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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. WANDA NELSON, Defendant and Appellant.	2d Crim. No. B271618 (Super. Ct. No. 1479637) (Santa Barbara County)

Wanda Nelson was indicted for first degree murder. (Pen. Code, §§ 187, subd. (a), 189.)[1] She appeals from the judgment entered after a jury had convicted her of the lesser included offense of involuntary manslaughter. (§ 192, subd. (b).) The conviction was based on appellant's criminal negligence in leaving unattended a paralyzed patient who was under her care. In appellant's absence the patient's ventilator became disconnected, resulting in death by asphyxiation. The jury acquitted appellant of first and second murder. It rejected the

[1] Unless otherwise stated, all statutory references are to the Penal Code.

People's theory that she had intentionally disconnected the ventilator.

The court suspended the imposition of sentence. It placed appellant on probation on condition that she serve one year in county jail. Appellant contends that the evidence is insufficient to support her conviction of involuntary manslaughter because there is no substantial evidence of criminal negligence. We agree and reverse.

Facts

People's Evidence

"In light of [appellant's] sufficiency of the evidence contention . . . , we set forth the facts here in the light most favorable to the judgment. [Citations.]" (*People v. Lee* (2011) 51 Cal.4th 620, 625, fn. 5.)

Heidi Good (Heidi) had Amyotrophic Lateral Sclerosis (ALS). The disease rendered her a quadriplegic, but it did not affect her brain. A physician testified that her cognitive abilities "were surprisingly good." According to her husband, she was "[s]harp as a tack."

Because Heidi lacked the muscle function to breathe, she was placed on a ventilator that pumped oxygen into her lungs. The ventilator was connected to her trachea by a tracheostomy tube inserted through a hole in her neck. If the ventilator stopped working or was disconnected, within minutes she would suffer cardiac arrest. Because she could not swallow, she was fed and given medication through a gastric tube inserted into her stomach. Her physical activity was limited to smiling, moving her eyes back and forth, and blinking. She could not talk. She communicated through "'eye related interface computer assistance.'"

Heidi needed 24-hour care. She had several paid caregivers who worked different shifts. Appellant was one of the caregivers. Her responsibilities included making sure that the ventilator was working properly. She was not a licensed nurse.

Marjorie Good (Marjorie) was Heidi's 87-year-old mother.[2] She lived with Heidi and her family. Marjorie was usually left alone with Heidi every weekday morning from 8:00 a.m., when the nighttime caregiver left, until 10:00 a.m., when the daytime caregiver (appellant) arrived. During this two-hour period, Marjorie would usually come into Heidi's room and lie next to her in bed. Heidi's husband was not "comfortable" with this arrangement "[b]ecause if something had occurred with the [ventilator] or there was an emergency, Marjorie Good would not have known what to do or how to deal with it." Husband brought his concerns to Heidi's attention, but she did "[a]bsolutely nothing" about the situation. Husband also did nothing because he "let Heidi manage the caregiving shifts."

On March 25, 2013 at about 2:00 p.m., while appellant was the sole caregiver on duty, she left the house and drove to Rite Aid to get medication for Heidi. She told Heidi's son, "'I'm going to go run some errands for your mother.'" Son testified that, when appellant left the house, Marjorie "was outside gardening." Son walked outside into a shed in the backyard, where he listened to music with friends.

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[2] Marjorie did not testify at the trial. She was appellant's codefendant and was also indicted for murder. Pursuant to Evidence Code sections 459 and 452, subdivision (h), we take judicial notice that the trial court declared a mistrial as to Marjorie. (See http://www.santamariasun.com/news/14317/judge-declares-mistrial-in-marjorie-good-case/.)

Heidi's son heard Marjorie yelling. He went inside the house and saw his mother dead on the bed. Appellant entered the bedroom a few minutes later.

Data recorded by the ventilator shows that a low pressure alarm was activated at 2:03 p.m. The alarm "usually indicates that something is disconnected or there's a leak." The alarm produced "a high pitched beeping sound." The alarm continued until 2:33 p.m., when the condition was cleared.

Neither Heidi's son nor Marjorie heard the alarm. Marjorie said, "[T]he . . . alarm went off and I didn't hear it because I was outside."

The day after Heidi had died, Detective Jason Bosma interviewed appellant. She said "multiple times" that "'everything was attached'" to the ventilator when she entered Heidi's bedroom after her trip to Rite-Aid. She also said: "Marjorie is deaf. She wears hearing aids. . . . [S]he was outside cutting the hedge" and "probably couldn't hear [the ventilator alarm]." Several months later, appellant told Detective Matt Fenske that one of the ventilator tubes was "loose" and the alarm "was going off."

Heidi's death certificate states, "'Decedent's ventilator was tampered with causing her to asphyxiate.'"

Appellant's Testimony

Appellant testified as follows: As to Heidi's ventilator, appellant "would always make sure everything is plugged in because there has been times just out of breathing or whatever it will pop off. This would pop off. Anything could pop off." "I know that it has a habit of coming off." Appellant recalled "at least maybe five incidents" when the ventilator had become disconnected and she had reattached it. If appellant had not

fixed the ventilator on these occasions, Heidi "would have continued to go without air." Marjorie "didn't know anything about the ventilator."

On the day Heidi died, she was "fine" and "smiling." She asked appellant to go to Rite Aid and pick up a medication. Marjorie, not appellant, would usually perform this task. Heidi explained that she wanted appellant to go to Rite Aid because she did not want Marjorie to use her credit card. Heidi expressed concern that Marjorie "would spend a little extra more than needed to be spent."[3]

Marjorie was outside in the front yard cutting the hedge. Appellant told Marjorie that Heidi had asked her to go to Rite Aid. Marjorie protested, "'[W]ell, why? I usually go.'" Marjorie and appellant walked into Heidi's bedroom. Heidi confirmed that she wanted appellant, not Marjorie, to go to Rite Aid.

Appellant checked the ventilator to make sure that all of the tubes were securely attached. She then drove to Rite Aid. She "felt it was safe [to go] because" she had "been to the store for [Heidi] before" and had "taken [Heidi's son] places before." In her absence, appellant "understood that Marjorie was going to be caring for Heidi." When appellant left, Marjorie "was in the front of the house cutting the hedge" with electric clippers. The clippers were "loud." That Marjorie was outside using the hedge clippers did not cause appellant "any concern at all."

[3] But in an interview conducted by the police on March 25, 2015, appellant stated that she "didn't know why [Heidi] just says, 'I don't . . . want [Marjorie] to go, I want you [appellant] to go.' "

After appellant had picked up the medication, she purchased a birthday card for Heidi. She then drove back to Heidi's house. When she arrived, Marjorie was still outside in the front yard cutting the hedge. Appellant had been gone for about 30 minutes.

Upon entering the house, appellant heard the ventilator alarm. She ran to Heidi's bedroom and noticed that the "bottom hose" was disconnected. Otherwise, the ventilator was working "fine." Appellant "automatically" reconnected the hose. "I put the tube back in because that's what we would do. If it pops off, you put it back in." Appellant checked Heidi's pulse and felt nothing. She ran outside to tell Marjorie that Heidi was dead.

Appellant knew that Marjorie was hard of hearing. Before Heidi died, she had accompanied Marjorie to a "hearing doctor" because Marjorie "was having problems with [her] hearing aid."

Meetings between Marjorie and Heidi's Daughter

At the request of the police, in May 2014 Heidi's daughter met twice with Marjorie. Daughter was wearing a recording device. The recording of the meetings was played for the jury.

Marjorie stated as follows: At about "2:00 in the afternoon" appellant said that Heidi "wants [her] to go get the . . . medicine." This arrangement "once in a while happened, not very often, cause usually [Marjorie] went to get the medicine." But sometimes Heidi would say, "'Well let [appellant] run over.'"

In response to appellant's statement that Heidi wanted appellant to get the medicine, Marjorie "said, 'Okay,' . . . .

So [appellant] left to get the medicine." Marjorie was in the front yard. She "went right in [the house], almost immediately after . . . [appellant] left." She saw that Heidi was sleeping and "everything was fine." Marjorie "went back outside."

When appellant returned from the pharmacy, Marjorie was outside "putting rakes . . . and stuff away." Appellant entered the house, and "the alarm was on." Appellant came outside and said that Heidi was "'gone.'"

Marjorie knew nothing about Heidi's ventilator. If she had realized that the ventilator was disconnected, she "wouldn't have known what to [do]."

Issue on Appeal

Appellant states that "the substantive issue" on appeal is "whether there was evidence from which the jury could conclude that [she] acted with criminal negligence when she left Heidi in [Marjorie's] care while she went to the pharmacy."

Standard of Review

"[A]nalyzing evidence, and determining the facts, are functions peculiarly within the expertise of juries. Although appellate courts review the sufficiency of the evidence supporting verdicts, such review is narrowly prescribed. '[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a *reasonable trier of fact* could find the defendant guilty beyond a reasonable doubt.' [Citations.] [¶] This standard means that when an appellate court determines that the evidence was insufficient, it has concluded that no 'reasonable' trier of fact could have found the defendant guilty." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1126-1127.)

"'We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] . . . "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.] We do not reweigh evidence or reevaluate a witness's credibility. [Citation.]' [Citations.]" (*People v. Nelson* (2011) 51 Cal.4th 198, 210.) "'Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] . . . .'" (*People v. Brown* (2014) 59 Cal.4th 86, 106.) Thus, "[o]n appeal all conflicts must be resolved on the side of the judgment." (*People v. Collins* (1925) 195 Cal. 325, 343.)

Substantial Evidence Does Not Support the Jury's Finding of Criminal Negligence

Appellant was convicted of involuntary manslaughter based on an unlawful killing without malice "in the commission of a lawful act which might produce death . . . without due caution and circumspection." (§ 192, subd. (b).) Such a conviction "requires criminal negligence in the commission of the offending act. [Citations.]" (*People v. Mohamed* (2016) 247 Cal.App.4th 152, 161.) The jury was instructed, "The People allege that the [appellant] committed the following lawful act with criminal negligence: left the residence with Marjorie Good outside the house."

"Criminal negligence is "'aggravated, culpable, gross, or reckless . . . conduct . . . [that is] such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life . . . .'" [Citation.]" (*People v. Valdez*

(2002) 27 Cal.4th 778, 783.) "[I]nvoluntary manslaughter . . . requires a showing that a reasonable person would have been aware of the risk. [Citation.] Thus, even if the defendant had a subjective, good faith belief that his or her actions posed no risk, involuntary manslaughter culpability based on criminal negligence is warranted if the defendant's belief was objectively unreasonable. [Citations.]" (*People v. Butler* (2010) 187 Cal.App.4th 998, 1008-1009.)

Appellant claims that there is no substantial evidence of criminal negligence because (1) on prior occasions Marjorie had cared for Heidi when no caregiver was present; (2) "the ventilator rarely malfunctioned"; (3) before leaving Heidi, appellant checked "the ventilator connections to ensure they were not loosely connected"; (4) Heidi instructed appellant to go to the pharmacy; and (5) appellant "made sure [Marjorie] knew that she was leaving. Appellant thus reasonably assumed that [Marjorie] would conform to her normal practice of staying by Heidi's side until appellant returned."

The People argue that the jury's finding of criminal negligence is supported by substantial evidence because (1) appellant knew that sometimes the ventilator connections would become loose or pop off; (2) "Marjorie did not know how to fix the ventilator"; (3) "[w]hen appellant left, Marjorie was outside"; (4) "[t]here is no evidence that Marjorie ever said, 'I'll cover while you're gone' "; (5) "appellant was gone for at least half an hour" and "never told Marjorie to attend to Heidi"; and (6) "[t]he combination of Marjorie's hearing deficit and her use of an electric hedge clippers, both of which appellant was aware of . . . , ensured that Marjorie would not hear the ventilator alarm if it went off."

Viewing the evidence in the light most favorable to the judgment, we conclude that no reasonable trier of fact could have found beyond a reasonable doubt that appellant was criminally negligent. During oral argument before this court, the Attorney General conceded that it is "undisputed" that Marjorie knew appellant was driving to the pharmacy to get medication for Heidi and would be gone "for more than a few minutes." Marjorie would have known this only because appellant had told her that she was going to the pharmacy. During the recorded meeting with Heidi's daughter, Marjorie confirmed that appellant had so informed her.

Appellant was not required to stay with Heidi at all times while she was on duty. Heidi's son testified that, with Heidi's permission, appellant had sometimes driven him to school. Marjorie remained with Heidi until appellant returned. Son declared, "Whenever my mom needed medicine [appellant] would go to the store and get her medicine." While appellant was gone, Marjorie "was left to look after [Heidi]." Marjorie told Heidi's daughter that it "wasn't that unusual" for appellant to drive to get medication.

Furthermore, appellant knew that every weekday morning before she started her shift, Heidi was left alone with Marjorie for about two hours. In view of this arrangement, it was not objectively unreasonable for appellant to believe it was safe to leave Heidi alone with Marjorie for 30 minutes while she went to the pharmacy.

The People argue that appellant's conduct was objectively unreasonable because Marjorie was not with Heidi when appellant left. Instead, Marjorie was outside cutting the hedge with loud electric clippers. Appellant knew that Marjorie

was hard of hearing. Thus, appellant should have known that if the ventilator became disconnected, Marjorie would not hear the alarm.

But it was not objectively unreasonable for appellant to believe that, after she had left, Marjorie would stop gardening and go inside the house to care for Heidi. Appellant informed Marjorie that she was leaving. Marjorie therefore knew or should have known that she was in charge of Heidi until appellant returned. Marjorie told Heidi's daughter that she had gone inside "almost immediately after . . . [appellant] left." She saw that Heidi was sleeping and "everything was fine." So she "went back outside."

Accordingly, no reasonable trier of fact could conclude that, by leaving Heidi in Marjorie's care for 30 minutes while she went to the pharmacy, appellant engaged in conduct """incompatible with a proper regard for human life . . . ."""" (*People* v. *Valdez*, *supra*, 27 Cal.4th at p. 783.)

Disposition

The judgment is reversed.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Rogelio R. Flores, Judge

Superior Court County of Santa Barbara

Mark R. Feeser, 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, Susan Sullivan Pithey, Supervising Deputy Attorney General, Robert M. Snider, Deputy Attorney General, for Plaintiff and Respondent.