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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. JOHN THOMAS JORDAN III, Defendant and Appellant.	B231818 (Los Angeles County Super. Ct. No. BA 357308)

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

Rachel Lederman, 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, Steven E. Mercer and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted appellant John Thomas Jordan III of the voluntary manslaughter of Steve Moore and found true the allegation that he had personally used a deadly and dangerous weapon. Appellant contends that we must reverse his conviction because the trial court failed to instruct on the lesser included offense of involuntary manslaughter. We affirm.

STATEMENT OF FACTS

1. Prosecution Evidence

On the afternoon of June 2, 2009, Cardell Smith, Clarence Young, Kimberly Washington, Karlton McGary, Steve Moore, and appellant were gathered outside a vacant house on Hooper Street. The house was used as a "hangout" where people went to use drugs and drink alcohol. Young is a double leg amputee and was using a wheelchair. Young and Moore were best friends and had known each other for approximately 25 years. Smith is also one of Young's best friends. Washington is Young's sister. Young described appellant as an "associate" of the group.

Everyone was drinking and using cocaine and/or marijuana that day at the house, including appellant. Appellant was talking to Washington. Smith had consumed approximately three 16-ounce beers before he had even arrived at the Hooper Street house that day. Smith and appellant got into an argument and began shoving each other on the front porch of the house. Appellant also punched Smith. Appellant "got the best of" Smith in the fight.

After witnessing the fight, Young left the house and went to the liquor store, where he consumed more alcohol. Young had consumed six 16-ounce cans of beer at that point, and he also had been up all night the night before drinking with Smith. Young estimated he had consumed 14 cans of beer between midnight of June 2, 2009, and 1:30 p.m. that afternoon.

Young returned to the house after the trip to the liquor store, where Smith, Washington, McGary, Moore, and appellant were still gathered. Smith and appellant got into another argument, this time solely verbal. Moore then challenged appellant to a fight, saying "You picking on him [Smith]. Why don't you come on back and let's get

down." The two pushed and shoved each other to the side of the house and then the back of the house. Moore did not have anything in his hands at this point. Young saw appellant had a knife in his hand. After the two men pushed and shoved their way to the back of the house, Young saw appellant come from the back holding the knife, and Moore was following appellant, holding his chest and bleeding. Moore still did not have anything in his hands. Appellant said, "I told you I was going to stab the nigga."

After they emerged from the back of the house, Moore laid down on the front porch of the house and was bleeding. He then picked up a wooden broom stick from the porch and began beating appellant with it on the front steps of the house. Smith also found a stick and began beating appellant with it. Appellant still had the knife in his hand but dropped it when Smith began hitting him. Young picked up the knife and stabbed appellant twice in his legs and once in the head. The knife broke when he stabbed appellant in the head. Young then started hitting appellant with a wooden stick until he saw a metal pipe in the yard, at which point he threw down the stick and picked up the pipe. The police arrived as Young was wielding the pipe and broke up the fight.

Moore died of stab wound to the chest that pierced his heart.

2. Defense Evidence

Appellant testified on his own behalf. He arrived at the Hooper Street house at approximately 9:30 a.m. on June 2, 2009. When he arrived, he began talking to Washington on the porch. Smith arrived after him, and while he was talking with Washington, Smith was "slapping [appellant's] feet in a playful manner." After about 30 to 45 minutes at the house, appellant left. He returned to the Hooper Street house at approximately 11:00 a.m. Between 11:00 a.m. and noon he drank approximately a half can of beer. He saw Smith at the house again, and he "faked like [he] was going to go get" Smith. Smith "took off running." He went back to the porch and talked with Washington some more. Smith began "playing by popping [him] on the head and the shoulders." Smith was not hitting him hard, and appellant did not get angry with Smith. Appellant stayed at the house for 15 to 20 minutes this time, left shortly, and then returned again at approximately 11:45 a.m. When he returned to the house this time, he

came up behind Smith, playfully "bear hug[ged]" him, and shook him a few times. Appellant went back to the porch and Smith started "tapping" or "messing with" him again. Once more, appellant stayed at the house for 15 to 20 minutes and then left.

He returned to the Hooper Street house one final time shortly thereafter. He surprised Smith when he snuck up on the porch and tapped Smith on his head and shoulders in a playful manner. This time, Smith became mad and violent. Appellant and Smith got into a fist fight. The fight continued for 15 to 20 seconds before McGary broke the fight up. McGary grabbed Smith and took him off the porch to the side of the house. Appellant stayed on the porch and began talking with Washington again. Smith kept trying to get back on the porch, but McGary was restraining him. Smith was calling appellant names and yelled that he was going to kill appellant.

Fifteen to 20 minutes after the fight between appellant and Smith, Moore arrived at the house. He talked with Smith briefly, who was still angry and trying to get at appellant. Appellant observed Moore talking with Young and Smith and taking several hits of cocaine. Moore then went to appellant and said, "you want to fight, I'll show you how to fight." Appellant responded that what had happened was between him and Smith, and he just wanted to be left alone. Moore challenged appellant a few more times. Smith came up to appellant also and was carrying a piece of wood. Young had also armed himself with two tent poles. Appellant had a knife in his back pocket.

Appellant left the porch and headed for his car, but before he got there, Smith, Young, and Moore surrounded him. Young threw a pole to Moore, who began to beat appellant with it. Appellant was trying to fight back. The fight between him and Moore moved from the front of the house to the side yard. After Moore hit appellant 10 to 15 times with the pole, Moore left appellant on the side of the house and gathered with Young and Smith back in front. Appellant again tried to get to his car, but Young, Smith, and Moore blocked his way. Smith came at him with a piece of wood and struck him repeatedly. Moore was also beating him with the pole again. They beat him for 20 to 30 seconds, by which time his face was bloody and blood was getting in his eyes. Appellant had pulled out his knife and had it in his hand. As he was falling to the ground, he "stuck

the knife out to get whoever was closest to [him]." When he stuck the knife out, he stabbed Moore. He was not able to see where he was stabbing because there was blood in his eyes. He did not intend to kill Moore or anyone else. He was in fear for his life. Appellant dropped his knife when he fell to the ground. Young picked it up and stabbed appellant with it. When the fight was over, appellant had multiple stab wounds, and a piece of the knife was stuck in his head.

PROCEDURAL HISTORY

Appellant was charged with the murder of Moore and the assault of Smith. The trial court dismissed the count charging assault of Smith. The jury found appellant guilty of voluntary manslaughter with respect to Moore and found that appellant personally used a knife within the meaning of Penal Code section 12022, subdivision (b)(1).[1] The court sentenced appellant to the high term of 11 years in state prison and stayed the weapon enhancement. Appellant filed a timely notice of appeal.

STANDARD OF REVIEW

"An appellate court applies the independent or de novo standard of review to the failure by a trial court to instruct on an uncharged offense that was assertedly lesser than, and included, in a charged offense." (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

DISCUSSION

The Evidence Was Insufficient to Support an Involuntary Manslaughter Instruction

Involuntary manslaughter is a lesser included offense of murder. (*People v. Sanchez* (2001) 24 Cal.4th 983, 989, overruled on another ground in *People v. Reed* (2006) 38 Cal.4th 1224, 1228-1229.) "[A] trial court must instruct on lesser included offenses, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present." (*People v. Lewis* (2001) 25 Cal.4th 610, 645.) "Conversely, even on request, a trial judge has no duty to instruct on any lesser offense *unless* there is substantial evidence to support such

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1 All further statutory references are to the Penal Code.

instruction." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008.) "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense . . . ." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) Evidence is substantial for this purpose if it could cause a jury composed of reasonable persons to conclude that the defendant committed the lesser but not the greater offense. (*Ibid.*)

Involuntary manslaughter is the unlawful killing of a human being without malice (1) "in the commission of an unlawful act, not amounting to felony" (the so-called "misdemeanor manslaughter" theory), or (2) "in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (§ 192, subd. (b); see also *People v. Lee* (1999) 20 Cal.4th 47, 61 (*Lee*).)

Here, the court instructed the jury on, among other things, self-defense, the various degrees of murder, voluntary manslaughter, and imperfect self-defense. Appellant argues that the evidence was sufficient to also support an involuntary manslaughter instruction on the theory that he killed Moore "accidentally, while committing a misdemeanor, brandishing." His theory is that he was brandishing the knife -- that is, drawing or exhibiting it in the presence of another person "in a rude, angry, or threatening manner" (§ 417, subd. (a)(1)) -- when he simply stuck the knife out blindly as he was falling, rather than intentionally directing the knife into a particular person's body.

We disagree. Substantial evidence did not support the "misdemeanor manslaughter" theory of involuntary manslaughter. Appellant's own testimony foreclosed the theory. He was clear that while he did not specifically intend to kill Moore, the stabbing was anything but an accident. He knew that Moore, Smith, and Young were surrounding him and were in close range. He said he thrust the knife out "to get whoever was closest to" him. Plainly, he intended to wound one of his attackers with the knife. It matters not that he could not see which one was in his aim because his vision was obscured. The intent was there. This case is analogous to *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1145, in which our Supreme Court held that an involuntary manslaughter instruction was unwarranted when the defendant stated that he intentionally

fired a shotgun at the victim, thus precluding a misdemeanor manslaughter theory based on brandishing a weapon. Likewise, appellant's intentional act was not merely "draw[ing] or exhibit[ing]" (§ 417, subd. (a)(1)) a weapon with no intent to injure.

The misdemeanor manslaughter cases on which appellant relies are readily distinguishable. They involved killings that could clearly be interpreted as accidental when the defendant was brandishing a weapon with no intent to injure. In *People v. Carmen* (1951) 36 Cal.2d 768 (*Carmen*), the court held that the trial court should have instructed on the misdemeanor manslaughter theory of involuntary manslaughter. The defendant told an officer that he shot a gun "to frighten" the victims "but had no intention of killing or injuring anyone" and did not point the gun at anyone or aim at them. (*Id.* at pp. 772, 774-775.) At trial, the defendant also said the gun accidentally discharged when he stumbled and lost his balance as he approached the victims. (*Id.* at p. 772.) The court held that if the defendant had no intent to injure anyone, his conduct did not rise to a felony but could be merely brandishing, and the killing could qualify as involuntary manslaughter. (*Id.* at p. 775.)

In *Lee*, *supra*, 20 Cal.4th 47, the court also held that the evidence supported a misdemeanor manslaughter theory. The defendant had been drinking heavily and was arguing with this wife. (*Id.* at p. 53.) The couple's daughter saw the defendant retrieve a gun from his bedroom, go to his wife in the kitchen, and pull her into a hallway, where they were pushing each other with the gun between them. (*Ibid.*) The witness left the room and went to her bedroom, heard arguing, and then heard a shot. When she came out of her bedroom, she saw the defendant holding his wife on the floor, begging her not to die. (*Ibid.*) The court held that the defendant could have committed the misdemeanor offense of brandishing when he used his gun in the fight. (*Id.* at p. 61.)

In both *Carmen* and *Lee*, the evidence left open the possibility that the defendants did not intend to injure their victims and their guns discharged accidentally. Not so here. It was not as if appellant said he exhibited his knife with no intent to injure any of the men, and then he stumbled and fell into Moore with the knife.

Appellant also relies on *People v. Villanueva* (2008) 169 Cal.App.4th 41, which was not a misdemeanor manslaughter case per se. The main issue in that case was whether the evidence warranted instructions on excusable homicide, when the defendant testified he exhibited a gun in self-defense and the gun discharged accidentally. (*Id.* at pp. 48-49.) In an aside, the court noted that when a person lawfully brandishes a weapon in self-defense, but does so in a criminally negligent manner, an accidental killing is involuntary manslaughter, not excusable homicide. (*Id.* at p. 55, fn. 12.) This aside was consistent with the second theory of involuntary manslaughter codified in section 192 (not a misdemeanor manslaughter theory) -- a killing "in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." *Villaneuva* also does not assist appellant because, as discussed, his testimony foreclosed a theory that he was merely brandishing a weapon and his weapon accidentally wounded the victim. We note, moreover, that the court instructed the jury on justifiable homicide in self-defense. The jury rejected that theory. Thus, it necessarily decided that appellant was not lawfully defending himself, and any assumed error in not instructing on "lawful act" involuntary manslaughter was harmless. (*People v. Lewis, supra*, 25 Cal.4th at p. 646 ["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"].)

DISPOSITION

The judgment of conviction is affirmed.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.