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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. KIRK DUNCAN, Defendant and Appellant.	B278018 (Los Angeles County Super. Ct. No. BA441393)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mildred Escobedo, Judge. Affirmed.

Kathy R. Moreno, 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, Victoria B. Wilson and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Kirk Duncan was convicted of second-degree murder for killing his brother, Bobby, during an argument. On appeal, he contends the court erred in two evidentiary rulings and in refusing to instruct the jury on involuntary manslaughter. Finding no prejudicial error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Background of the Family*

At the time of the killing, Bobby was 66 years old. He was 6 feet tall and weighed 267 pounds. He was in good physical shape, training for a cycling marathon. Defendant, in contrast, had lost a leg some 35 years earlier. He could hop or use crutches to get around, but was using a wheelchair at the time.

Bobby lived in a house with his wife, Pamela. Defendant and his 42-year-old disabled son, Kirk Paul, also lived in Bobby and Pamela's house. Kirk Paul was developmentally delayed.[1] Defendant had not lived in the house as long as Kirk Paul had; for some time, defendant was homeless and lived in his van. Sometimes, defendant would park the van in the driveway or in front of the house. Bobby and Pamela initially did not allow defendant to live in the house, but a few years before the murder, they allowed defendant to move in.

Defendant and his brother Bobby loved each other, but argued a lot. Sometimes, arguments between the two would get physical, with pushing and shoving. Twice, when defendant

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[1] While the evidence on this point was limited, both counsel agreed, in opening statements, that Kirk Paul was "mentally disabled." The prosecutor said he had the mind of a 12 year old, while defense counsel said he had the mental function of a "teenager or young person."

stood up, Bobby pushed him back into his wheelchair. Defendant also argued with Pamela. Profanity was frequently used between them. If Bobby was around, he would intervene in arguments between defendant and Pamela; Bobby was always protective of his wife.

One night, some years back, when defendant was living in his van in the driveway, he got into an argument with Pamela over the volume of the music he was playing in the van. During the argument, Pamela slapped defendant, who responded by turning the volume up even louder. Bobby came out of the house. Defendant threatened to hurt Pamela, and Bobby punched defendant, then slammed defendant's head against the steering wheel with enough force that it damaged the van's steering column. Bobby and Pamela ultimately paid for the damage to the van.

2. *The Killing*

Defendant fatally stabbed Bobby on the evening of November 9, 2015. By 3:30 that afternoon, defendant was already drunk and belligerent. One of Pamela's relatives, Xavier Washington, was visiting the house. Defendant rolled his wheelchair up to Washington, got a few inches away from his face, and said, unprovoked, "I can fuck you up." Defendant was reeking of alcohol. Washington did not take his threat seriously, and told defendant to back off.

At around 7:00 p.m., defendant was roughhousing with his son Kirk Paul in the living room – defendant was in his wheelchair; Kirk Paul was in a recliner; and defendant had his son by his ankles, lifting them up in front of his face. Kirk Paul was having none of it, telling defendant to stop and saying he would punch him if he did not. Defendant did not stop, and Kirk

Paul hit him, although not hard. Pamela had heard Kirk Paul's pleas, and entered the room, telling defendant to "[b]ack the fuck up off of him." Defendant responded, "Don't fucking tell me what to do. He's my fucking son." Pamela pulled defendant's wheelchair back to get him away from Kirk Paul. She told defendant, "Get out, either get out or go to your room, but leave him alone." The argument and the volume escalated. Defendant yelled, "Don't tell me what to do. Fuck you, don't tell me what to do." Pamela pushed defendant's chair toward the door and said, "Get the fuck up out of here." Pamela had been pushing defendant toward the front door; there was a wheelchair ramp to facilitate access through that door.

Bobby heard defendant and Pamela arguing and joined the fray. He told Pamela, "Call 911. This motherfucker is leaving this house tonight." Bobby angrily went toward the back of defendant's wheelchair to physically move him out of the house. Pamela told Bobby to back away from defendant and to let him get out of the house himself. She was concerned for defendant's physical safety and worried that Bobby would push defendant out the door and topple him from his wheelchair. Pamela did call 911, and, to some degree, narrated the events to the operator as they unfolded.

Things moved very quickly. Defendant pulled out a small multi-tool pocket knife. The blade was not open. Bobby said, "motherfucker, don't you ever pull a blade on me" and knocked the pocket knife out of defendant's hand. Bobby then socked defendant in the face, knocking him out of his wheelchair. Pamela told Bobby to stop; Bobby repeated that defendant was leaving the house that night. Defendant got back into his wheelchair, and wheeled past Bobby and Pamela into the

kitchen. He opened a drawer and removed a kitchen knife, with an eight- to ten-inch blade. He exited the kitchen with the knife in his hand, rolled up to Bobby, grabbed Bobby's shirt, and stabbed him in the side with the knife. Bobby did not immediately realize how badly injured he was, and responded by punching defendant in the face, flipping him over the back of his wheelchair and knocking him to the ground. This was the end of the fight. Pamela saw that defendant was bleeding from the mouth and asked the 911 operator to send ambulances for both Bobby and defendant.

Bobby grabbed his side and started complaining of pain. There was little blood, but fat (which Pamela incorrectly identified as intestines) was emerging from the wound. Defendant got into his wheelchair and went back to his room. Police and paramedics arrived, as a result of Pamela's call. They recovered both the closed pocket knife and the kitchen knife from the living room. They also took note of defendant's injuries; he had bleeding around his mouth with a trail of blood on his cheek. There was a single contusion on the right side of his face, with no other bruising. He declined medical treatment.

Bobby was taken to the hospital, where exploratory surgery was performed. He was suffering from low blood pressure due to blood loss – there were three liters of blood in his abdomen. The single stab wound had injured blood vessels leading to his small and large intestines, as well the back of his stomach, a vein adjacent to his aorta, and his liver. Based on the distance of the internal injuries from the entrance wound, the trauma surgeon concluded the blade went eight inches into Bobby's body. The deputy medical examiner was less certain, concluding the depth was between four and eight inches. After three surgeries over

two days, it was determined that all of Bobby's abdominal organs were dead, and he would not survive. A decision was made to allow him to die; he passed away on November 11.

3. *Charges and Trial*

Defendant was charged by information with Bobby's murder. (Pen. Code, § 187.) It was further alleged that he personally used a knife in the commission of the crime. (Pen. Code, § 12022, subd. (b)(1).) Defendant pleaded not guilty and proceeded to trial.

At trial, the prosecutor relied on Pamela's account of the stabbing. Defendant did not offer any testimony supporting a contrary version, but instead attempted to undermine Pamela's story. For the most part, defendant's evidence was geared toward establishing that Bobby had been the aggressor. He relied heavily on the 911 recording, in which Pamela repeatedly was heard telling Bobby to "stop," but not telling defendant to do so. He also pointed out omissions in what Pamela had told police, in an effort to demonstrate that Pamela had downplayed Bobby's violence toward defendant.

In closing argument, defense counsel suggested that, based on the evidence, it was logical to infer the following. After defendant's pocket knife had failed to keep Bobby back, defendant went to the kitchen to get a larger "symbol of power." Thereafter, Bobby "went back after [defendant] but to teach him a lesson." Unafraid of defendant and the knife, Bobby came at defendant. The end result of Bobby being stabbed and defendant being on the ground "was the effect of a collision of Bobby coming at [defendant] and [defendant] being given no choice because in order to get someone in the side, you have to be in their space."

The jury was instructed on murder, self-defense, voluntary manslaughter by provocation, and voluntary manslaughter by imperfect self-defense. The court denied defendant's request to have the jury instructed on involuntary manslaughter.

The jury found defendant guilty of second-degree murder. Defendant's motion for new trial and/or to modify the verdict to voluntary manslaughter was denied. Defendant was sentenced to 15 years to life for the murder, plus an additional year for the knife enhancement. Defendant filed a timely notice of appeal.

DISCUSSION

1. *Admission of Defendant's Threat to Washington*

Defendant first contends the trial court erred in admitting Washington's testimony that, at 3:30 on the afternoon of the killing, defendant said to him, "I can fuck you up."

Defendant objected to this anticipated testimony by pretrial motion, arguing that the testimony was inadmissible hearsay offered for the truth of the matter asserted. He also argued that the evidence was irrelevant, and more prejudicial than probative under Evidence Code section 352. The trial court disagreed, and allowed the testimony.

The testimony was not hearsay. It was not offered for the truth of whether defendant could, in fact, "fuck [Washington] up." (*People v. Dennis* (1998) 17 Cal.4th 468, 528 [defendant's threat was not offered for its truth so was outside the hearsay rule].) Instead it was offered for the relevant, nonhearsay purpose of establishing that four hours before his deadly argument with Bobby, defendant was already drunk and spoiling for a fight.

The testimony was not more prejudicial than probative. "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." (Evid. Code, § 352.) A trial court's determination under Evidence Code section 352 will not be disturbed on appeal absent a clear showing of abuse of discretion. (*People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1610.) " 'The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. "[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is 'prejudicial.' 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.' " ' " (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.)

Here, although the evidence was not extraordinarily relevant, it was not particularly prejudicial. Indeed, given the other evidence which was indisputably admissible – minutes before the killing, defendant held his developmentally delayed son's legs up in the air against his protests, and used profanity to argue with Pamela when she attempted to intervene on Kirk Paul's behalf – we fail to see how defendant's threat to Washington, which Washington had not taken seriously, prejudiced defendant in any way.

On appeal, defendant argues for the first time that his threat to Washington should have been excluded as inadmissible propensity evidence. Subject to certain exceptions, Evidence

Code section 1101, subdivision (a) prohibits "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct)" when the evidence is "offered to prove his or her conduct on a specified occasion." Defendant did not raise this argument at trial, so the prosecutor had no opportunity to refute it. We find the point has been forfeited. (Evid. Code, § 353, subd. (a).) Even if the argument had been raised, we have no doubt the trial court would have overruled that objection. First of all, it was not propensity evidence. The testimony recounted some of the earlier events of the day and put into context the disagreement that lead to the murder. Second, it was admissible under Evidence Code section 1103. Subdivision (a) allows a criminal defendant to offer evidence of a *victim's* trait of character in order to prove the victim acted in conformity with his character. Subdivision (b) allows the prosecution to introduce evidence of a *defendant's* character for violence to show the defendant acted in conformity therewith, if offered after the defendant has offered evidence to show the victim had a character for violence under subdivision (a). Here, the prosecutor did not offer evidence that defendant had threatened Washington until after defendant had elicited testimony that Bobby had punched defendant and pushed his head into his steering wheel. Thus, even assuming the Washington threat was propensity evidence, the Evidence Code section 1103 exception would apply.

2. *Exclusion of Bobby's Hearsay Regarding Pushing Defendant's Head Into the Steering Wheel*

On cross-examination, defendant elicited testimony from Pamela regarding the incident when Bobby punched him and

pushed his head into the steering wheel. Pamela clearly testified that she saw Bobby punch defendant. However, she testified that she had turned away, and did not see Bobby slam defendant's head against the steering wheel. She volunteered, however, that she knew this happened because defendant gave her the bill for the damage to the car. In going over this testimony a second time, the following questions and answers occurred:

"Q And so your testimony that you did not see him slam his head against the steering wheel –

"A Correct.

"Q But you believe that to have happened because you were presented a bill to the damage to the van by [defendant]?

[The prosecutor's objection that the question called for speculation was overruled.]

"A I know that that is what Bobby told me he did, and I know that is what [defendant] told me Bobby did.

[The prosecutor's hearsay objection was sustained, and motion to strike was granted.]

"A I have personal knowledge that we paid for the damage to the steering column."

Thus, testimony that Bobby slammed defendant's head into the steering wheel sufficient to damage the van was admitted. What was excluded was the hearsay that Bobby, and defendant, both told Pamela that this had occurred. We are concerned only with the ruling excluding Bobby's statement.

At trial, defendant argued that the testimony should have been admitted as a statement against Bobby's penal interest. (Evid. Code, § 1230.) The trial court found that this hearsay exception did not apply, and defendant does not challenge this ruling on appeal.

Instead, in his opening brief, defendant argues the statement should have been admitted as a nonhearsay statement of Bobby's then state of mind, which was relevant to his state of mind at the time of the stabbing. (Evid. Code, § 1250.) Defendant failed to assert this ground below, and the claim is therefore forfeited. (*People v. Edwards* (2013) 57 Cal.4th 658, 727.) In any event, the exception does not apply for two reasons. First, the statement in question – "that is what Bobby told me he did" – is not a statement of Bobby's state of mind. It does not indicate, for example, that Bobby was proud of what he did, or sorry for it. It is simply Bobby's admission that he did an act; it says nothing of his state of mind. Moreover, even if it were evidence of his state of mind at the time he said it, there is no indication that it is somehow relevant to his state of mind several years later, once defendant had moved into his house, and the two had had many more interactions since.

In his reply brief on appeal, defendant's argument for admissibility changed somewhat, and he argued that the statement was admissible to show defendant's "fear of Bobby and thus his actions in self-defense." This point is waived for the failure to raise it at trial, and the additional reason it was not raised in the opening brief. (*People v. Selivanov* (2016) 5 Cal.App.5th 726, 794.) Even if we were to address it, we would reject the claim. Any fear defendant may have had of Bobby because of the prior incident was because of the incident itself, not because Bobby told Pamela that he did it (particularly when there is no evidence that defendant heard Bobby's admission). The attack itself – both that Bobby punched defendant and that he slammed defendant's head into the steering wheel – was in evidence. Bobby's excluded statement to Pamela would have

added nothing to the evidence relating to defendant's state of mind.

Defendant also argues that the two challenged evidentiary rulings (admitting his threat to Washington and excluding Bobby's statement) are asymmetrical and therefore unconstitutionally unfair. We disagree; if anything, the two rulings reflected a consistent application of Evidence Code section 1103: defendant introduced evidence that Bobby punched him and slammed his head into the steering wheel a few years earlier; the prosecutor responded with evidence that defendant had threatened Pamela's relative on the day of the killing. Even if we were to find error, any error would have been harmless in light of the uncontradicted evidence of how Bobby was killed.

3. *Any Error in Failing to Instruct on Involuntary Manslaughter was Harmless*

When a defendant kills with malice but in imperfect self-defense, the imperfect self-defense defeats malice, and the crime is voluntary manslaughter. (*People v. Cruz* (2008) 44 Cal.4th 636, 664.) Defendant argues on appeal that the absence of malice could also suggest that the killing was *involuntary* manslaughter, and the trial court erred in not instructing on involuntary manslaughter. Involuntary manslaughter is "the unlawful killing of a human being without malice in the commission of an unlawful act not amounting to a felony or in the commission of a lawful act that might produce death, in an unlawful manner, or without due caution or circumspection. (1 Witkin & Epstein, California Crimes (4th ed. 2012) Crimes Against Persons, § 246.)

In this case, the jury was instructed on murder, self-defense, and voluntary manslaughter by imperfect self-defense. The trial court rejected the involuntary instruction on the basis

that the only evidence was that defendant intentionally went to the kitchen, obtained a knife, and shoved it in his brother's abdomen, necessarily establishing malice.

Defendant argues an involuntary manslaughter instruction was supported by a theory posited by Justice Mosk in a dissenting opinion in *People v. Blakeley* (2000) 23 Cal.4th 82, 98-99. There, Justice Mosk suggested that while imperfect self-defense which *defeats* malice results in the crime of voluntary manslaughter, imperfect self-defense *without* malice results in involuntary manslaughter. We observe that the citation was to Justice Mosk's dissent not to the majority opinion. Although the majority had "no quarrel with this view," (*id.* at p. 91) it had no cause to address the issue because there had been malice in that case. When there is malice, but it is defeated by imperfect self-defense, the crime is voluntary manslaughter. (*People v. Cruz, supra,* 44 Cal.4th at p. 664.) We have no cause to address the issue either, as the jury in this case found defendant guilty of second degree murder and rejected voluntary manslaughter, thus necessarily finding that defendant had acted with malice, and not in imperfect self-defense.

"Error 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. [Citation.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 646.) Here, the jury convicted defendant of murder rather than voluntary manslaughter, conclusively establishing that defendant acted with malice and not in imperfect self-defense, thereby negating any likelihood that the jury would have returned with a verdict of involuntary manslaughter. Thus, even if defendant had a legal

and factual basis for an involuntary manslaughter instruction, any error would have been harmless.

Defendant does not disagree with this proposition. He argues only that the murder verdict was itself suspect because of the two evidentiary errors identified above. As we have rejected both defendant's claims of evidentiary error, the murder verdict was not problematic, and serves to render any instructional error harmless.

DISPOSITION

The judgment is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.