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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.

JOSEPH DAVID DORSEY,

Defendant and Appellant.

G050883

(Super. Ct. No. RIF1203537)

O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Mark A. Mandio, Judge. Affirmed.

Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Lynne McGinnis, and Jennifer B. Truong, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Joseph David Dorsey of first degree murder. (Pen. Code, §§ 187, subd. (a).) The court found defendant had a prior conviction for a serious felony (§ 1170.12, subd. (c)(1), § 667, subds. (c), (e)(1)) and had served two prior prison terms (§ 667.5, subd. (b)). The court sentenced defendant to 56 years to life in state prison. Defendant appeals, asserting instructional error and evidentiary error pursuant to Evidence Code section 352. We reject defendant's contentions and affirm the judgment.

FACTS

Defendant admitted (both in a post-arrest interrogation and in his trial testimony) that he killed victim Christine Stewart, a woman with whom defendant had a romantic relationship. Defendant choked Stewart with his hands and a phone cord, then held her underwater in a bathtub. Defendant fled with Stewart's body in a suitcase, eventually leaving the suitcase behind in a motel room before defendant crossed the border into Mexico.

The defense argument at trial was that defendant did not commit first degree murder, but was instead guilty of voluntary manslaughter, provoked by Stewart's relationship with another man and the insults she unleashed at defendant during arguments about the status of her relationships.

DISCUSSION

Court Did Not Commit Error in Jury Instructions

Defendant first asserts the court prejudicially erred by failing to instruct the jury adequately with regard to second degree murder. "The 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. [Citation.] This sua sponte duty encompasses instructions on lesser included offenses that are supported by the evidence. [Citation.] . . . [Citation.] Once the trial court adequately instructs 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 (*Hernandez*)). “In reviewing a claim that the court’s instructions were incorrect or misleading, we inquire whether there is a reasonable likelihood the jury understood the instructions as asserted by the defendant. [Citation.] We consider the instructions as a whole and assume the jurors are intelligent persons capable of understanding and correlating all the instructions.” (*Id.* at p. 1332.)

As previously noted, defendant’s theory of the case was that he was provoked into committing a voluntary manslaughter, but was not guilty of first degree murder. Obviously, second degree murder was also an option for the jury, situated between first degree murder and voluntary manslaughter. “To reduce a murder to second degree murder, premeditation and deliberation may be negated by heat of passion arising from provocation. [Citation.] If the provocation would not cause an average person to experience deadly passion but it precludes the defendant from subjectively deliberating or premeditating, the crime is second degree murder. [Citation.] If the provocation would cause a reasonable person to react with deadly passion, the defendant is deemed to have acted without malice so as to further reduce the crime to voluntary manslaughter.” (*Hernandez, supra*, 183 Cal.App.4th at p. 1332.)

There was no objection to the pertinent instructions or request to supplement the instructions with clarifying or amplifying language. A modified version of CALCRIM No. 520 listed the elements of murder (“committed an act that caused the death of another person” and “had a state of mind called malice”), explained the concept of malice, and concluded with the following sentence: “If you decide that the defendant committed murder, you must then decide whether it is murder of the first or second degree.”

A modified version of CALCRIM No. 521 indicated that “defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation” and explained these concepts. CALCRIM No. 521 concluded with the following paragraph: “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.”

A modified version of CALCRIM No. 522 stated: “Provocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.” A modified version of CALCRIM No. 570 described in detail the crime of voluntary manslaughter as a homicide committed as a result of a provocation.

Finally, a modified version of CALCRIM No. 640 instructed the jury as to the order of their deliberations. The jury was free to “consider these different kinds of homicide in whatever order” they wished. But the jury was obligated to reach a verdict as to first degree murder before reaching a verdict as to second degree murder (if they found defendant not guilty of first degree murder), and the jury was similarly obligated to then reach a verdict as to second degree murder before reaching a verdict as to voluntary manslaughter (if they found defendant not guilty of second degree murder).

Defendant now contends the instructions failed to adequately define second degree murder or explain how a finding of provocation could result in the conclusion that defendant was guilty of second degree murder rather than first degree murder. Recall that the modified version of CALCRIM No. 521 provided to the jury concluded with this

sentence: “If the People have not met this burden, you must find the defendant not guilty of first degree murder.” Defendant rightly notes that the current version of CALCRIM No. 521 is stated differently: “If the People have not met this burden, you must find the defendant not guilty of first degree murder *and the murder is second degree murder.*” (Italics added.) Defendant also contrasts the presence of an entire instruction (CALCRIM No. 570) devoted to the question of how a finding of provocation could result in a voluntary manslaughter conviction with the lack of such an instruction for second degree murder.

We reject defendant’s assertion of error. *Hernandez, supra*, 183 Cal.App.4th 1327 persuasively rejected a similar contention to that made here by defendant: “We are satisfied that, even without express instruction, the jurors understood that the existence of provocation can support the absence of premeditation and deliberation. Thus, without a request for further instruction, the trial court was not required to amplify the instructions to explain this point.” (*Id.* at p. 1334.) Moreover, our review of all of the homicide instructions leads us to conclude that the jury would have understood that a defendant who committed murder but not first degree murder was necessarily guilty of second degree murder.

Court Did Not Commit Error by Admitting Writings Attributed to Defendant

Next, defendant claims the court erred under Evidence Code section 352 when it refused to exclude from evidence certain writings created by defendant after the death of his victim. “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (*Ibid.*) We review rulings under Evidence Code section 352 for an abuse of discretion. (*People v. Williams* (2008) 43 Cal.4th 584, 634-635.)

Before trial, the court reviewed for admissibility a series of diary entries and other writings (attributable to defendant and dated after the homicide at issue). The court found several passages to be relevant and admissible, but excluded the remainder of the materials from evidence as either irrelevant or unduly prejudicial. We quote the evidence in part and italicize those portions that defendant contends are unduly prejudicial.

An entry in a diary in defendant's possession at the time of his arrest stated: "Well, I've made it to the next day here in, quote, Third World Mexico. Wow. Never ever, ever expected to have to live like this. Oh, well. My choices put me here, and I'll be okay. . . . [¶] *I can't get over the fact that this should be really bothering my conscience, yet I seem to have no remorse whatsoever. Am a monster?* I have been almost afraid to take the crucifix from my neck, scared who I might become. The night things happened, I don't even have the slightest idea why it did. I was absolutely sober. Nothing at all in my system. I just do not understand why I snapped, but I did. It's like I wasn't actually in control of my body. Felt like the devil or a demon speaking through me. Just don't understand what went where, how. I mean, I know I remember everything. I mean every little tiny detail. However, I do not understand. I loved her so, so much. [¶] I by no means am trying to push the blame on anyone else. I take full responsibility for my heinous actions. I did take the life away from one of my loved ones. Yet I still do not quite understand why exactly I did what I did. It's done now, and I apologize to all. Especially, Chris. She did not deserve to be left that way or treated that way or disrespected at all. She was so very good to me. And I or whatever has hold of me treated her like a fuckin' rag doll, or even worse."

In a separate, spiral-bound notebook found in defendant's possession at the time of his arrest, it was written: "Must build rodent destruction devices. *Killing rodents is nothing like killing people. Not nearly the rush.*"

The court also admitted a letter defendant wrote to a female while he was in jail while awaiting trial: “So it seems to me you think that I killed my drug counselor. God only knows where you may have gotten that idea. All in all, actually, I killed my girl of going on two years. We lived together most of the time. As far as keeping her mouth shut about her clients, well, you know women can’t keep their mouth shut. And the only thing she would have said about me is how I fucked her better than any other man she had ever been with. Talk about keeping her mouth shut, no way. [¶] I must have been doing something right because she left not one but two other men for me. I was driving her ’04 BMW 325ci convertible, and she came to court to lie on the stand to get me off the hook for \$35,000 cash that I walked away with. Oh, and there is a reason I left the suitcase in the motel room. Fucked up part is I was actually sober.”

The court was within its discretion in deciding that these post-homicide writings were relevant to defendant’s mental state at the time of the homicide. These documents did not solely go to the question of whether defendant killed his victim. It was for the jury to consider whether these documents exhibited a lack of remorse and cavalier attitude toward defendant’s actions. It was also for the jury to decide whether a lack of remorse and/or cavalier attitude toward a homicide after the homicide occurred was indicative of a particular mental state at the time of the homicide. A reasonable juror might posit these sentiments are generally inconsistent with a killing done in the heat of passion. These materials were not unduly prejudicial in the context of a horrific homicide case in which the primary task for the jury was determining defendant’s mens rea on the night of the victim’s death.¹

¹ Defendant separately briefs the issue of cumulative error, but this section of his brief presupposes that the court erred both in its jury instructions and with regard to the admission of defendant’s writings. As no error occurred, no cumulative error occurred.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

ARONSON, ACTING P. J.

FYBEL, J.