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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. PHILLIP LESTER VARGAS, Defendant and Appellant.	B282540 (Los Angeles County Super. Ct. No. NA101954)

APPEAL from a judgment of the Superior Court of Los Angeles County, Judith Levey Meyer, Judge. Affirmed.

Elizabeth K. Horowitz, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Phillip Lester Vargas of voluntary manslaughter, a lesser included offense of murder, and found true a specially alleged weapon enhancement. On appeal Vargas contends the court erred in failing to instruct the jury on involuntary manslaughter, denying his mid-trial request for a short continuance and excluding expert testimony and other evidence. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information*

An information filed January 19, 2016 charged Vargas with one count of murder (Pen. Code, § 187, subd. (a))[1] for the killing of Kustanya Buckhalter. It was specially alleged that Vargas had personally used a deadly or dangerous weapon, a knife, in committing the offense (§ 12022, subd. (b)(1)) and had served four prior separate prison terms for felonies within the meaning of section 667.5, subdivision (b). Vargas pleaded not guilty and denied the special allegations.

2. *The Evidence at Trial*

Vargas and Buckhalter lived among Long Beach's homeless population and would frequently meet on the streets or in Lincoln Park with other homeless people to talk and to drink beer. On May 30, 2015 Vargas and Buckhalter had been arguing all morning, as had become their custom. On this occasion Buckhalter became angry when Vargas would not share his beer. After several minutes of arguing, Vargas left. He and several other individuals arranged to meet later that evening at the park. Vargas deliberately did not mention this gathering to Buckhalter.

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[1] Statutory references are to this code unless otherwise stated.

When Buckhalter showed up at the park that evening offended at not having been invited, the two men continued to argue. At some point Vargas threw a beer bottle at Buckhalter at close range. The bottle hit Buckhalter in the face, cutting him and causing him to bleed. Vargas then stabbed Buckhalter in the chest with a knife, kicked him in the stomach and pepper sprayed him. Vargas fled the scene and did not seek help for Buckhalter. Buckhalter died from the stab wound. An autopsy revealed his chest blood alcohol level was at .28 percent.

The People argued Vargas had stabbed Buckhalter with intent to kill or, at the very least, with conscious disregard for human life and was guilty of murder. In their case-in-chief the People presented the testimony of a female acquaintance of both men who was at the park and had witnessed the stabbing. According to this witness, after Vargas cut Buckhalter's face with the beer bottle, Vargas ran up to Buckhalter, pulled out a knife and, using a downward motion, stabbed Buckhalter in the chest. Buckhalter lifted his shirt, saw blood from his stab wound, and said to Vargas, "You killed me." As Buckhalter stumbled, Vargas ran after him, a distance of about 20 feet, and pepper sprayed and kicked him. Buckhalter, hunched over but still standing after the attack, lumbered away.

Testifying in his own defense, Vargas conceded he had killed Buckhalter but vigorously disputed the People's theory of the case. According to Vargas, he and Buckhalter had known each other for years. Buckhalter, a much larger man than Vargas, often assumed the role of Vargas's protector on the streets. Vargas testified that he had seen firsthand on some occasions, and heard about other incidents, when Buckhalter had become violent after feeling disrespected, especially when he had

been drinking. Although Buckhalter had never hit Vargas, he had threatened to do so many times. When Buckhalter showed up at the park, he was angry at Vargas and yelled at him for leaving him behind. Vargas knew his friend and could tell from the look on Buckhalter's face and his body language that Buckhalter intended to attack him. Vargas threw his beer bottle. He had intended to throw it to the ground but it hit Buckhalter in the face. Buckhalter, undeterred, continued "to come at" Vargas, and Vargas felt afraid. Warning Buckhalter, "Don't come any closer," Vargas pulled a knife from his pocket and swung it in Buckhalter's direction to get the larger man to back away. When Buckhalter continued to move toward him, Vargas testified, he swung the knife and stabbed Buckhalter. Buckhalter yelled, "Did you cut me? Why you cut me?" Because Buckhalter remained upright and did not appear to be hurt, even after the stabbing, Vargas, still afraid, pepper sprayed Buckhalter; he did not recall kicking him. Vargas testified he simply wanted to immobilize Buckhalter so he could get away. He did not mean to kill him.

On cross-examination Vargas admitted that in 2010 he had stabbed and pepper sprayed another individual when that person asked Vargas to leave his home. That stabbing resulted in a large gash on the victim's head. He also admitted assaulting his former girlfriend during their relationship and giving her a black eye. Vargas's former girlfriend confirmed both violent incidents when she testified during the People's rebuttal case.

3. *Jury Instructions, Verdict and Sentence*

The court instructed the jury on first degree premeditated murder, second degree murder, voluntary manslaughter based on imperfect self-defense, and perfect self-defense, among other things. The jury found Vargas guilty of voluntary manslaughter

and found true the specially alleged weapon enhancement. In a bifurcated proceeding Vargas admitted he had served two prior separate prison terms for felonies within the meaning of section 667.5, subdivision (b). The People did not submit any evidence relating to the other alleged prior separate felony prison term allegations.

The court sentenced Vargas to an aggregate state prison term of 14 years, the upper term of 11 years for voluntary manslaughter, plus one year for the weapon enhancement and two years (one year each) for the prior felony prison term allegations.

DISCUSSION

1. *The Court Did Not Err in Failing To Instruct the Jury on Involuntary Manslaughter*

   a. *Governing law and standard of review*

In a criminal case the trial court must instruct the jury on general principles of law raised by the evidence regardless of whether the defendant has requested the instruction. (*People v. Smith* (2013) 57 Cal.4th 232, 239; *People v. Breverman* (1998) 19 Cal.4th 142, 154.) An instruction on a lesser included offense is required when there is substantial evidence the defendant is guilty of the lesser offense, but not the greater. (*Smith,* at pp. 239-240; see *People v. Williams* (2015) 61 Cal.4th 1244, 1263 [substantial evidence is evidence a reasonable juror could find persuasive].)

Murder is the unlawful killing of a human being with express or implied malice. (§ 187, subd. (a); see *People v. Bryant* (2013) 56 Cal.4th 959, 964-965 (*Bryant I*).) Malice is express when defendant intends to kill; it is implied when the defendant knowingly performs an act, the natural consequences of which

are dangerous to human life, with a conscious disregard for life. (*People v. Elmore* (2014) 59 Cal.4th 121, 133; *Bryant I,* at pp. 964-965.)

Self-defense, when based on a reasonable belief that killing is necessary to avert an imminent threat of death or great bodily injury, is a complete justification for homicide; such a killing is not a crime. (§ 197, subd. (3); *People v. Elmore, supra,* 59 Cal.4th at pp. 133-134.) When the defendant kills under an actual but unreasonable belief in the necessity to use deadly force to defend against imminent peril to life or great bodily injury, the conduct, while not justifiable, reduces a homicide from murder to voluntary manslaughter. (*Elmore,* at p. 134 [although malice is technically present in imperfect self-defense, it is legally negated by the actual, albeit unreasonable, belief in the need to use deadly force; in such a case, a defendant can be guilty of no greater crime than voluntary manslaughter]; see *People v. Barton* (1995) 12 Cal.4th 186, 199.)

Involuntary manslaughter, also a lesser included offense of murder, is the unlawful killing of a human being without malice. (§ 192.) It is statutorily defined as a killing occurring during the commission of "an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, [accomplished] in an unlawful manner, without due caution and circumspection." (§ 192, subd. (b); see *People v. Thomas* (2012) 53 Cal.4th 771, 813.) The Supreme Court has interpreted section 192 broadly to also encompass an unintentional killing in the course of a noninherently dangerous felony committed without due caution and circumspection. (See *People v. Burroughs* (1984) 35 Cal.3d 824, 835, disapproved on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 89; *People v.*

Brothers (2015) 236 Cal.App.4th 24, 31 (*Brothers*).) In addition, as we discussed in detail in in our decision in *Brothers*, a homicide committed during an inherently dangerous assaultive felony accomplished without malice is, by default, involuntary manslaughter. (*Brothers,* at pp. 32, 33-34; see *People v. Bryant* (2013) 222 Cal.App.4th 1196, 1205 (*Bryant II*) [same]; see also *Bryant I, supra,* 56 Cal.4th at p. 970 [killing without malice in the commission of an inherently dangerous assaultive felony is not voluntary manslaughter]; *id*. at p. 974 (conc. opn. of Kennard, J.) [killing during an assault with a deadly weapon may be involuntary manslaughter].)

We review the record de novo to determine whether substantial evidence supported giving a particular jury instruction. (*People v. Nelson* (2016) 1 Cal.5th 513, 518; *People v. Trujeque* (2015) 61 Cal.4th 227, 271.)

b. *There was no evidentiary basis for an involuntary manslaughter instruction*

Relying on *Brothers, supra,* 236 Cal.App.4th 24, Vargas contends the court had a sua sponte duty to instruct on involuntary manslaughter based on substantial evidence that he committed an inherently dangerous assaultive felony without malice. In particular, Vargas emphasizes his testimony that he did not intend to kill Buckhalter—he "swung" the knife at Buckhalter, rather than aimed it, and did so with the purpose of getting Buckhalter to back away, not to kill him.

In suggesting there was evidence the stabbing was accidental, Vargas misstates his own testimony. Although Vargas claimed at trial he swung the knife at Buckhalter to get him to back away, he also admitted that, when Buckhalter continued to advance, he deliberately stabbed him in the chest.

There was no evidence Buckhalter fell on the knife, the stabbing was unintentional or Vargas did not appreciate the danger his conduct posed. To the contrary, Vargas claimed his actions were justified for his own protection. That testimony supported the court's giving both perfect and imperfect self-defense instructions, as the court properly did. It did not require an involuntary manslaughter instruction. (See *Brothers, supra,* 236 Cal.App.4th at p. 35 ["when . . . the defendant indisputably has deliberately engaged in a type of aggravated assault the natural consequences of which are dangerous to human life, thus satisfying the objective component of implied malice as a matter of law, and no material issue is presented as to whether the defendant subjectively appreciated the danger to human life his or her conduct posed, there is no sua sponte duty to instruct on involuntary manslaughter"]; see also *People v. Cook* (2006) 39 Cal.4th 566, 596 [no sua sponte duty to instruct on involuntary manslaughter when the defendant, who did not intend to kill the victim, "savagely beat" victim to death]; *People v. Guillen* (2014) 227 Cal.App.4th 934, 1028 [involuntary manslaughter instruction not appropriate where the defendant "knew the risk involved" in a violent attack on the victim and there was no reasonable doubt from the evidence the defendant acted with intent to kill or a conscious disregard for human life].)

2. *The Court Did Not Err in Excluding the Defense Expert's Testimony*

a. *Relevant proceedings*

Vargas sought to introduce expert testimony that homeless individuals are inclined to react more acutely to a perceived threat of violence than those who are not homeless, a theory of hypervigilance that Vargas likens to battered intimate partner

syndrome. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1077 [expert testimony on battered intimate partner syndrome is relevant to a defendant's actual mental state at time of killing as well as the objective reasonableness of his or her belief that the killing was necessary]; *People v. Sotelo-Urena* (2016) 4 Cal.App.5th 732, 750-752 (*Sotelo-Urena*) [for reasons similar to those expressed by the *Humphrey* Court in intimate partner battering cases, expert testimony explaining reasons chronically homeless individual would experience a heightened fear of aggression and violence and the reasonableness of that reaction was also admissible to support homeless defendant's perfect and imperfect self-defense claims].)

To that end, Vargas proffered the testimony of retired San Diego Superior Court Judge Robert C. Coates. At an Evidence Code section 402 hearing, Judge Coates described his expertise: As a municipal and superior court judge he presided over multiple misdemeanor cases involving homeless defendants; founded and served on the mayor's task force for the homeless in San Diego in the 1980's; in 1990 published a book entitled *A Street Is Not a Home* addressing homelessness and proposing solutions; toured various cities and homeless shelters in researching his book; read, and continues to read, reports by nonprofit and government organizations involving homelessness; spent time with a friend and homeless volunteer on the streets handing out water to homeless people. While Judge Coates wrote in his book about the effect of substance abuse on the homeless population, and explained a close family member had also suffered from substance abuse, he conceded he had not addressed in his book or other work the theory of hypervigilance in the

homeless population and was unable to cite to any work he had read addressing the theory.

Following the hearing, the court excluded Judge Coates's proffered testimony, finding he failed to qualify as an expert witness on hypervigilant reactions in the homeless community.

b. *The trial court did not err in excluding Judge Coates's testimony*

Vargas contends the expert testimony on hypervigilance in the homeless population was relevant to the question of both Vargas's mental state in using deadly force and the reasonableness of that mental state, matters directly at issue for both perfect and imperfect self-defense. As to Judge Coates's expertise, Vargas observes Judge Coates was the same expert witness whose testimony the *Sotelo-Urena* court held should have been admitted (see *Sotelo-Urena, supra,* 4 Cal.App.5th 732) and argues there is no reason in this case to depart from that court's holding.

Sotelo-Urena, however, is distinguishable in a significant respect: The court of appeal had before it only an offer of proof that Judge Coates would testify to hypervigilance experienced by the homeless population; no Evidence Code section 402 hearing had been conducted by the trial court in that case to examine Judge Coates's expert qualifications. Here, at a section 402 hearing, Judge Coates acknowledged that his research did not address the issue of hypervigilance, he had no specialized training, and none of the studies he had reviewed addressed the point. Following an exhaustive examination, the court found Judge Coates, while perhaps an expert on other matters, did not qualify as an expert on the matter of hypervigilance in the homeless population. (See Evid. Code, § 720, subd. (a) ["[a]

person is qualified to testify as an expert if he has special knowledge, skill experience, training, or education" with respect to the matter at issue]; *People v. Watson* (2008) 43 Cal.4th 652, 692-693 [trial court's exclusion of criminologist's proffered testimony concerning explanations for why individuals with similar backgrounds as defendant turn to gangs and crime following Evid. Code, § 402 hearing was not an abuse of discretion; although criminologist had "a significant educational background in criminal justice and was experienced in noncapital sentencing alternatives, . . . he was not a psychologist and candidly acknowledged he was not qualified to offer an expert opinion as to the psychological impact of defendant's upbringing on his current behavior or how defendant would actually adjust to life in prison"].)

3. *The Trial Court Did Not Err in Excluding as Irrelevant Instances of Buckhalter's Conduct*

Vargas contends the court abused its discretion in excluding evidence that (1) Buckhalter's mother had obtained a restraining order against him, and (2) Buckhalter appeared to be intoxicated when he punched a woman in the face in 2013. He insists this evidence was relevant to Vargas's self-defense claim and supports his theory Buckhalter had acted as the aggressor in his conflict with Vargas. (See Evid. Code, § 1103, subd. (a)(1) ["[i]n a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove the conduct of the victim in conformity with the character or trait of character"]; *People v. Myers* (2007)

148 Cal.App.4th 546, 553 [Evid. Code, § 1103 permits evidence of victim's violent character in case where victim's conduct as aggressor is at issue]; *People v. Shoemaker* (1982) 135 Cal.App.3d 442, 448.)

Both of Vargas's evidentiary challenges lack merit. The court excluded evidence of the restraining order only after it carefully reviewed the reporter's transcript in that case and learned the injunctive order was based on Buckhalter's verbal abuse rather than physical violence. The exclusion of the restraining order on relevance grounds was not an abuse of discretion. (*People v. Clark* (2016) 63 Cal.4th 522, 590 [court's ruling excluding evidence reviewed for abuse of discretion]; *People v. Waidla* (2000) 22 Cal.4th 690, 725 [same].)

Based on Evidence Code section 1103, the court permitted Long Beach Police Officer Brian Elliott to testify that he had observed Buckhalter punch a woman in the face in 2013. When defense counsel inquired further whether Buckhalter had appeared to Officer Elliott to be intoxicated at the time of the 2013 incident, the court sustained the People's relevance objection. Contrary to Vargas's contention, this limited evidentiary ruling was not error. As Vargas acknowledges, at issue was Buckhalter's character for violence and whether he acted in conformity with that character in his interaction with Vargas the evening of the stabbing. Whether the 2013 incident occurred when Buckhalter was drunk or sober was not relevant to this question. What was relevant was that the conduct occurred at all. Vargas has not demonstrated the court's evidentiary ruling was an abuse of discretion, much less that the narrow ruling resulted in a miscarriage of justice. (See Evid. Code, § 353.)

4. *The Court Did Not Err in Denying Vargas a Mid-trial Continuance*

a. *Relevant proceedings*

On March 13, 2017, at the beginning of trial, Vargas's counsel advised the court he intended to call Bartholomew Verner, a homeless man who would testify that Buckhalter was a heavy drinker and that he had seen Buckhalter on another occasion punch an individual known as "Scrappy." The court overruled the prosecutor's objection to this evidence, finding it relevant and admissible.

On March 20, 2017, after the People rested their case, Vargas's counsel told the court that Verner's sober living home had refused to transport him to court because of body lice, a contagious medical condition. Defense counsel reported Verner wanted to come to court "and he may just show up. So, if he shows up, I'm going to ask to put him on the stand as part of the defense." The court responded, "If he shows up, I will take care of any health issues. It will not be anybody's concern at this point but this court's." However, the court also stated it would not delay the matter: If Verner did not show up by the time defense counsel completed his examination of other defense witnesses, Verner would not be able to testify. Vargas's counsel replied, "I understand that."

Later that same day Vargas's counsel finished with his last witness and asked the court for a continuance to the following morning to try to obtain Verner's attendance at trial. The court denied the request for a continuance, and the defense rested.

b. *Governing law and standard of review*

A continuance of a criminal trial may be granted only upon a showing of good cause. (§ 1050, subd. (e); *People v. Wilson*

(2005) 36 Cal.4th 309, 352.) When a mid-trial continuance is sought to secure a witness's attendance, the moving party must show he or she has exercised due diligence; the witness's expected testimony is material, not cumulative; the testimony can be obtained within a reasonable time; and the facts to which the witness would testify cannot otherwise be proved. (*People v. Jenkins* (2000) 22 Cal.4th 900*,* 1037; accord, *People v. Fudge* (1994) 7 Cal.4th 1075, 1105 [in ruling on the motion, the court must consider "'"not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion"'"].) We review the trial court's denial of a criminal defendant's motion for a mid-trial continuance for abuse of discretion. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1036 ; *Jenkins,* at p. 1037.)

c. *The court did not abuse its discretion; Verner's proposed testimony was cumulative*

Vargas contends the court abused its discretion in denying him a short continuance and the error denied him his due process right to present a defense. The less-than-one-day continuance, he argues, would not have prejudiced the prosecution or inconvenienced the jury. He also asserts the ruling was highly prejudicial. Had the continuance been granted, Verner would have appeared at trial and testified Buckhalter was a heavy drinker and a violent person, evidence that would have supported Vargas's theory that his use of deadly force against Buckhalter was justified.

Vargas and the People dispute whether defense counsel exercised reasonable diligence to ensure Verner's attendance at

trial.[2] However, even assuming defense counsel's diligence, we cannot say the court's ruling was an abuse of discretion. Verner's next-day attendance was far from certain, and Vargas's counsel did not offer any explanation how he could ensure Verner's appearance. In addition, Verner's proposed testimony of a prior instance of violent conduct and excessive drinking was cumulative: Both Officer Elliott and Vargas testified to prior specific instances of Buckhalter's violent conduct; and Tony Harmon, one of the individuals who had been with Buckhalter and Vargas the day of the stabbing, testified Buckhalter was a heavy drinker and had been drinking vodka constantly on the day he was killed. Furthermore, Buckhalter's toxicology results revealed a substantially elevated blood alcohol level. Under these circumstances the trial court's denial of a continuance was not arbitrary or irrational, much less a denial of due process. (See *People v. Jenkins, supra,* 22 Cal.4th at p. 1040 [if "the defendant cannot show he or she has been diligent in securing the attendance of witnesses, or that specific witnesses exist who would present material evidence, '[g]iven the deference necessarily due a state trial judge in regard to the denial of granting of continuances,' the court's ruling denying a continuance does not support a claim of error under the federal

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[2] The People describe defense counsel's representation that Verner "may show up" as being far short of due diligence. Vargas, on the other hand, asserts he was diligent: His counsel had identified Verner early in the case and had been in contact with the manager of Verner's sober living home to get Verner to appear.

Constitution"]; *Ungar v. Sarafite* (1964) 376 U.S. 575 589 [84 S.Ct. 841, 849, 11 L.Ed.2d 921] [same].)[3]

For the same reasons—lack of any assurance of Verner's appearance and the cumulative nature of his testimony— it is not reasonably probable Vargas would have received a more favorable verdict had the mid-trial continuance been granted. Accordingly, even if the court erred in denying the request, any error was harmless. (See *People v. Hawkins* (1995) 10 Cal.4th 920, 945 [applying state standard of prejudice articulated in *People v. Watson* (1956) 46 Cal.2d 818 to erroneous denial of mid-trial continuance], disapproved on another ground in *People v. Blakeley, supra,* 23 Cal.4th at p. 89; see *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1549 [applying *Watson* standard of prejudice to denial of continuance].)

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J. SEGAL, J.

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[3] Our holding that no error occurred in this case also defeats Vargas's contention that cumulative error denied him due process.