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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. GEORGE MARIO REYES, Defendant and Appellant.	B235382 (Los Angeles County Super. Ct. No. MA048357)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daviann L. Mitchell, Judge. Affirmed.

Landra E. Rosenthal, 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, Scott A. Taryle and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant George Mario Reyes challenges his conviction for second degree murder. He contends the trial court improperly declined to instruct the jury regarding lesser included and lesser related offenses to murder. We reject these contentions and affirm.

RELEVANT PROCEDURAL HISTORY

On November 9, 2010, an information was filed charging appellant with a single count of murder (Pen. Code, § 187, subd. (a).)[1] Appellant pleaded not guilty. On August 5, 2011, the jury found appellant guilty of second degree murder. Appellant was sentenced to a term of imprisonment of 15 years to life.

FACTS

A. *Prosecution Evidence*

In September 2006, appellant pleaded guilty to driving under the influence. He was placed on probation until April 24, 2010. The trial court advised him: "If you continue to drive under the influence of alcohol, drugs, or both[,] and someone is killed as a result, you can be charged with murder."

Between 7:00 and 8:00 p.m. on February 19, 2010, appellant and Michelle Garcia began a visit with Oscar and Mary Portillo in their home in Palmdale. During the evening, appellant drank approximately six bottles of beer. Garcia had no alcoholic drinks. At or shortly after 2:00 a.m., appellant and Garcia left the Portillos' home in appellant's car. According to the Portillos, Garcia drove the car while appellant sat in the front passenger seat, and both wore seat belts.

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[1] All further statutory citations are to the Penal Code.

Shortly after 3:00 a.m. on February 20, 2010, Los Angeles County deputy sheriffs responded to a call regarding an accident and located appellant's overturned car in an open field near Avenue S in the Palmdale area. Deputy Sheriff Trevor King, the first officer to see appellant, found him in the driver's seat wearing the seat belt. The car contained no one else. After an ambulance took appellant away, the deputy sheriffs found Garcia face down on the ground 30 to 40 yards behind the car. She was determined to be dead.

Appellant's blood alcohol level, as determined by tests performed at 4:29 a.m. and 5:14 a.m., was .21 percent. At approximately 8:00 p.m., California Highway Patrol officers interviewed appellant. He acknowledged that he had suffered a prior conviction for driving under the influence, but denied that he was placed on probation for the offense. He could not recall what had occurred after he and Garcia left the Portillos' home.[2]

On the basis of skid marks, investigating officers concluded that the car had been travelling approximately 76 miles per hour when it veered across the road, overturned on a raised median, and rolled over for approximately 200 feet. Only the driver's seat belt showed signs that it had restrained a body during the incident. An autopsy established that Garcia had fatal injuries consistent with her having been ejected from the car.

B. *Defense Evidence*

Edward Acosta, an appointed defense investigator, testified that he interviewed Los Angeles County Sheriff's Department Sergeant Mark Wright, who had responded to the accident call on February 20, 2010. According to

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[2] An audio recording of the interview was played for the jury.

Acosta, Wright said that appellant was not wearing a seat belt when he saw him inside the car.

DISCUSSION

Appellant contends the trial court erred in declining to instruct the jury regarding involuntary manslaughter as a lesser included offense of murder and vehicular manslaughter as a lesser related offense of murder. As explained below, we disagree.

A. *Governing Principles*

Generally, the trial court is obligated to instruct sua sponte on lesser included offenses that the evidence tends to prove, even the parties object to the instruction on tactical grounds. (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155 (*Breverman*).) For purposes of this rule, courts apply the so-called "'accusatory pleading'" test, which "looks to whether '"'the charging allegations of the accusatory pleading include language describing the [charged] offense in such a way that if committed as specified [the candidate] lesser [included] offense is necessarily committed.'"'"[3] (*People v. Montoya* (2004) 33 Cal.4th 1031, 1035, quoting *People v. Lopez* (1998) 19 Cal.4th 282, 288-289.) The court must instruct

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[3] In certain other contexts, courts apply the so-called "elements" test to decide whether an offense in necessarily included within a charged offense. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227-1228.) "Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former." (*Id*. at p. 1227.) This test is properly employed in determining whether a defendant may be convicted of multiple charged crimes. (*Id*. at p. 1231.)

on any lesser included offense for which there is substantial evidence to support a conviction (*Breverman*, *supra*, 19 Cal.4th at p. 162), but not if the pertinent evidence is "minimal and insubstantial" (*People v. Springfield* (1993) 13 Cal.App.4th 1674, 1680).

The rule obliging the trial court to instruct on lesser included offenses flows from the trial court's duty to provide instructions adequate for the case. (*People v. Birks* (1998) 19 Cal.4th 108, 118 (*Birks*).) "[I]n 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. St. Martin* (1970) 1 Cal.3d 524, 531.)

As our Supreme Court has explained, the instructional rule regarding lesser included offenses implements this general duty in a manner that benefits both defense and prosecution. (*Birks*, *supra*, 19 Cal.4th at p. 119.) The rule preserves the prosecutor's discretion over the offenses to be charged, ensures that the defendant has adequate notice of the offenses alleged and prevents either party from "gambling on an inaccurate all-or-nothing verdict when the pleadings and evidence suggest a middle ground." (*Id*. at pp. 118, 127.) Regarding the latter interest, the Supreme Court has stated: "Our courts, we have stressed, '"are not gambling halls but forums for the discovery of the truth."' [Citations.]" (*Id*. at p. 127.)

In contrast, the trial court is not required to instruct on lesser related offenses, either sua sponte or on the defendant's request, even if there is substantial evidence to support a conviction for the offense. (*Birks*, *supra*, 19 Cal.4th at p. 137; *People v. Lam* (2010) 184 Cal.App.4th 580, 583; *People v.*

Valentine (2006) 143 Cal.App.4th 1383, 1387.) Although an instruction on a lesser related offense is proper if both defense and prosecution agree to it, the court may not instruct on a lesser related offense over the prosecution's objection. (*Birks*, *supra*, at p. 136, fn. 19; *People v. Lam*, *supra*, at p. 583; *People v. Valentine*, *supra*, at p. 1387.) This requirement for mutual agreement reduces the potential for improper "'gambling hall' strategies" by ensuring that the defendant is not denied notice of the lesser related offense and that the prosecution has an adequate opportunity to prove it. (See *Birks*, *supra*, 19 Cal.4th at pp. 128-129.) Furthermore, the requirement respects the prosecution's authority under the doctrine of the separation of powers to select the offenses to be charged against a defendant. (*Id*. at pp. 134-136.) As our Supreme Court has stated, "the California Constitution should not be construed to grant criminal defendants an affirmative right to insist on jury consideration of nonincluded offenses without the prosecutor's consent." (*Id*. at p. 136.)

B. *Lesser Included Offense*

Appellant contends the trial court erred in refusing to instruct the jury on involuntary manslaughter as a lesser included offense of murder. Subdivision (b) of section 192 defines involuntary manslaughter as "the unlawful killing of a human being without malice" that occurs "in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." Because involuntary manslaughter is ordinarily a lesser included offense of murder (*People v. Sanchez* (2001) 24 Cal.4th 983, 991, overruled on another point in *People v. Reed*, *supra*, 38 Cal.4th at p. 1228), appellant maintains that the court was obliged to instruct on involuntary manslaughter. He points in

particular to the evidence at trial that he caused Garcia's death while performing a lawful act -- driving a car -- in an unlawful or reckless manner. As explained below, he is mistaken.

Appellant's argument incorrectly disregards the express restriction that the Legislature has imposed on involuntary manslaughter. Subdivision (b) of section 192 states: "This subdivision shall not apply to acts committed in the driving of a vehicle." As our Supreme Court has explained, under the separation of powers established in the California Constitution, "'the power to define crimes and fix penalties is vested exclusively in the legislative branch.'" (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 516, quoting *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631 (*Keeler*); accord, *People v. Farley* (2009) 46 Cal.4th 1053, 1119.) Thus, "[t]he courts may not expand the Legislature's definition of a crime . . . ." (*People v. Farley*, at p. 1119, italics omitted.)

An instructive application of this principle is found in *Keeler*. There, the Supreme Court addressed the then-effective version of section 187, which defined murder as the "unlawful and malicious killing of a 'human being.'" (*Keeler, supra*, 2 Cal.3d at p. 619.) The court held that the doctrine of the separation of powers barred it from construing the term "human being" to include an unborn but viable fetus, reasoning that the term, as used by the Legislature in enacting the statute, was clearly restricted to "one who has been born alive." (*Id*. at p. 632.) The court stated: "Whether to thus extend liability for murder in California is a determination solely within the province of the Legislature." (*Id*. at pp. 632-633.)

Here, the Legislature has defined involuntary manslaughter in a manner that expressly excludes "acts committed in the driving of a vehicle" (§ 192, subd. (b)). For this reason, the trial court was obliged to instruct on the offense only if there was substantial evidence that appellant committed it while *not* driving the car. As

there was none, the court properly declined to instruct the jury on involuntary manslaughter. (*People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1082-1085.)

Appellant asserts that the court's failure to instruct on involuntary manslaughter contravened his rights to present a defense under the United States Constitution and California law. We disagree. Our Supreme Court has repeatedly determined that the federal Constitution establishes no right in noncapital cases to instructions on lesser included offenses, and only a limited right to instructions in capital cases. (E.g., *Breverman*, *supra*, 19 Cal.4th at p. 169 ["In light of the United States Supreme Court's careful disclaimers, and its tendency to interpret related federal rules . . . in a narrow way, we decline to do what the high court has expressly not done -- to hold that such an instructional rule is required in noncapital cases by the federal Constitution."]; *People v. Rundle* (2006) 43 Cal.4th 76, 148, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 ["[E]xcept for the limited situation in a capital case in which the state has created an artificial barrier to the jury's consideration of an otherwise available noncapital verdict, there is no federal constitutional right to instruction on lesser necessarily included offenses."].)

We find guidance on appellant's contention in *People v. Taylor* (2010) 48 Cal.4th 574, 624-625, a death penalty case. There, our Supreme Court held that an instruction on a lesser included offense was properly denied because there was insufficient evidence to support a conviction for the offense. (*Id*. at p. 624.) In so concluding, the court rejected the defendant's contention that the trial court's refusal to give the instruction violated his federal constitutional rights to present a defense, reasoning that no federal decision "require[d] instructions on a lesser included offense that substantial evidence does not support." (*Id*. at p. 625.) In view of *People v. Taylor*, the trial court did not contravene appellant's federal

constitutional rights in declining to instruct on involuntary manslaughter.

Appellant's contention also fails under California law. Generally, the trial court's duty to instruct on a defense theory, like its duty to instruct on lesser included offenses, follows from the court's general obligation to provide instructions adequate for the case. (*People v. Stewart* (1976) 16 Cal.3d 133, 140.) For this reason, the trial court may decline to give an instruction related to a defense when there is no substantial evidence to support the instruction. (*People v. Salas* (2006) 37 Cal.4th 967, 982-983; *People v. Villanueva* (2008) 169 Cal.App.4th 41, 49.) As explained above, that is the case here. Because the Legislature has restricted involuntary manslaughter so that it cannot be committed by a defendant who causes a death while driving, the trial court had no duty to instruct on the offense as a defense theory. (See *People v. Saille* (1991) 54 Cal.3d 1103, 1120 [courts are not required to instruct on the defense of diminished capacity after its abolition].) In sum, the trial court was not obliged to instruct the jury on involuntary manslaughter as a lesser included offense of murder.

C. *Lesser Related Offense*

Appellant contends the trial court erred in failing to instruct the jury on vehicular manslaughter as a lesser related offense to attempted murder. He does not dispute that vehicular manslaughter was not a lesser included offence of murder under the accusatory pleading test, as the information lacked any allegations regarding the driving of a vehicle.[4] (See *People v. Sanchez*, *supra*, 24 Cal.4th at pp. 991-992.) Nor does he dispute that under *Birks*, *supra*,

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[4] Under section 192, subdivision (c), vehicular manslaughter can be committed only when the defendant was "driving a vehicle."

19 Cal.4th 108, trial courts must refuse to instruct on a lesser related offense when, as here, the prosecution has objected to the instruction. Instead, he maintains that *Birks* was wrongly decided, arguing that the refusal to instruct on vehicular manslaughter contravened his federal constitutional rights to present a defense.[5]

This argument fails, as our Supreme Court has reaffirmed *Birks* in response to contentions of this type, including contentions framed in terms of a right to present a defense. (*People v. Rundle*, *supra*, 43 Cal.4th at p. 148 ["[T]here is no federal constitutional right of a defendant to compel the giving of lesser-related-offense instructions[,]" including a due process right "to present the 'theory of the defense case.'"]; accord, *People v. Foster* (2010) 50 Cal.4th 1301, 1343-1344.) We are bound by these determinations. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Appellant's contention also fails to the extent it relies on a defendant's right to defense instructions under California law. As explained above (see pt. B., *ante*), the trial court's obligation to give defense instructions flows from its general instructional duty. In *Birks*, our Supreme Court examined the application of this general duty to lesser related offenses. (*Birks*, *supra*, 19 Cal.4th at pp. 118-132.) Because the obligation to give defense instructions stems from the general duty, it provides no independent basis to depart from *Birks*.[6]

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[5] In *Birks*, the Supreme Court abrogated *People v. Geiger* (1984) 35 Cal.3d 510 (*Geiger*), which held that defendants were entitled to instructions on lesser related offenses upon request, provided certain minimal conditions were met. (*Birks*, *supra*, 19 Cal.4th at pp. 115, 122.)

[6] Appellant suggests that under *People v. Lagunas* (1994) 8 Cal.4th 1030, 1036-1038, defendants have a state constitutional right to defense-related instructions on lesser related offenses upon request. However, *Lagunas* merely applied *Geiger*, which was overuled in *Birks* (see fn. 5, *ante*).

We recognize that the jury confronted an "all or nothing" decision regarding appellant's guilt, even though the aim of the instructional rule regarding lesser included offenses is to inhibit the presentation of such decisions to the jury "when the pleadings and evidence suggest a middle ground" (*Birks, supra*, 19 Cal.4th at pp. 119, 127). However, the decision presented to the jury resulted directly from the Legislature's restriction on involuntary manslaughter and the prosecution's selection of the offense charged against appellant. Both the legislative restriction and the prosecutorial decision constituted legitimate exercises of authority that we are obliged to respect under the separation of powers doctrine. (*Keeler*, *supra*, 2 Cal.3d at pp. 632-633; *Birks*, *supra*, 19 Cal.4th at p. 136.)

Appellant also suggests that the prosecutor necessarily "opened the door" to the requested instruction on vehicular manslaughter by presenting evidence that appellant committed a murder while driving a car. We reject this contention, as holding that the mere submission of evidence bearing on a lesser related offense entitles the defendant to instructions on it would gut *Birks*.

In a related contention, appellant argues that the information was defective because it contained no allegation that he committed the murder while driving a car. This contention fails, as an information need not allege the particular manner in which a crime is committed. (4 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Pretrial Proceedings, § 228, pp. 489-490.)

DISPOSITION

The judgment is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.