Filed 5/23/12 P. v. Silva CA2/2

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>MARTIN LOUIS SILVA,<br><br>Defendant and Appellant. | B232618<br><br>(Los Angeles County<br>Super. Ct. No. KA088871) |

APPEAL from a judgment of the Superior Court of Los Angeles County. George Genesta, Judge. Affirmed.

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Marc A. Kohm and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

---

Martin Louis Silva appeals from the judgment entered upon his conviction by jury of second degree murder (Pen. Code, § 187, subd. (a)).[1] The trial court sentenced him to state prison for a term of 15 years to life. Appellant contends that (1) the trial court erred and deprived him of his constitutional rights by failing to instruct the jury sua sponte that he could be guilty of voluntary manslaughter as a lesser included offense of murder on the theory that he killed unintentionally, without malice during the commission of an inherently dangerous felony, and (2) the trial court committed prejudicial constitutional error by failing to instruct the jury sua sponte that involuntary manslaughter can be based on an unintentional killing during the commission of a felony that is not inherently dangerous to human life.

We affirm.

## FACTUAL BACKGROUND

*The parties*

Appellant and his wife, Rossana Silva (Rossana), rented a room in the house of Rossana's niece, Pauline Acosta Duran (Pauline), and her partner, Adriana Duran (Adriana), and their respective daughters, Pauline Salcido (Salcido) and Brenda Duran (Brenda).

In November 2009, Richard Basulto (Basulto), Rossana's brother, was 55 years old and in poor health as a result of diabetes and liver disease. He was confined to a wheelchair because his right foot and part of his right leg had been amputated. In October or November 2009, shortly after his hospitalization to have his leg amputated, Basulto came to live with Rossana, who planned to act as his caregiver. The entire family, including appellant, assisted Basulto. Appellant was Basulto's friend, though they often argued.

According to appellant and Rossana, Basulto was ungrateful for, and complained about, the care he was receiving, became demanding, did nothing for himself and cursed

---

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

everyone.[2] On one occasion, they told Basulto, "You need to shut up, Richard; otherwise, we're going to roll you outside." Rossana told appellant that he or her brother, Tommy, needed to put Basulto in his place, stating, "If you need to, bitch-slap him." Appellant said he could not hit Basulto and that Rossana's brother should do it.

*The November 29, 2009 beating*

Appellant generally had a bad temper, but he was not violent. On November 29, 2009, he was in a bad mood. Throughout the day, he was getting high on marijuana, methamphetamine, beer and Xanax and Halcion, the latter two drugs prescribed for his pain. He abused those drugs and had not slept for two days because of the methamphetamine.

Around 6:00 p.m., Salcido and Adriana, who were sleeping in their bedrooms, heard Basulto arguing with appellant about money Basulto had lent to appellant and Rossana. Adriana got up from bed and told them to be quiet. Salcido went to the kitchen to make something to eat and saw appellant at the kitchen table and Basulto in his wheelchair in the living room and the ensuing fight.

Appellant and Basulto angrily called each other names. Appellant called Basulto a rat, and Basulto called appellant a rapist or child molester. After asking Basulto to repeat what he said and Basulto doing so, appellant instantly reacted, approached Basulto and said, "You motherfucker. I told you to shut your fucking mouth" and, "Now you're going to get it."[3] Salcido saw no weapon in Basulto's hand and did not see him attack appellant. Appellant lunged at Basulto, knocked him and his wheelchair into the couch and repeatedly punched Basulto's face and upper body with closed fists, by one account

---

[2] Salcido testified that Basulto was not demanding.

[3] Appellant testified that when he was called a rapist, he felt uncontrollable rage because he knew that Basulto was referring to the fact that appellant had been charged with having inappropriate sexual contact with a young niece years earlier, and he was not a rapist. Appellant worked to reestablish a relationship with the family after the incident, which was not discussed among family members. Appellant claimed to have blacked out after punching Basulto once in the face, did not know what he had done or how hard he had hit Basulto and never meant to hurt or kill him.

seven or eight times and by another between 10 and 20 times. Appellant admitted he hit Basulto once with his right fist but claimed to recall nothing after that. Basulto did not defend himself. He told appellant to stop.

Adriana went into Rossana's bedroom and told her that appellant was beating her brother and then returned to the living room. Salcido called 911. Adriana pulled appellant off Basulto. She and Rossana put Basulto back in his wheelchair. Rossana slapped appellant and said, "Look what you did to my brother." Appellant replied, "You told me to slap him. You told me to put him in his place before" and "bitch-slap" him. Rossana responded, "Yeah, bitch-slap him, but not that." Appellant had a "glazed," "spacey," look.

Appellant told responding paramedics that he and Basulto were wrestling, and Basulto fell from his wheelchair. But appellant testified that he hit Basulto after Basulto called him a rapist and did not recall what happened after that until Rossana shook him. According to Pauline, when appellant was arrested, he had a smile on his face.

*Post-attack statements and autopsy*

An emergency medical technician that had arrived at the scene took Basulto outside and helped him to a gurney. Basulto told paramedics to arrest that man. He stated, "He beat the shit out of me," and pointed to the other male in the room (appellant), who responded, "No. That's not what happened. You fell out of your wheelchair."

At the hospital, Basulto went into cardiac arrest and died. An autopsy revealed that blunt force trauma to the head and chest was the cause of death. He suffered multiple contusions to his face, a broken nose, fractures to his cheekbones, lacerations inside his mouth, bruises on his chin and three broken ribs, from more than 20 blows. His severe diabetes and late-stage alcoholic cirrhosis of the liver contributed to his death, as they cause easy bruising, thinning of the blood, and profuse bleeding. Basulto's bones were in poor condition which possibly made it easier for them to break.

Appellant seemed indifferent and had been drinking. He was bleeding from his finger and went to the hospital where he received six stitches. He reported to the treating

physician that he was pushing Basulto's wheelchair up the ramp, when they both fell over and sustained their injuries.

Sometime after November 29, 2009, appellant wrote a letter to Basulto's sister, asking her forgiveness for Basulto's death and for his conduct in 1978. He claimed that Basulto's death was due to a lack of proper treatment at the hospital.

*Appellant's interview*

Near midnight on November 29, 2009, appellant was interviewed by detectives. He denied drinking or using drugs before the attack. He also denied intending to hurt Basulto, who appellant thought was going to hit him. Appellant saw blood on his hand that looked like it came from a knife cut, and thought Basulto had a knife. He believed he got cut first and was defending himself. He said that Basulto was probably hurt when he fell from his wheelchair. Later in the interview, appellant changed his story, stating that Basulto did not fall and that any injuries Basulto suffered were "probably" from appellant. He said that he probably slapped Basulto once or twice with an open hand when defending himself. He did not hit him that hard. He later admitted that he might have hit Basulto once with a closed fist.

## DISCUSSION

### I. Instruction on voluntary manslaughter

#### *A. Background*

Appellant was charged with murder. The jury was instructed on second degree murder in accordance with CALCRIM No. 520.[4] The jury was also instructed on the

---

[4] CALCRIM No. 520, as given, provides in pertinent part: "The defendant is charged in Count 1 with murder in violation of Penal Code section 187. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant committed an act that caused the death of another person; AND [¶] 2. When the defendant acted, he had a state of mind called malice aforethought. [¶] There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder. [¶] The defendant acted with express malice if he unlawfully intended to kill. [¶] The defendant acted with implied malice if: [¶] 1. He intentionally committed an act; [¶] 2. The natural and probable consequences of the act were dangerous to human life; [¶] 3. At the time he

lesser included offense of voluntary manslaughter on the theory of sudden quarrel or heat of passion (CALCRIM No. 570)[5] and on the effects of voluntary intoxication (CALCRIM No. 625).[6] He was convicted of second degree murder.

---

acted, he knew his act was dangerous to human life; AND [¶] 4. He deliberately acted with conscious disregard for human life. [¶] Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time. . . . [¶] . . . [¶] If you find the defendant guilty of murder, it is murder of the second degree."

5 CALCRIM No. 570, as given, is as follows: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of a sudden quarrel or in the heat of passion if: [¶] 1. The defendant was provoked; [¶] 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; AND [¶] 3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment. [¶] Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection. [¶] In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time. [¶] It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment. [¶] If enough time passed between the provocation and the killing for a person of average disposition to 'cool off' and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder."

6 CALCRIM No. 625, as given, is as follows: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill. [¶] A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any

***B. Contention***

Appellant contends that the trial court erred in failing to instruct the jury that an unintentional killing without malice, committed during the course of an inherently dangerous felony constitutes voluntary manslaughter. He argues that "[b]ecause there was sufficient evidence from which the jury could find the People met their burden of proving the defendant did not act in heat of passion, yet there was also substantial evidence that the killing was unintentional and without express or implied malice, there was a gap in the instructions. To fully instruct the jury on the applicable law and all lesser included offenses supported by substantial evidence, the trial court was required to instruct the jury sua sponte on the theory of voluntary manslaughter articulated in *People v. Garcia* (2008) 162 Cal.App.4th 18, 31–32 [(*Garcia*)], that an unintentional killing without malice, committed during the course of an inherently dangerous felony, constitutes voluntary manslaughter." We conclude that appellant suffered no prejudice by the failure to instruct the jury on voluntary manslaughter as he argues.

***C. Duty to instruct***

In criminal cases, "'"even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case."'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*).)

"'The duty to instruct, sua sponte, on general principles closely and openly connected with the facts before the court also encompasses an obligation to instruct on defenses . . .'" (*People v. Lopez* (1992) 11 Cal.App.4th 1115, 1120) that are "supported by substantial evidence [and] that are not inconsistent with the defendant's theory of the case" (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047). Substantial evidence, in this

---

intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] You may not consider evidence of voluntary intoxication for any other purpose."

context, is evidence from which a jury of reasonable persons could conclude that the lesser offense, but not the greater, was committed. (*People v. Bohana* (2000) 84 Cal.App.4th 360, 372.) The trial court must also instruct sua sponte on all supportable theories of a lesser included offense. (*Breverman, supra*, 19 Cal.4th at pp. 153, 162.) The sua sponte duty to instruct on lesser included offenses, unlike the duty to instruct on mere defenses, arises even against the defendant's wishes, and regardless of the trial theories or tactics the defendant has actually pursued. (*People v. Beames* (2007) 40 Cal.4th 907, 926.)

***D. Murder and manslaughter***

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) Malice may be either express or implied. It is express when the defendant manifests "a deliberate intention unlawfully to take away the life of a fellow creature." (§ 188.) It is implied "'when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.'" (*People v. Dellinger* (1989) 49 Cal.3d 1212, 1217.) Malice should be implied when "'"the killing proximately resulted from an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life."'" (*Id*. at p. 1218.) Malice may be inferred from the circumstances of the murder. (*People v. Harmon* (1973) 33 Cal.App.3d 308, 311.)

Manslaughter is "the unlawful killing of a human being without malice." (§ 192.) It is a lesser included offense of murder. (*Breverman, supra,* 19 Cal.4th at p. 154; *People v. Verdugo* (2010) 50 Cal.4th 263, 293.)

Voluntary manslaughter is an intentional and unlawful killing without malice. (*People v. Moye* (2009) 47 Cal.4th 537, 549.) A defendant lacks malice and is guilty of voluntary manslaughter in "'limited, explicitly defined circumstances: either when the defendant acts in a "sudden quarrel or heat of passion" (§ 192, subd. (a)), or when the defendant kills in "unreasonable self-defense." [Citation.]'" (*People v. Lasko* (2000) 23 Cal.4th 101, 108.) An intentional killing is reduced from murder to manslaughter if a

"killer's reason was actually obscured as the result of a strong passion aroused by a 'provocation' sufficient to cause an '"ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment."'" (*Breverman, supra,* 19 Cal.4th at p. 163.) No specific type of provocation is required, and "the passion aroused need not be anger or rage, but can be any '"'[v]iolent, intense, high-wrought or enthusiastic emotion.'"'" (*Ibid*.)

Involuntary manslaughter is by definition an unintentional killing committed in the commission of an unlawful act not amounting to a felony, in the commission of a lawful act which might produce death, in an unlawful manner or without due caution and circumspection, and an unintentional homicide committed in the course of a noninherently dangerous felony. (§ 192; *People v. Burroughs* (1984) 35 Cal.3d 824, 835–836 (*Burroughs*), disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89; *People v. Butler* (2010) 187 Cal.App.4th 998, 1007.)

***E. Appellant's third category of voluntary manslaughter***

Relying principally on *Garcia, supra,* 162 Cal.App.4th 18,[7] appellant argues that in addition to heat of passion and imperfect self-defense voluntary manslaughter, there is a third category of that offense applicable when voluntary manslaughter is a lesser included offense, namely when a person kills unintentionally, without malice, during commission of an inherently dangerous felony. Consequently, he contends that the trial court erred in failing to instruct the jury on that third category of voluntary manslaughter. (*Breverman, supra,* 19 Cal.4th at pp. 153, 162 [trial court must instruct on all theories of lesser included offenses].)

---

[7] Appellant also relies on *People v. Bryant* (2011) 198 Cal.App.4th 134. However, the California Supreme Court has granted review of that decision (Aug. 9, 2011, D057570) to determine whether "voluntary manslaughter [may] be premised on a killing without malice that occurs during the commission of an inherently dangerous assaultive felony." The Court of Appeal opinion is therefore no longer citable and is of no precedential value.

In *Garcia,* the victim moved toward the defendant, who was holding a shotgun. Fearing that the victim might try and take the shotgun, the defendant struck the victim in the face with the butt of the gun in order to back him up. This caused the victim to fall and hit his head on the sidewalk, dying from the injuries sustained in the fall. (*Garcia, supra,* 162 Cal.App.4th at pp. 22–23.) The defendant did not mean to hit the victim in the face or to kill him. A jury found the defendant not guilty of murder, but guilty of the lesser included offense of voluntary manslaughter. (*Id*. at p. 23.)

On appeal, the defendant claimed that the trial court committed prejudicial error in failing to instruct the jury on involuntary manslaughter as a lesser offense of murder because there was substantial evidence that the killing was "committed without malice and without either an intent to kill or conscious disregard for human life and, therefore, was neither murder nor voluntary manslaughter." (*Garcia, supra,* 162 Cal.App.4th at p. 26.) Our colleagues in Division Seven of this district held only that an unintentional killing, without malice, during commission of an inherently dangerous felony does not constitute involuntary manslaughter. (*Id*. at p. 22.) However, in dictum, they added that such a homicide was "at least voluntary manslaughter," without specifying under what circumstances, if any, it would be voluntary manslaughter and under what circumstances it would be a greater offense. (*Ibid.*)

To begin with, the facts in *Garcia* bear no resemblance to the facts presented here. In that case, the defendant inflicted a single unintended blow to a person approaching him, potentially trying to take the defendant's shotgun. Here, appellant repeatedly and viciously struck Basulto, a disabled man, who made no threatening advance towards appellant.

Furthermore, *Garcia's* statement that an unintentional killing without malice in the course of committing an inherently dangerous felony can be voluntary manslaughter is mere dictum, as the Court of Appeal there was only called upon to determine if the offense was involuntary manslaughter. It is less than clear what offense that kind of killing can be. An unintentional killing without malice during an inherently dangerous felony cannot be murder for murder requires malice. (§ 187, subd. (a).) It also cannot be

*involuntary* manslaughter, as that offense only occurs during commission of a nonfelony or noninherently dangerous felony. (§ 192; *Burroughs, supra,* 35 Cal.3d at pp. 835–836; *People v. Butler, supra,* 187 Cal.App.4th at p. 1007.)

Thus, if it is anything, it would appear to be *voluntary* manslaughter. But voluntary manslaughter, under fundamental principles, is an intentional killing without malice (or at least a killing in conscious disregard for life because of provocation or imperfect self-defense (*People v. Rios* (2000) 23 Cal.4th 450, 461, fn. 7 (*Rios*)). Also, there is no statutory authority for this version of voluntary manslaughter. *Rios* even suggests that while appellant's new theory of voluntary manslaughter may be appropriate when voluntary manslaughter is the charged offense, it may not be where voluntary manslaughter is merely a lesser included offense of a charged murder. (*Rios, supra,* at pp. 461–463 [suggesting that there are different proof requirements for voluntary manslaughter when it is a lesser offense of a murder charge than when voluntary manslaughter is the charged offense].)

It is therefore unclear what precise offense is committed by such a killing and whether an instruction on voluntary manslaughter of this type is required. We need not resolve this thorny issue, which is now before our Supreme Court, for appellant suffered no prejudice by the failure to instruct on this theory of voluntary manslaughter.

***F. Harmless error***

Even if the trial court should have instructed the jury that the unlawful killing of a person unintentionally and without malice in the commission of an inherently dangerous felony is voluntary manslaughter, that error was harmless. "The sua sponte duty to instruct fully on all lesser included offenses suggested by the evidence arises from California law alone," (*Breverman, supra,* 19 Cal.4th at p. 149) and thus a trial court's error in fulfilling this duty "must . . . be evaluated under the generally applicable California test for harmless error . . . set forth in [*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*)]." (*Breverman, supra,* at p. 176.) Under *Watson,* reversal is not warranted unless "it appears 'reasonably probable' the defendant would have obtained a more

favorable outcome had the error not occurred." (*Breverman, supra*, at p. 178; *Watson*, *supra*, at p. 836.)

We find no such probability here. Rossana took Basulto, a foot and leg amputee, into her home with the intention of becoming his caregiver. But Basulto was demanding, ungrateful and refused to do anything for himself, including those things of which he was still capable. Rossana and appellant became angry and resentful of Basulto's attitude. They once threatened that if he did not shut up, they would "roll [him] outside." Finally, Rossana told appellant that either he or her brother needed to put Basulto in his place, "bitch slap[ping] him," if necessary.

On November 29, 2009, appellant began arguing with Basulto and, when Basulto called him a rapist, appellant became incensed and attacked Basulto who was in his wheelchair. Appellant brutally beat him, punching him approximately 20 times, causing Basulto to suffer multiple contusions to his face, a broken nose and fractures of his cheekbones, lacerations to his mouth, bruises to his chin and three broken ribs. It defies credulity that one could inflict such a brutal attack on a person confined to a wheelchair, without intending to kill. The nature of the attack, without more, permits an inference of intent to kill. (See *People v. Warrick* (1967) 249 Cal.App.2d 1, 5 ["'The evidence that deceased was strangled supports the finding that defendant acted with "malice aforethought"'"].)

Furthermore, appellant's claims that he was intoxicated, "blacked out" after the first blow and never intended to kill Basulto are supported only by the weakest of evidence, provided substantially by appellant himself. His testimony and pretrial statements were riddled with contradiction. He said in front of paramedics at the crime scene that Basulto was hurt when he fell out of his wheelchair. At the hospital, where appellant was receiving stitches for his cut finger, he reported that Basulto was hurt when he and Basulto fell as appellant was pushing the wheelchair up a ramp. When interviewed by detectives, appellant initially denied ever punching Basulto. He claimed that he only slapped him, only later in the interview admitting that he hit Basulto once with a closed fist. He also denied drinking or using drugs before the attack, while at trial

he testified that he was intoxicated. He told the detectives that Basulto was probably hurt falling from the wheelchair, only later stating that Basulto did not fall and that any injuries Basulto suffered were probably from appellant. Appellant's inconsistent statements and testimony gave him little credibility, making it unlikely that the jury believed his defense.

In any event, pursuant to the properly given instructions, the jury decided adversely to appellant the very questions posed by the omitted voluntary manslaughter instruction. (*People v. Lewis* (2001) 25 Cal.4th 610, 646 ["[e]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions"].) The jury was instructed that to find appellant guilty of second degree murder, it had to find that he acted with malice; that is either intentionally or with conscious disregard for human life. The jury so found. By doing so, it necessarily rejected appellant's self-serving testimony that he did not intend to kill Basulto.

The jury was also instructed that murder could be reduced to voluntary manslaughter if appellant killed in the heat of passion or in a sudden quarrel, which negate malice. In finding appellant guilty of murder, the jury also necessarily rejected his claim that he was provoked by Basulto's calling him a rapist.

Finally, the jury was instructed that voluntary intoxication could negate appellant's intent to kill. In finding him guilty of murder, it must have found that his faculties were not so blurred by intoxication as to preclude him from forming the intention to kill or being aware of the grave risk his conduct presented. Hence, the jury had already decided the issues of malice and intent against appellant, elements of voluntary manslaughter under the instruction appellant claims should have been given.

## II. Instruction on involuntary manslaughter

### *A. Background*

The trial court instructed the jury on second degree murder and voluntary manslaughter based on a sudden quarrel or heat of passion. It did not instruct the jury on involuntary manslaughter as a lesser included offense of murder.

### *B. Contention*

Appellant contends that the trial court erred in failing to instruct the jury on involuntary manslaughter as a lesser included offense of murder. He argues that "the conduct underlying the murder charge, appellant's assault of Basulto with his fists, is a felony that is not inherently dangerous to life when its elements are viewed in the abstract."[8] Involuntary manslaughter can be based on an unintentional homicide committed during the course of a noninherently dangerous felony. Consequently, he concludes that the jury should have been instructed sua sponte on voluntary manslaughter. We disagree.

### *C. Involuntary manslaughter based on a noninherently dangerous felony*

As previously stated, involuntary manslaughter can be proved by establishing that a homicide was unintentional and committed in the commission of an unlawful act, not amounting to a felony, in the commission of a lawful act which might produce death, in an unlawful manner or without due caution and circumspection (§ 192) and an unintentional homicide committed in the course of a noninherently dangerous felony. (*Burroughs, supra,* 35 Cal.3d at pp. 835–836; *People v. Butler, supra,* 187 Cal.App.4th at p. 1007.)

Appellant's underlying offense was an assault by means likely to produce great bodily injury. Only if that offense is a noninherently dangerous felony would he be

---

**8** We note that this contention is in direct conflict with appellant's contention in part I, *ante,* where he claimed that the jury should have been instructed on voluntary manslaughter on the theory that the killing was unintentional and without malice committed during his commission of an inherently dangerous felony. Appellant cannot prevail on both conflicting claims, and based upon our analysis, he prevails on neither.

subject to conviction for involuntary manslaughter and hence entitled to an instruction on that offense.

***D. Inherently dangerous felony***

An inherently dangerous felony for purposes of the second degree felony-murder doctrine "is one which, 'by its very nature, . . . cannot be committed without creating a substantial risk that someone will be killed. . . .'" (*People v. Hansen* (1994) 9 Cal.4th 300, 309, overruled on other grounds in *People v. Chun* (2009) 45 Cal.4th 1172.) A felony is considered inherently dangerous to human life when the felony, viewed in the abstract, "by its very nature . . . cannot be committed without creating a substantial risk that someone will be killed" (*People v. Burroughs*, *supra*, 35 Cal.3d at p. 833). In determining whether a felony is inherently dangerous to human life, the court considers the elements of the offense in the abstract, not the defendant's specific conduct. (*People v. Hansen*, at p. 309; see generally *People v. Schaefer* (2004) 118 Cal.App.4th 893, 900.) Whether a crime is an inherently dangerous felony is a question of law for the court. (*People v. Schaefer*, *supra*, at p. 902.)

We conclude that, considered in the abstract, appellant's underlying offense of assault by means of force likely to produce great bodily injury is an inherently dangerous felony. Great bodily injury is defined in section 12022.7 as "a significant or substantial physical injury." (§ 12022.7, subd. (f).) Using force likely to produce that type of injury necessarily involves conduct that by its very nature creates a substantial risk that someone will be killed.

Additionally, section 245 at the time the charged offense was committed,[9] appears to equate assault with a deadly weapon and assault by means likely to produce great bodily injury, including both offenses in the same subsection of that statute and making them subject to the same punishment. This suggests that assault by force likely to cause

---

**9** Effective January 1, 2012, section 245, subdivision (a)(1) was amended to separate the offenses of assault with a deadly weapon and assault by force likely to cause great bodily injury into separate subsections, though leaving both subject to the identical punishment.

great bodily injury, shares numerous aspects with assault with a deadly weapon, so as to make it an inherently dangerous felony (*Garcia, supra*, 162 Cal.App.4th at p. 31 ["Garcia unquestionably committed an assault with a deadly weapon/firearm on Gonzalez, an inherently dangerous felony"]).

Moreover, appellant's underlying conduct, given its savageness and the disfigurement that Basulto must have suffered in having his nose and cheeks fractured, may well have constituted mayhem (§ 203), clearly an inherently dangerous felony. (*People v. Allesch* (1984) 152 Cal.App.3d 365, 373.)

Appellant relies upon the discussion in *Burroughs* in arguing that assault with force likely to produce great bodily injury is not an inherently dangerous felony. He argues that *Burroughs* differentiated between acts which create a danger to human life and acts which create a danger of great bodily injury. But *Burroughs* was concerned with the offense of practicing medicine without a license in violation of Business and Professions Code section 2053, an offense much different on its face than assaulting someone with force likely to produce great bodily injury. In the former case, the offense is not aimed at injuring someone, while in the latter case, the very purpose of the offense is to inflict injury, but with force making it likely that the injury will be substantial.

***E. No involuntary manslaughter instruction was required***

Involuntary manslaughter is a lesser offense of murder, distinguished by its mens rea. (*Rios, supra*, 23 Cal.4th at p. 461.) If there was evidence to support involuntary manslaughter, the trial court was required to instruct the jury on it sua sponte. As previously stated, the only basis for finding a person guilty of involuntary manslaughter, is an unintentional killing, without malice, committed in the course of committing a misdemeanor, a lawful act which might produce death, in an unlawful manner or without due caution and circumspection or a felony that is not inherently dangerous. The killing by appellant was in the course of committing an unlawful act that was a felony. Because we have concluded that it was an inherently dangerous felony, it could not be the basis of an involuntary manslaughter conviction. (*Garcia, supra*, 162 Cal.App.4th at p. 31 [court

concluded that "an unlawful killing during the commission of an inherently dangerous felony, even if unintentional, is at least voluntary manslaughter"].)

Moreover, given the ferocity of appellant's attack on Basulto, a wheelchair-confined amputee, striking him approximately 20 times, breaking his nose, cheek bones and three of his ribs and inflicting numerous bruises and contusions, despite appellant's denial of intent to kill him, does not present a factual basis for instructing on involuntary manslaughter. (See *People v. Hendricks* (1988) 44 Cal.3d 635, 643 [no involuntary manslaughter instruction required when, although the defendant denied intent to kill, he shot victims six times and five times respectively at point-blank range].) The discussion in *People v. Parras* (2007) 152 Cal.App.4th 219, 228 is pertinent here. That court stated: "We further disagree with appellant's argument that the jury should have been instructed that an unintentional killing during the commission of 'another crime' constitutes involuntary manslaughter. If this homicide occurred during the commission of another criminal offense, that offense was a felony, not the misdemeanor required under this theory. [Citation.] The undisputed evidence showed that Ms. Lombera's injuries were inflicted by the use of great, violent force. Her head was hit with a portable radio and possibly a chair as well. Her injuries included a compound fracture to her jaw, four teeth being knocked out, and 12 to 15 distinct head wounds. Infliction of these injuries did not involve a simple misdemeanor battery, as appellant seems to contend, but an aggravated felony assault with a deadly weapon or by means of force likely to produce great bodily injury. (See § 245, subd. (a).)" (*People v. Parras, supra,* at p. 228.)

***F. Harmless error***

For the reasons set forth in part IF, *ante*, even if the trial court erred in failing to instruct the jury on involuntary manslaughter, that error was harmless in that it is not reasonably probable that appellant would have realized a more favorable result had that instruction been given. (*Breverman, supra,* 19 Cal.4th at p.176; *Watson, supra,* 46 Cal.2d at p. 836.)

## DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD