10; *People v. Carlson* (2011) 200 Cal.App.4th 695, 704.) Additional evidence to justify an unconsciousness instruction might be based on memory loss or the defendant’s mental state. (*People v. Wilson* (1967) 66 Cal.2d 749, 762.)

“A trial court must instruct on unconsciousness on its own motion if it appears the defendant is relying on the defense, or if there is substantial evidence supporting the defense and the defense is not inconsistent with the defendant’s theory of the case. [Citation.]” (*Rogers, supra*, 39 Cal.4th at p. 887.)

C. Analysis

Defendant argues the court had a sua sponte duty to give CALCRIM No. 3425, unconsciousness as a complete defense to murder, based on his trial testimony that he was very tired and had a fever that night; that he did not understand what happened when he stabbed Jackie; that his acts were mechanical rather than volitional; and that he had a hazy and incomplete memory of stabbing her. Defendant asserts that defense counsel's closing argument effectively summarized the elements of the unconsciousness defense, but counsel was foreclosed from expressly relying on that defense because the court failed to recognize its sua sponte duty to give CALCRIM No. 3425.

We find the trial court did not have a sua sponte duty to give CALCRIM No. 3425 under the facts and circumstances of this case. Indeed, defendant's arguments are almost identical to those addressed and rejected by the California Supreme Court in *Rogers*, *supra*, 39 Cal.4th 826. In that case, the defendant claimed the court had a sua sponte duty to instruct on unconsciousness as a complete defense to two counts of murder. The defendant argued there was substantial evidence to support the instruction based on his own testimony that he had no independent memory of the killings, and an expert's testimony that he " 'blacked out' " and could not remember some parts of the incident. (*Id.* at p. 887.)

Rogers held the court did not have a sua sponte duty to give the instruction because the experts never testified that the defendant was unconscious, and the defendant only claimed he could not recall the killings. (*Rogers, supra*, 39 Cal.4th at pp. 887-888.)

"The defense experts' testimony ... does not imply that [the defendant] was unconscious during the events. Rather, it suggests he was aware of the events as they were occurring, but reacted to them emotionally rather than logically. For example, [one expert] testified the killing was an emotional, 'impulsive heat of passion event,' and [another expert] testified the killing was an impulsive, emotional act of passion and fear. *Further, defendant's own testimony that he could not remember portions of the events, standing*

alone, was insufficient to warrant an unconsciousness instruction. [Citations.]” (*Id.* at p. 887-888, italics added.)

Rogers concluded that the defendant’s “professed inability to recall the event, without more, was insufficient to warrant an unconsciousness instruction. [Citations.]” (*Rogers, supra*, 39 Cal.4th at p. 888.)

In this case, defendant did not introduce any expert testimony about his alleged unconsciousness. Thus, his trial testimony would have provided the only evidence pertaining to this purported defense. As in *Rogers*, however, defendant never testified that he was unconscious. Instead, he offered specific details about the events leading up to the very moment that he repeatedly sliced Jackie’s neck, and he failed to present any substantial evidence that he was unconscious when he killed her.

Defendant extensively testified about Jackie’s alleged demands to drink and party, and defendant’s attempts to calm the situation by having her sleep in the bedroom while he stayed in the living room. Defendant explained that he opened up the fold-out bed in the living room and tried to sleep, but Jackie emerged from the bedroom, got into bed with him, and kept yelling at him. Defendant also explained that he got up from the bed and went into the adjacent kitchen to get away from her, but Jackie followed and accused him of not being able to have sex with her. Defendant testified he “started tripping out,” and he could not understand “why she was upset.” Defendant “couldn’t just hear her anymore,” but he knew that “I ended up with a knife in my hand.”

While defendant did not remember grabbing the knife, he knew he used a knife from the kitchen, that he stood in front of Jackie in the living room, “and then I remember getting my hand and cutting her.” Defendant may not have remembered what he was thinking when he repeatedly cut her throat, but he realized that he was cutting her neck for a couple of seconds, and that he could not stop. Defendant also had near-perfect recollection of the what happened after he realized Jackie was dead – he placed her on the bed, slit his own throat, realized after several hours that he was still alive, got up and tried

to take care of the baby, repeatedly fell down, returned to the bed, wrote the notes to his family, used another knife to slit his wrist, again realized he was still alive, and decided to call 911 so someone could take care of the baby. Most importantly, he admitted that he wrote both notes, one of which said that he “ ‘did it for love,’ ” and the other which said: “ ‘Jackie Lua with me till death. I said it always.’ ”

Defendant asserts the unconsciousness instruction was supported by other parts of his trial testimony, when he said that “it didn’t seem real – what was happening,” he was “emotional,” he “didn’t understand what was going on,” he felt like he “blacked out,” he realized that she was dead, and then he sliced his own neck. However, defendant’s testimony on these points was part of his description of his “very hot-blooded rage,” that his “blood was pumping fast and I felt hot.” While defendant tried to back away from his initial admission about his “very hot-blooded rage,” he repeatedly said that he “felt hot” and his “hand was all hot” during and after the time that he was cutting her neck.

Defendant complains that defense counsel did not realize that he could have relied on unconsciousness as a defense. Given defendant’s prior admissions at the scene (through his knowing and responsive gestures to Chief Donnelly and Detective Solis), the presence of the two notes, and the testimony about defendant’s prior threats toward Jackie, defense counsel was faced with an extremely difficult task in this case. However, he skillfully relied on the evidence to argue that the homicide was not first degree murder, there was no premeditation or deliberation, and that Jackie’s alleged argument with defendant raised the theories of heat of passion and provocation to reduce the killing to voluntary manslaughter.

We thus conclude that the court did not have a sua sponte duty to instruct the jury with unconsciousness as a complete defense. While defendant could not explain why he cut Jackie’s neck, defendant testified in fairly “sharp detail” about how he stabbed Jackie. “Defendant’s own testimony makes clear that he did not lack awareness of his actions” during the killing, and defendant’s claimed memory loss did not create substantial

evidence of unconsciousness. (*People v. Halvorsen, supra*, 42 Cal.4th at p. 418.) Moreover, “[defendant’s] statement that he did not know what was going through his mind” did not present substantial evidence to trigger the court’s sua sponte duty to give the unconsciousness instruction. (See, e.g., *Ochoa, supra*, 19 Cal.4th at p. 424.)

Finally, even assuming that an unconsciousness instruction should have been given, the error is harmless by any applicable standard. (*People v. Boyer* (2006) 38 Cal.4th 412, 470-471.) Aside from defendant’s self-serving and inherently inconsistent testimony, there is no evidence of any meaningful value to support the conclusion that defendant was legally unconscious when he repeatedly sliced Jackie’s neck. As the pathologist explained, Jackie was not stabbed but instead suffered 8 to 15 cuts across her neck, and it would have taken two to three minutes to inflict those cuts. While defendant claimed he had a “blackout,” he only made that claim when the prosecutor pressed him during cross-examination as he tried to retreat from his earlier statement that he was in a “very hot-blooded rage.” Moreover, defendant never managed to explain how Jackie suffered the blunt force trauma on her face and body, and the large bruise on the back of her head which could have incapacitated her. Finally, the two notes constituted the most damaging evidence against defendant’s claim of unconsciousness, particularly the note that said “ ‘Jackie Lua with me till death. I said it always,’ ” which corroborated the testimony from Jackie’s family and friends about defendant’s repeated threats if she left him.

II. The restitution hearing

Defendant next contends the court’s restitution order must be stricken because the trial court lost jurisdiction to make such an order since the hearing was held after defendant filed his notice of appeal from his conviction and sentence. Defendant also contends the restitution order is invalid because he was not present at the hearing; he never waived his right to be present; and his defense counsel did not have authority to waive his presence.

We will review the postverdict proceedings and find that any error was harmless.

A. Probation report

On April 23, 2010, the jury found defendant guilty of second degree murder.

According to the probation report, the victim's compensation board provided assistance to Jackie's family of \$5,000. Jackie's father stated that he had \$6,000 in funeral expenses which were not covered by the victim's compensation board. The probation report recommended restitution in the amount of \$11,000.

According to a letter written by a member of Jackie's family, Jackie's funeral was held on the same date and location that was supposed to be a 50th wedding anniversary party for her grandparents.

B. Sentencing hearing

On September 1, 2010, after numerous continuances, the court held the sentencing hearing. Defendant was present with his defense counsel. Jackie's family was present but declined to speak. Instead, the prosecutor summarized their feelings about defendant and the impact of the murder on their family.

The court sentenced defendant to 15 years to life for second degree murder, plus one year for the use of a knife. The court then stated:

“And I will order restitution is reserved, and we can set this for an ex parte restitution hearing when [defendant] does not need to be present, and [defendant] is ordered to pay a restitution fine, and that's the amount of \$10,000 and that will be collected by the Director of Corrections. He'll have an additional \$10,000 fine that's staying pending successful completion of parole if he is ever released on parole.”

The court asked defense counsel for a date for “the restitution pretrial.” After a brief discussion, the court scheduled the “ex parte restitution pretrial” for October 6, 2010.

On September 13, 2010, defendant filed his notice of appeal.

C. The restitution hearing

The instant record only contains a minute order for October 6, 2010. It states that defense counsel appeared without defendant, and the restitution hearing was continued to October 26, 2010.⁹

On October 26, 2010, the court conducted the continued restitution hearing. Defense counsel was present, but defendant was not there. The court stated that defendant's attorney "had previously waived his presence." The court further noted that defense counsel had objections to the amount requested by the family for victim restitution.

Thereafter, the court and parties addressed the restitution claim by Jackie's family, particularly about whether defendant should be ordered to pay the family's obligations to a caterer, because they had to cancel the anniversary party and instead conduct the funeral. Defense counsel asserted the family's catering expenses for the cancelled anniversary party were inappropriate for the victim restitution order. The prosecutor replied defendant was responsible for any expenses that had arisen from his conduct, including the cancellation of the anniversary party which was supposed to be held on the date that turned out to be Jackie's funeral.

The court asked for the exact amount of restitution being requested by the family. The prosecutor explained that \$5,000 would go to the victim compensation board because it paid some of the family's expenses. In addition, the family had a separate request for \$9,528.97, for their additional expenses for the funeral and burial. The court was concerned about possible overlap if the victim compensation board paid for any of the funeral expenses that were being separately requested by the family. The court and the

⁹ The instant record also contains a declaration from the court reporter that no stenographic notes were taken at this hearing.

parties extensively reviewed bills and receipts produced by the family, which were for the funeral, burial, and expenses incurred because of the cancelled anniversary party.

After reviewing the paperwork, the court was satisfied there was no overlap. It ordered defendant to pay \$5,000 in restitution to the victim compensation board, and \$9,528.97 to Jackie's family.

D. Notice of appeal

Defendant raises two contentions in support of his argument that the restitution order must be stricken. First, defendant argues the court's restitution order is invalid because it was entered after defendant filed his notice of appeal. Defendant asserts that once he filed that notice of appeal, the superior court lost jurisdiction over the case.

“Victim restitution is mandated by the California Constitution, which provides in relevant part that ‘[r]estitution shall be ordered from the convicted persons in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary.’ (Cal. Const., art. I, § 28, subd. (b).) Subdivision (f) of section 1202.4 implements the constitutional directive to require restitution for crime victims. A court must order ‘full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record.’ (§ 1202.4, subd. (f).) To the extent a victim has received financial assistance from the Restitution Fund through the Victim Compensation Board, restitution in an amount equal to the assistance provided by the Victim Compensation Board must be deposited to the Restitution Fund. (§ 1202.4, subd. (f)(2).) ‘If, as a result of the defendant’s conduct, the Restitution Fund has provided assistance to *or on behalf of* a victim ..., the amount of assistance provided shall be presumed to be a direct result of the defendant’s criminal conduct and shall be included in the amount of the restitution ordered.’ (§ 1202.4, subd. (f)(4)(A), italics added.) Thus, the statute mandates a victim restitution award regardless of whether the restitution is paid directly to a victim or to the Restitution Fund to the

extent it incurred expenses on behalf of the victim. (§ 1202.4, subd. (f).)” (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1225.)

Section 1202.46 provides that a court retains jurisdiction to order restitution even after sentence has been imposed:

“Notwithstanding Section 1170, *when the economic losses of a victim cannot be ascertained at the time of sentencing pursuant to subdivision (f) of Section 1202.4, the court shall retain jurisdiction over a person subject to a restitution order for purposes of imposing or modifying restitution until such time as the losses may be determined.* Nothing in this section shall be construed as prohibiting a victim, the district attorney, or a court on its own motion from requesting correction, at any time, of a sentence when the sentence is invalid due to the omission of a restitution order or fine without a finding of compelling and extraordinary reasons pursuant to Section 1202.4.” (Italics added.)

In this case, while there was a brief mention of the family’s expenses in the probation report, and some family members were present at the sentencing hearing, there is no evidence that either the parties or the family were prepared to address the various bills and expenses, which they incurred from the cancellation of the anniversary party, and from the funeral and burial which was held instead. The court was statutorily authorized to retain jurisdiction to receive evidence concerning, and thereafter rule, as to the amount of restitution payable by defendant to Jackie’s family. (§ 1202.46; see, e.g., *People v. Bufford* (2007) 146 Cal.App.4th 966, 970-971; *People v. Moreno* (2003) 108 Cal.App.4th 1, 7-12.)

E. Defendant’s absence from the restitution hearing

Defendant next contends the court’s restitution order must be reversed because he was not present at the hearing, he never waived his presence, and his attorney was not able to waive his presence.

A defendant has the constitutional and statutory right to be present at critical stages of the criminal prosecution, which includes sentencing and pronouncement of judgment. (*People v. Wilen* (2008) 165 Cal.App.4th 270, 287; *People v. Cain* (2000) 82

Cal.App.4th 81, 87.) The restitution hearing has been held to be “part and parcel of the sentencing process.” (*People v. Cain, supra*, 82 Cal.App.4th at p. 87.) A competent defendant may waive his right to be present at a critical stage. (*People v. Davis* (2005) 36 Cal.4th 510, 530.) In addition, a defense counsel may waive the defendant’s presence, “but only if there is evidence that defendant consented to the waiver. [Citations.] At a minimum, there must be some evidence that defendant understood the right he was waiving and the consequences of doing so. [Citation.]” (*Id.* at p. 532, fn. omitted.)

The instant record is absolutely silent as to the waiver of defendant’s presence at the restitution hearing, by either defendant or his attorney. At the sentencing hearing, the court seemed to presume that defendant did not need to be present at the “restitution pretrial” of October 6, 2010. According to the October 6, 2010, minute order, defendant was not present at that particular hearing, so he obviously could not have waived his own presence for the subsequent restitution hearing. In addition, there is no reporter’s transcript for the October 6, 2010, hearing, and no evidence as to whether defense counsel attempted to waive defendant’s presence at the subsequent restitution hearing. Thus, there is no evidence that defendant knowingly and intelligently waived his right to be present at the October 26, 2010, restitution hearing. (*People v. Davis, supra*, 36 Cal.4th at p. 532.)

Even assuming error, however, we find no prejudice arising from defendant’s absence at the restitution hearing. “Defendant’s absence, even without waiver, may be declared nonprejudicial in situations where his presence does not bear a ‘reasonably substantial relation to the fullness of his opportunity to defend against the charge.’ [Citations.]” (*People v. Garrison* (1989) 47 Cal.3d 746, 782.) Defendant has the burden to demonstrate that his absence prejudiced his case or denied him a fair trial. (*Id.* at p. 783.)

At the restitution hearing in this case, defense counsel extensively challenged the court’s restitution order, and defendant has failed to explain how his absence from the

restitution hearing was prejudicial, or how his presence would have altered the outcome of the hearing. (*People v. Davis, supra*, 36 Cal.4th at pp. 533-534; *People v. Medina* (1990) 51 Cal.3d 870, 902-903; *People v. Bradford* (1997) 15 Cal.4th 1229, 1358.)¹⁰

DISPOSITION

The judgment is affirmed.

Poochigian, J.

WE CONCUR:

Kane, Acting P.J.

Detjen, J.

¹⁰ Defendant notes in passing that no evidence was introduced to support the court's calculation of the restitution requested by the family. To the contrary, the court extensively reviewed bills and invoices presented by the family, the parties argued whether certain expenses could be within the restitution order, and the court made its order. In any event, defendant has not specifically challenged the exact restitution order made by the court.