Filed 8/17/12 P. v. Bonilla CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ROBERTO RAMON BONILLA, Defendant and Appellant.	B232473 (Los Angeles County Super. Ct. No. YA077428)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark S. Arnold, Judge. Affirmed.

Khouri & Freisleben and Michael J. Khouri for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Colleen M. Tiedemann and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

The jury found defendant Roberto Ramon Bonilla guilty of involuntary manslaughter (Pen. Code, § 192, subd. (b))[1] of Ozvaldo Hernandez. Imposition of sentence was suspended and defendant was granted formal probation for five years.

In this timely appeal, defendant contends the trial court erred in admitting evidence that (1) he did not call 911 after Hernandez was in medical distress, and (2) that his surgery room was not sterile. He further contends substantial evidence does not support the conviction of involuntary manslaughter. We affirm.

STATEMENT OF FACTS

I. Prosecution Case

On June 4, 2008, Hernandez, who was 31 years old and in good health, went to defendant's medical office for his appointment to undergo gallbladder removal surgery. The medical office, a converted house, was not licensed for defendant to use general anesthesia when performing surgery.

A. Defendant's Plan for the Surgery

Gallbladder removal surgery is major surgery. Defendant planned to remove the gallbladder by means of open surgery, not laparoscopically, and to use a local anesthesia, lidocaine, not general anesthesia. The surgery would be performed in his non-sterile surgery room.[2] The room lacked necessary equipment and drugs to resuscitate

---

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

[2] The room contained many sources of possible contamination. The sink where defendant washed his hands was in the room. The medical assistants put their gowns on over their street clothes in the room. An operating room should not have a window, but this room had a window with a paper sheet taped over it. Doubling as a storage room, the room was cluttered with boxes, bottles, and other items of medical supplies and

Hernandez should the need arise. Defendant would operate without the assistance of another physician, an anesthesiologist, or trained nurses. The three medical assistants who worked in his office would help him. They were not licensed to assist during surgery, start an intravenous line (I.V.), or give medicine through an I.V., and they were not trained to assist with or use resuscitation equipment, such as a defibrillator. Their training to become medical assistants consisted of a six- to eleven-month course in drawing blood and taking vital signs.

B. Preparation for Surgery

The medical assistant who prepared Hernandez for surgery was not sterile. One medical assistant inserted an I.V. into Hernandez, and another medical assistant put medicine into the I.V. Hernandez was not intubated.[3]

C. Administration of Local Anesthesia and Hernandez's Response

Defendant gave Hernandez more than seven injections of lidocaine into the right side of his stomach, because a large area needed to be incised; he also injected marcaine (bupivacine). The anesthesia had to numb to a depth of five inches, the intended depth of the incision. Probing the area, defendant asked Hernandez whether he had any feeling; Hernandez indicated he did not. Defendant started to cut. A few seconds later, Hernandez began to go into shock. He said bad words, talked nonsensically, twitched, had convulsions, and then had seizures. The E.K.G. was flat, blood pressure was at zero,

---

equipment. These items were on open shelves, in open containers, on the floor, in a cabinet, and under pieces of plastic. The boxes were dusted before surgeries, a procedure which did not decontaminate them.

[3] Intubation involves putting a tube down the trachea to insure oxygen reaches the lungs.

and oxygen saturation was at a dangerous level. Hernandez lost consciousness, and his heart stopped.

D. Resuscitation Efforts

Cardiopulmonary resuscitation (CPR) efforts were initiated at 4:00 p.m. Defendant began to do chest compressions. As he was doing them by himself, it is unlikely his efforts were effective for more than five minutes. One of the medical assistants turned on the defibrillator following the instructions on the pads concerning where to place the pads and the instructions provided by the machine as to when to deliver shocks. Another medical assistant gave medications through the I.V. The third medical assistant connected one end of an Ambu-Bag to an oxygen tank, put the other end into Hernandez's mouth, and manually squeezed the bag while defendant performed chest compressions. It is unlikely any useful amount of oxygen entered Hernandez's lungs from the use of the Ambu-Bag. One of the medical assistants suggested that 911 should be called, but 911 was not called at any time. Defendant did not employ Advanced Cardiac Life Support (ACLS) and did not intubate Hernandez to secure the airway. Hernandez's vital signs never returned. At 7:20 p.m., defendant pronounced Hernandez dead. The coroner's office and other experts determined Hernandez died from lidocaine toxicity.

E. Records

Nothing was entered in the medical record between 3:45 p.m., when it was noted Hernandez was fine, and 4:00 p.m., when it was noted CPR was begun. Hernandez's disorientation, seizures, and convulsions were not noted in his chart. Defendant rewrote key documents, altered the record of drug dosages, made notations that could not be true, and wrote about events before they could have happened. Because of poor documentation, it is not clear when Hernandez's heart stopped.

F. Cover-Up

Defendant called a mortuary to pick up the body. Defendant intended to sign the death certificate, instead of the coroner. He did not tell the investigator from the coroner's office that Hernandez was shaking, using bad words, and having a seizure. He told the investigator he gave CPR for three and a half hours. Defendant did not call 911 for help.

G. Experts' Testimony that Defendant's Actions Were an Extreme Deviation From the Standard of Care

Defendant's conduct was an "extreme departure from the standard of care [¶] [and was] reckless[,] and . . . a reasonable doctor would know that this kind of behavior could result in bodily injury or death." Laparoscopic surgery under a general anesthetic is the standard procedure for gallbladder removal. It is vitally important that the operating room be sterile and not contaminated, to reduce the risk of infection to an open abdominal cavity. Whether laparoscopic or open, the standard of care for gallbladder removal requires the surgery to be done in a hospital operating room or an approved surgery center, which is an institution that has approved personnel, all necessary instruments, adequate medical recordkeeping, and approval from organizations that monitor whether the surgery center meets the standard of care. Gallbladder surgery should never be done by a single doctor. There should be an assistant surgeon, an anesthesiologist or anesthetist, and other qualified personnel in the operating room available to help when a problem occurs.

The surgery here was "an extreme deviation from the standard of care." The patient was at great risk and the environment did not have the support necessary to take care of a problem. "It [was] reckless and inherently dangerous, that could cause either great bodily injury or even death." Defendant's medical records were "an extreme

deviation from the standard of care." "'Extreme" in this context means so shocking that it's appalling."

After Hernandez exhibited a toxic reaction to the lidocaine, "the problem was the resuscitation of the patient. Any patient who receives local anesthetic can have a reaction. But it's the treatment of it that determines the outcome." Defendant knew something serious will go wrong during some open gallbladder surgeries with lidocaine, knew he should be ready for a reaction, and knew he would not be able to handle it in his "ill-equipped, poorly staffed operating room."

Defendant's resuscitation efforts did not meet the standard of care. He did not provide Hernandez with even one minute of effective resuscitation. One person cannot perform effective chest compressions for more than a few minutes. Defendant should have given, but failed to give, Hernandez epinephrine immediately. He should have intubated Hernandez and called 911, even if there was no heartbeat, so that Hernandez could be transported by paramedics to a nearby hospital, where he would have received proper resuscitation efforts.

Patients who receive timely and proper resuscitation after a lidocaine overdose can be saved. Intralipid, which Hernandez would have received right away in a hospital, would have allowed the heart muscle to contract again and, thus, would have made it possible for resuscitation to be effectual. Proper resuscitation would have saved Hernandez's life. "The resuscitation was so badly done, that it wouldn't have brought him back from any reaction to lidocaine; a properly done resuscitation could have saved him from any of these causes -- anything due to lidocaine, could have saved him from even just a spontaneous heart attack. . . . [¶] . . . [¶] . . . [T]he resuscitation should have and could have been successful in this healthy 31-year-old." If Hernandez's heart had a sudden stoppage from a toxic reaction to the lidocaine and had been given intralipid and proper resuscitation quickly, he would have had a better than 50 percent chance of survival. Without intralipid and prompt resuscitation, the chance of survival was close to zero. Hernandez died because "it was the wrong place. It was the wrong surgery. It was the wrong personnel. It was people who didn't know what to do when something went

wrong. It was people who did the wrong things when something . . . predictable went wrong. [¶] It's the totality. . . . [¶] This is a healthy guy, 31 years old."

Defendant's decision to call the mortuary and not 911 or the coroner was an extreme deviation from the standard of care. Calling 911whenever any patient is in severe distress with a heart problem is a fundamental step that must be taken.

In the totality of circumstances in this case, "defendant's actions were reckless and inherently dangerous to human life[.]" "This was surgery that should never have been done in the way it was done; in a setting that was unsafe; with personnel that was poorly trained; a doctor that clearly had no idea what to do when the common and uncommon side effects of the medications he was using actually occurred; did all the wrong things after that happened; [and] failed to call for help." Defendant did not care about his patient; he "just said, 'I'm a good doctor. I can handle it. I can do it, even though nobody else does it this way. I don't need to know the side effects. I don't need to be able to handle them, and I don't need any help either.' I mean, if that's not reckless disregard for people's lives, I don't know what is."

II. Defense Case

Defendant had an excellent reputation as a qualified surgeon and caring doctor, and a very good reputation for high standards of recordkeeping, honesty, and morality.

Hernandez died of anaphylactic shock related to being given lidocaine or because he had another drug, such as an opiate, in his system. Defendant's resuscitation efforts, the surgery room, the amount of oxygen given, and not calling 911 complied with the standard of care. Intralipid is not used for resuscitation. The vast majority of patients who have no electrical activity in the heart will not survive. Performing open gallbladder surgery in the office using only lidocaine is done around the world; although in California, it is below the standard of care. When a doctor does not know what is going on with a patient in distress and he is the only doctor around, he should call 911. The patient should not be transported to the hospital until he has a heart rhythm and a pulse.

Hernandez was clinically dead once the lidocaine and marcaine hit his heart. Defendant kept him on life support, but most people in those circumstances do not survive.

DISCUSSION

I. Admission of Evidence

Defendant contends it was an abuse of discretion to admit testimony he did not call 911 and his surgery room was not sterile, because the evidence was irrelevant (Evid. Code, § 350), and the evidence the surgery room was not sterile was more prejudicial than probative (Evid. Code, § 352). We disagree with the contentions.

A. Standard of Review

We review relevancy and Evidence Code section 352 rulings for abuse of discretion. (*People v. Weaver* (2001) 26 Cal.4th 876, 933.) "A trial court abuses its discretion when its ruling 'fall[s] "outside the bounds of reason."' [Citations.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 714.)

B. Elements of Involuntary Manslaughter

Section 192 provides in pertinent part: "Manslaughter is the unlawful killing of a human being without malice. It is of three kinds: [¶] . . . [¶] (b) Involuntary--. . . in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."

The jury was instructed on involuntary manslaughter in the language of Judicial Council of California Criminal Jury Instructions (2008-2009) CALCRIM No. 581: "The People must prove that: [¶] 1. The defendant committed a lawful act, but acted with criminal negligence; and [¶] 2. The defendant's acts caused the death of another person.

[¶] Criminal negligence involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when: [¶] 1. He or she acts in a reckless way that creates a high risk of death or great bodily injury; [¶] and [¶] 2. A reasonable person would have known that acting in that way would create such a risk. [¶] In other words, a person acts with criminal negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act. [¶] There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A substantial factor is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death. [¶] Great bodily injury means significant physical injury. It is an injury that is greater than minor or moderate harm. [¶] The People allege that the defendant committed the following lawful act with criminal negligence: performing gallbladder surgery."

C. Evidence Defendant Did Not Call 911 Was Relevant

Defendant made a pretrial motion to exclude evidence he did not call 911, on the ground the evidence was not relevant. Denying the motion, the trial court stated: "Paramedics are specifically trained to save lives by giving emergency aid. A medical doctor does not necessarily have this training. I think the admissibility goes to proving criminal negligence. The defense is certainly entitled to present evidence or to explain why he didn't call 911 or why Dr. Bonilla didn't feel the necessity to call 911, to negate criminal negligence. But I think it's relevant. I think it's admissible." Defendant then argued that, as a matter of law, the failure to call 911cannot be neglect because a physician is licensed to resuscitate people. The court ruled this argument should be made to the jury.

"No evidence is admissible except relevant evidence." (Evid. Code, § 350.) "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any

disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "[T]he trial court 'has broad discretion in determining the relevance of evidence [citations], but lacks discretion to admit irrelevant evidence' [citation]." (*People v. Weaver*, *supra*, 26 Cal.4th at p. 933.)

The trial court's finding the evidence was relevant was not an abuse of discretion. The standard of care required calling 911 for help immediately upon Hernandez going into severe distress, even if there was no heartbeat, because paramedics would do what defendant could not do at the scene, including intubation, and would transport Hernandez to a nearby hospital where this healthy, 31-year-old man would probably be resuscitated. Defendant's failure to call 911 was relevant to whether he breached the standard of care and whether such breach was a substantial cause of Hernandez's death. There was evidence defendant reasonably knew 911 should be called and refused to call even after one of the medical assistants suggested it. This evidence was relevant to whether he knowingly breached the standard of care with recklessness. (See CALCRIM No. 581.) The facts defendant failed to seek help, intended to sign the death certificate himself and have a mortuary take away the body, altered the medical record, and failed to disclose the facts of Hernandez's reaction reasonably indicate defendant tried to hide the circumstances of the surgery and Hernandez's death. The attempted cover-up is relevant to a consciousness of guilt, tending to show he knew he had acted recklessly in performing major surgery under a local anesthetic in his inadequately staffed and ill-equipped office.

Defendant's contentions his failure to call 911 was not relevant to whether he acted with criminal negligence because he had more authority and ability than paramedics and was not relevant to the cause of death because Hernandez was already dead are merely requests we reweigh the evidence. That is not our role. Admission of the evidence defendant did not call 911 was not an abuse of discretion.

D. Admission of Evidence the Surgical Room Was Not Sterile Was Not an Abuse of Discretion

Defendant made a pretrial motion to exclude evidence the surgical room was not sterile on the grounds the evidence was not relevant and substantially more prejudicial than probative. (Evid. Code, § 352.) The trial court denied the motion and stated: "I think that the level of sterility is relevant to prove negligence. I think if there is any evidence of substandard care, I think the jury should be entitled to hear it. [¶] I think you're certainly entitled to argue that the lack of sterility had no effect on the victim's death; therefore, your client should not be culpable. But I think these are arguments that should be made to the jury."

The finding the evidence was not substantially more prejudicial than probative was not an abuse of discretion. (Evid. Code, § 352.) "A trial court may exclude otherwise relevant evidence when its probative value is substantially outweighed by concerns of undue prejudice, confusion, or consumption of time. (Evid. Code, § 352; *People v. Riggs* (2008) 44 Cal.4th 248, 290 (*Riggs*).) '"'Prejudice' as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of *undue* prejudice. Unless the dangers of undue prejudice, confusion, or time consumption '"substantially outweigh"' the probative value of relevant evidence, a section 352 objection should fail. (*People* v. *Cudjo* (1993) 6 Cal.4th 585, 609.) '"The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.'" [Citation.]' (*People* v. *Karis* (1988) 46 Cal.3d 612, 638.) [¶] The prejudice that section 352 '"is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." [Citations.]

"Rather, the statute uses the word in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors. [Citation.]" [Citation.]' (*People* v. *Zapien* (1993) 4 Cal.4th 929, 958.) In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose." (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1008–1009.)' (*People v. Doolin* (2009) 45 Cal.4th 390, 438–439.)" (*People v. Scott* (2011) 52 Cal.4th 452, 490-491.)

The challenged evidence was highly probative of whether defendant committed involuntary manslaughter. The standard of care for major surgery requires the operating room to be as sterile as possible. Evidence that a lack of sterility creates a risk of infection and that defendant's operating room contained multiple, evident sources of contamination and was not sterile, was relevant to whether defendant breached the standard of care, acted in a reckless way that created a high risk of injury or death, and reasonably knew his action created such a risk. (See CALCRIM No. 581.) The fact the environment where defendant performed major surgery was not sterile is relevant to his motive to cover-up the procedure that led to Hernandez's death.

Concerning Evidence Code section 352, presentation of the evidence on the lack of sterility in the operating environment did not take a significant amount of time. There is no possibility the evidence confused the jury as to the cause of death, as no witness or party suggested Hernandez's death was due to an infection. There was no danger of undue prejudice, as the evidence was directly relevant to the standard of care and was only one of many circumstances that amounted in totality to an extreme deviation from the standard of care. Admission of the evidence was not an abuse of discretion.

III. Substantial Evidence

Defendant contends substantial evidence does not support the verdict he committed involuntary manslaughter because there was evidence Hernandez died from accidental lidocaine intoxication. This is nothing more than a request that we reweigh the evidence on causation. We do not reweigh the evidence. (*People v. Manriquez* (2005) 37 Cal.4th 547, 576-578.) Reviewing the record in the light most favorable to the judgment, as we must, there is ample evidence to support the finding defendant's criminal negligence deprived Hernandez of the resuscitation efforts that were necessary to save his life and, accordingly, was a substantial factor in causing Hernandez's death. (See CALCRIM No. 581; *People v. Story* (2009) 45 Cal.4th 1282, 1296.) In any event, as there was evidence the use of lidocaine to anesthetize Hernandez during major open surgery was itself an extreme deviation from the standard of care, defendant's contention is without merit. We conclude the verdict is supported by substantial evidence.

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J. MOSK, J.