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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE SANTIAGO AVALOS,

Defendant and Appellant.

G049460

(Super. Ct. No. 09ZF0058)

OPINION

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed.

David L. Kelly and Leslie A. Rose, under appointment by the Court of Appeal, for Defendant and Defendant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Kristine A. Gutierrez and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Jorge Santiago Avalos was sentenced to a prison term of 15 years to life and ordered to pay \$3,000 in restitution after a jury found him guilty of second degree murder in violation of Penal Code section 187, subdivision (a).

The sole issue on appeal concerns the trial court's instructions to the jury, in which it only instructed as to second degree murder and voluntary manslaughter. Defendant contends the trial court had a sua sponte duty to instruct the jury on involuntary manslaughter as a lesser included offense of second degree murder. We disagree and affirm defendant's conviction.

FACTS

1. The Incident

In June 2008, defendant and Fernando Urquiza revived their old friendship and began to spend time together at the home of Fernando's parents, Hilario and Genoveva Urquiza, where Fernando also lived. On September 12, 2008, defendant visited the Urquizas' house to drink with Hilario, while Fernando and his mother were at work. Both Hilario and defendant had already been drinking earlier that day.

When Fernando returned home that night, Hilario's vehicle was no longer parked in the driveway and the front door to the house was open. Fernando entered the house and discovered Hilario face down on the floor, near the couch, in a puddle of blood. Fernando immediately sought the assistance of a neighbor and dialed 911. The paramedics arrived and pronounced Hilario dead at the scene.

2. Defendant's Apprehension and Interview

Later that night, witnesses spotted defendant driving Hilario's vehicle approximately two miles from the Urquiza residence. He stopped the vehicle in the middle of an intersection. Police officers responding to a call intercepted defendant as he walked away from the vehicle. Defendant admitted he had been drinking. An officer conducted a field sobriety test and determined defendant was too impaired to drive. Later, a blood test confirmed defendant had a blood-alcohol content of .16 percent.

While defendant was in custody, detectives questioned him after he was advised of and waived his *Miranda* rights. (*Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].) In the course of that interview, defendant stated Hilario, who detested listening to music while drinking, became agitated over the music defendant was playing at the house. Defendant claimed Hilario grabbed him and pushed him while complaining about the music. When defendant pushed Hilario back and tried to calm him down, Hilario approached defendant as if to attack him. Fearful that Hilario would use the knife he typically carried with him, defendant grabbed a wooden axe handle to scare Hilario into "back[ing] off." Police asked defendant if he remembered hitting Hilario. Defendant at first stated he did not recall, but later admitted to "chin checking" him three times with the axe handle. He added that he did not want to hit Hilario, but could not take Hilario pushing and insulting him anymore. When Hilario fell to the floor, defendant took the keys to Hilario's vehicle and quickly left the house.

3. Forensic Evidence and Autopsy Results

Investigators at the crime scene detected blood spatter impact on Hilario's pillow which indicated that he had been hit more than once with a blunt force object on his head and body. Hilario's autopsy revealed he suffered approximately 18 blows to his body, resulting in lacerations to his forehead and a brain hemorrhage that ultimately

caused his death. Hilario, who exhibited no defensive wounds, had a blood-alcohol content of .34 percent at the time of his death.

4. Procedural History

The prosecution charged defendant with a single count of murder in violation of Penal Code section 187, subdivision (a). A prior jury returned a verdict of not guilty of murder in the first degree, but announced it was deadlocked as to the second degree murder charge. The court then entered a verdict of not guilty as to first degree murder, but declared a mistrial as to the lesser included offenses. After a retrial, a newly empanelled jury found defendant guilty of second degree murder.

DISCUSSION

1. Standard of Review

Defendant contends the trial court erred in failing to instruct the jury as to the lesser included offense of involuntary manslaughter. “““We apply the independent or de novo standard of review to the failure by the trial court to instruct on an assertedly lesser included offense.””” (*People v. Campbell* (2015) 233 Cal.App.4th 148, 158; citing *People v. Licas* (2007) 41 Cal.4th 362, 366.)

2. Failure to Instruct on Involuntary Manslaughter

The jury was instructed on the elements of second degree murder and voluntary manslaughter. Defendant asserts the trial court’s failure to instruct on involuntary manslaughter deprived him of substantial rights and due process. He argues an instruction for involuntary manslaughter is proper if there is no intent to kill and the victim’s death was a result of a noninherently dangerous felony. The Attorney General

maintains the court had no duty to instruct on involuntary manslaughter because assaultive crimes cannot form the basis for involuntary manslaughter.

We first examine a trial court's obligation to give jury instructions on lesser included offenses and determine involuntary manslaughter is a lesser included offense of second degree murder as charged in this case. We then explain, contrary to defendant's argument, an intent to kill is not essential to support a conviction for *voluntary* manslaughter. Therefore, the mere absence of an intent to kill does not require a trial court to instruct on the lesser offense of *involuntary* manslaughter. Furthermore, we conclude case authority at the time of defendant's trial did not require an involuntary manslaughter instruction when the killing resulted from the commission of an assaultive felony.

2.1 Trial Court's Obligation to Give Sua Sponte Instructions

In a criminal matter, a trial court must instruct the jury on *general principles of law* relevant to issues raised by the evidence. (*People v. Walker* (2015) 237 Cal.App.4th 111, 114 (*Walker*)). This requirement includes instructing a jury on a lesser included offense if there is substantial evidence from which a jury could reasonably conclude the defendant committed the lesser, uncharged offense but not the greater, charged offense. (*People v. Thomas* (2012) 53 Cal.4th 771, 813 (*Thomas*)). There must be some basis, “other than an unexplainable rejection of prosecution evidence, on which the jury could find the offense to be less than that charged.” (*Walker*, at p. 117.) The obligation to instruct on lesser included offenses applies even absent a request from the defendant for an instruction and over a defendant's express objection to an instruction. (*Id.* at p. 115.) But, a trial court has no duty “to instruct on theories that have no such evidentiary support.” (*People v. Smith* (2013) 57 Cal.4th 232, 240 (*Smith*), quoting *People v. Breverman* (1998) 19 Cal.4th 142, 162.)

The California Supreme Court has previously deemed involuntary manslaughter as an offense necessarily included in the greater offense of second degree murder. (See *Thomas, supra*, 53 Cal.4th at p. 813 [“Voluntary and involuntary manslaughter are lesser included offenses of murder”].)

2.2 Intent to Kill is Not Necessary to Support a Voluntary Manslaughter Conviction

Contrary to defendant’s contention, an intent to kill is not essential to support a conviction for voluntary manslaughter. (*People v. Bryant* (2013) 56 Cal.4th 959, 967 (*Bryant I*) [“We have . . . held . . . that intent to kill is not an element of voluntary manslaughter”]; *People v. Lasko* (2000) 23 Cal.4th 101, 108-111.)

Here, the trial court convicted defendant of second degree murder after the jury found him guilty of committing an unlawful killing with malice aforethought. (Pen. Code, § 187, subd. (a).) Unlike murder, manslaughter, in both its voluntary and involuntary forms, excludes malice aforethought. (*People v. Elmore* (2014) 59 Cal.4th 121, 133.) “A defendant commits *voluntary* manslaughter when a homicide that is committed either with intent to kill *or* with conscious disregard for life—and therefore would normally constitute murder—is nevertheless reduced or mitigated to manslaughter” because either “provocation [or] unreasonable self-defense . . . ‘negat[e]’ the malice required for murder or . . . caus[e] that malice to be ‘disregarded.’” (*Bryant I, supra*, 56 Cal.4th at p. 968, italics added.)

On the other hand, a violation of Penal Code section 192, subdivision (b)—*involuntary* manslaughter—occurs where there is an “unlawful killing of a human being without malice . . . in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.” (Pen. Code, § 192, subd. (b).) For example, while an individual “who kills in unreasonable self-defense may sometimes be guilty of

involuntary manslaughter,” a person “who, with the intent to kill or with conscious disregard for life, unlawfully kills in unreasonable self-defense is guilty of *voluntary* manslaughter.” (*People v. Blakeley* (2000) 23 Cal.4th 82, 91, first original italics deleted, second italics added.) Therefore, a defendant can be found guilty of voluntary manslaughter without a showing of an intent to kill—it could very well be defendant acted with a conscious disregard for life. Because an intent to kill need not be shown to support a voluntary manslaughter conviction, defendant is incorrect in asserting that an absence of an intent to kill warrants an involuntary manslaughter instruction.

2.3 Defendant’s Assaultive Felony Resulting in a Killing did not Require an Involuntary Manslaughter Instruction

As discussed below, the general principles of law at the time of defendant’s trial did not require an involuntary manslaughter instruction where an assaultive felony without malice resulted in an unlawful killing. Therefore, the trial court did not err in failing to give such an instruction sua sponte. But in light of a recent appellate decision, trial courts may now be obligated to give involuntary manslaughter instructions when an unlawful killing is a result of an assaultive felony committed without malice.

In 2013, controlling case law characterized the commission of an assaultive felony resulting in an unlawful killing as being *at least* voluntary manslaughter. (*Bryant I, supra*, 56 Cal.4th at p. 967; see *People v. Garcia* (2008) 162 Cal.App.4th 18, 31.) In *Bryant I*, the defendant claimed she did not intend to kill her boyfriend when he was stabbed during a domestic altercation. (*Bryant I*, at p. 963.) She appealed her second degree murder conviction, arguing the trial court had a sua sponte duty to instruct on the lesser included offenses of voluntary and involuntary manslaughter. (*Id.* at 964.)

The California Supreme Court held that the trial court did not have a sua sponte duty to give a voluntary manslaughter instruction on the basis that the killing resulted from the commission of an inherently dangerous assaultive felony. (*Bryant I*,

supra, 56 Cal.4th at p. 970 [“A defendant who has killed without malice in the commission of an inherently dangerous assaultive felony must have killed without either an intent to kill or a conscious disregard for life. Such a killing cannot be voluntary manslaughter because voluntary manslaughter requires either an intent to kill or a conscious disregard for life”].) But the majority opinion declined to consider whether the trial court was obligated to give an involuntary manslaughter instruction.

On remand from the Supreme Court, the Court of Appeal did consider the latter question and concluded the trial court did not err in failing to instruct the jury on the theory of involuntary manslaughter. (*People v. Bryant* (2013) 222 Cal.App.4th 1196, 1205 (*Bryant II*.) Relying on Supreme Court precedent which had refused to impose a sua sponte duty to instruct on theories prior to their general acceptance (*People v. Michaels* (2002) 28 Cal.4th 486, 529-530 [unreasonable defense of others]; *People v. Flannel* (1979) 25 Cal.3d 668, 672, 682 [imperfect self-defense]), the appellate court stated “a legal concept that has been referred to only infrequently, and then with ‘inadequate elucidation,’ cannot be considered a general principle of law requiring a sua sponte jury instruction.” (*Bryant II*, at p. 1205.) Therefore, it concluded “[i]n light of the lack of authority in support of [the defendant’s] theory of involuntary manslaughter, it is clear that pursuant to the Supreme Court law cited above, the trial court did not have a sua sponte duty to instruct the jury that an unlawful killing committed without malice in the course of an assaultive felony constitutes the crime of involuntary manslaughter.” (*Id.* at p. 1206, fn. omitted.)

However, earlier this year in *People v. Brothers* (2015) 236 Cal.App.4th 24, another appellate court held “when the evidence presents a material issue as to whether a killing was committed with malice, the court has a sua sponte duty to instruct on involuntary manslaughter as a lesser included offense, even when the killing occurs during the commission of an aggravated assault.” (*Id.* at p. 35.) Although the Court of Appeal ultimately affirmed the defendant’s voluntary manslaughter conviction, this

decision constitutes a shift in case law as to whether or not a trial court has a sua sponte duty to give involuntary manslaughter instructions. Prior to *Brothers*, no such instruction was required where an assaultive felony resulted in an unlawful killing where there was substantial evidence the killing was committed without malice. Now, however, a trial court might have a sua sponte duty to instruct on involuntary manslaughter in this context.

Defendant's second trial occurred in October 2013. This was after the Supreme Court's decision in *Bryant I*, but before issuance of the opinions in *Bryant II* and *Brothers*. Therefore, the rule recognized in the latter two cases had not been established as a general principle of law at the time of defendant's trial, and there was no duty to instruct on involuntary manslaughter in this case.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

FYBEL, J.