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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LIVORIO PEREZ, Defendant and Appellant.	B281137 (Los Angeles County Super. Ct. No. BA356682)

APPEAL from a judgment of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Marilee Marshall & Associates and Marilee Marshall, 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, Assistant Attorney General, Steven D. Matthews and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Livorio Perez appeals his conviction for second degree murder. He contends the trial court erred by failing to instruct the jury on involuntary manslaughter. Discerning no prejudicial error, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

Appellant Perez, a 51-year-old janitor, and the victim, 33-year-old Omar Ramirez, lived in the same neighborhood, approximately one-tenth of a mile apart. Garvanza Park was close by; among other things, it featured a picnic area and a children's play area.

a. *People's evidence*

Shortly before 7:00 p.m. on May 17, 2009, Perez chased Ramirez through the park with a knife with a three- to four-inch blade. Despite Ramirez's attempts to get away, Perez eventually succeeded in stabbing Ramirez in the arm, severing an artery and causing Ramirez to bleed to death.

Olga Hernandez, who was in the park's picnic area with her three daughters, observed the incident, as did Alice Lopez, who was near the playground. There were also many children in the playground area. Taken together, Hernandez's and Lopez's testimony recounted the attack as follows. Ramirez, looking frightened, ran through the park toward Hernandez, screaming for someone to call the police because Perez "wanted to kill him." Perez chased after Ramirez, holding the knife with the blade exposed; he appeared to be "terribl[y] mad." Ramirez moved behind one of Hernandez's daughters and grabbed her shoulders, using her as a shield between himself and Perez. Hernandez pulled her daughter away. Ramirez then grabbed Hernandez and tried to hide behind her. Perez attempted five or six times to

reach around Hernandez and stab Ramirez. When Hernandez broke free, Perez chased Ramirez around the picnic area for several minutes. Ramirez ran toward the play area, with Perez in pursuit. Ramirez tripped and fell to the ground. Perez stood over him and made stabbing motions toward the left side of Ramirez's torso three or more times. Ramirez repeatedly pushed Perez away, got to his feet, and backed away from Perez. Perez then stabbed Ramirez in the arm, causing blood to spurt out. Ramirez continued to push Perez away, but Perez kept "swinging at him, trying to keep stabbing him." Perez then chased Ramirez around the play area for several minutes. Ramirez positioned himself behind some play equipment and, as Perez thrust the knife at him five or six times, tried to dodge the blows. By this time, Ramirez's shirt was "soaked" with blood. Lopez estimated that during the attack, Perez lunged at Ramirez with the knife "constantly," approximately 20 times.

Eventually, Ramirez fell to his knees, tried to get up again, and fell to the ground. He yelled for someone to call an ambulance because he was dying. Meanwhile, Lopez and one of Hernandez's daughters had called 911.[1] Two men pulled Perez away and Lopez and other bystanders attempted to assist Ramirez until paramedics arrived. Perez ran off.

During the attack, Ramirez did not have a weapon, did not chase Perez, did not assume a fighting stance, did not swing at Perez, and did not grab for the knife.

Ramirez was transported to a hospital, where he died of his wounds. An autopsy revealed he had been stabbed twice in his left arm. The larger wound severed a major artery and a vein,

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1 Both calls were played for the jury.

resulting in massive blood loss and causing Ramirez's death. Ramirez had one defensive wound to his thumb, but no offensive wounds. No alcohol or drugs were present in his system.

A relative found Ramirez's truck parked on the street near the park. The door was open and the keys were in the ignition.

Investigating personnel observed a "massive quantity" of blood in the playground and in a nearby grassy area. This included blood spots, blood spatter, and blood trails "that wove in and out and around the play structure, including on the equipment, under the equipment, [and on] various paths and walkways around the equipment." Based on the blood evidence, it appeared that Ramirez had been moving around while he was bleeding.

Based on information obtained from a witness, officers arrived at Perez's house later that evening. Perez stated that he was the man the officers were looking for. He showed them the knife, which was in a drawer and appeared to have blood on the tip. His pants and shoes were bloodstained, and officers found a bloodstained sweatshirt in the house. He did not have any visible injuries. Lopez identified Perez in a field showup conducted shortly after the stabbing. Both she and Hernandez identified Perez in a pretrial photographic lineup, and at trial.

Martin Huerta worked at a laundromat where Perez took his laundry. Approximately two weeks before the stabbing, Huerta saw Perez with a bruise above his eye. Perez stated that Ramirez was "going to pay for it."

b. *Defense evidence*

Perez testified in his own behalf, as follows. Prior to March 2009, he had seen Ramirez in the neighborhood, but had had no contact or conflict with him and did not think Ramirez had any

reason to be angry with him. However, on March 29, 2009, Perez was walking on a street corner when Ramirez, who appeared to be drunk and angry, drove up, exited his truck, and punched Perez in the face twice. One of Ramirez's blows cut Perez over his eye and required stitches. Perez filed a police report.[2] Subsequently, Ramirez drove by Perez's house and "screech[ed] his tires." Ramirez also drove by Perez's residence playing music loudly, conduct which Perez thought was aimed at him. Thereafter, according to Perez, Ramirez "stalk[ed]" him, "always getting close" to him on the street or in stores. Perez believed Ramirez intended to hit him again, and felt threatened. Approximately a week before the stabbing, Ramirez "flipped the bird" at Perez. Perez felt the police were not doing anything, so he began carrying a knife for protection. However, between March 29 and May 17, Ramirez never touched Perez.

On May 17, 2009, the date of the stabbing, Perez was jogging near the park when he saw Ramirez standing by his (Ramirez's) truck. When Perez was approximately ten feet away from Ramirez, Ramirez blocked his path. Ramirez appeared to be drunk and angry, and Perez thought he was going to hit him again. Perez took out his knife. Ramirez said, " 'No, no' " and ran away. Perez chased Ramirez, hoping to scare him. Ramirez ran into the park, stopped, and made a call from his cellular telephone. Ramirez then came toward Perez and tried to punch Perez twice. Perez leaned back to avoid the blows, extending the arm in which he still held the knife, and accidentally cut Ramirez. Ramirez slipped on a pipe and fell. Ramirez got up,

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[2] An officer testified that Perez reported a battery by an unnamed person on March 29, 2009.

and Perez continued to chase him around the play equipment approximately twice, although he saw that Ramirez was bleeding. Perez was unable to catch Ramirez and did not stab him again. Perez denied telling Huerta that Ramirez was going to pay for what he did.

2. *Procedure*

The jury convicted Perez of second degree murder (Pen. Code, § 187, subd. (a))[3] and found he personally used a deadly and dangerous weapon, a knife (§ 12022, subd. (b)(1)). The trial court sentenced Perez to 15 years to life in prison, plus one year. It ordered Perez to pay victim restitution of $10,995 and imposed a restitution fine, a suspended parole revocation restitution fine, a court security fee, and a criminal conviction assessment. Perez appeals.[4]

DISCUSSION

The failure to instruct on involuntary manslaughter was not prejudicial error

The trial court instructed the jury on first and second degree murder, homicide in self-defense, provocation, voluntary manslaughter on both heat of passion and imperfect self-defense theories, and mutual combat. It did not instruct on involuntary manslaughter, reasoning that the offense was "murder, manslaughter, or it's nothing at all." Perez contends this was

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[3] All further undesignated statutory references are to the Penal Code.

[4] Perez's trial counsel failed to file a notice of appeal. In 2017, this court granted Perez's application to file a late notice of appeal and directed the superior court clerk to accept such a notice. Perez thereafter filed a notice of appeal in April 2017.

prejudicial error, depriving him of his federal constitutional right to present a defense. We disagree.

A trial court must instruct the jury on all general principles of law relevant to the issues raised by the evidence, including lesser included offenses, even absent a request. (*People v. Smith* (2013) 57 Cal.4th 232, 239.) Instruction on a lesser included offense is required when there is evidence the defendant is guilty of the lesser offense, but not the greater. (*People v. Whalen* (2013) 56 Cal.4th 1, 68.) This duty is not satisfied by instructing on only one theory of an offense if other theories are supported by the evidence. (*People v. Lee* (1999) 20 Cal.4th 47, 61.) Substantial evidence is evidence a reasonable jury could find persuasive. (*People v. Williams* (2015) 61 Cal.4th 1244, 1263.) The existence of *any* evidence, no matter how weak, will not justify an instruction. (*People v. Whalen*, at p. 68.) The testimony of a single witness, including the defendant, may suffice. (*People v. Wyatt* (2012) 55 Cal.4th 694, 698.) In determining whether substantial evidence existed, we do not evaluate the credibility of the witnesses, a task for the jury. (*Ibid.*) We independently review the question of whether the trial court erred by failing to instruct on a lesser included offense. (*People v. Nelson* (2016) 1 Cal.5th 513, 538; *People v. Trujeque* (2015) 61 Cal.4th 227, 271.)

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a); *People v. Bryant* (2013) 56 Cal.4th 959, 964; *People v. Brothers* (2015) 236 Cal.App.4th 24, 30.) Malice may be express or implied. It is express when the defendant intends to kill. (§ 188; *People v. Bryant*, at p. 964.) It is implied when the defendant (1) knowingly performs an act, the natural consequences of which are dangerous to life; (2) with a

conscious disregard for life. (*People v. Bryant*, at p. 965; *People v. Brothers*, at p. 30.)

Involuntary manslaughter is a lesser included offense of murder. (*People v. Thomas* (2012) 53 Cal.4th 771, 813.) It is statutorily defined as a killing occurring during either: (1) the commission of an unlawful act not amounting to a felony, that is, a misdemeanor; or (2) the commission of a lawful act which might produce death, performed in an unlawful manner or without due caution and circumspection. (§ 192, subd. (b); *People v. Manriquez* (2005) 37 Cal.4th 547, 587; *People v. Brothers*, *supra*, 236 Cal.App.4th at p. 31; *People v. Butler* (2010) 187 Cal.App.4th 998, 1006–1007.) In addition to these statutorily defined means of committing the offense, an unintentional homicide, committed in the course of a noninherently dangerous felony, without due caution and circumspection, may also be involuntary manslaughter. (*People v. Burroughs* (1984) 35 Cal.3d 824, 835-836, disapproved on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 89; *People v. Brothers*, at p. 31.) And, a homicide committed in the course of an inherently dangerous assaultive felony and accomplished without malice (that is, without the intent to kill and without conscious disregard for life) is also involuntary manslaughter. (*People v. Brothers*, at pp. 32, 33–34.)

Perez contends there was substantial evidence that his conduct fell within the first category listed *ante*, that is, a killing occurring during the commission of a misdemeanor. He points to his testimony that when Ramirez blocked his path he chased Ramirez with the knife, intending only to scare him. When Ramirez came toward him and attempted to punch him, Perez – who was "shorter and much older" than the victim – unintentionally inflicted the fatal cut while attempting to avoid

the blows. This evidence, he contends, supported an involuntary manslaughter instruction on the theory the killing occurred during his commission of a misdemeanor, brandishing a weapon in violation of section 417. Section 417 provides that any person who "draws or exhibits any deadly weapon whatsoever, other than a firearm, in a rude, angry, or threatening manner, or who in any manner, unlawfully uses a deadly weapon other than a firearm in any fight or quarrel is guilty of a misdemeanor . . . ." An accidental killing committed while a defendant is brandishing a weapon can constitute involuntary manslaughter. (*People v. Thomas*, *supra*, 53 Cal.4th at p. 814 ["[A]n accidental shooting that occurs while the defendant is brandishing a firearm in violation of section 417 could be involuntary manslaughter"]; see generally *People v. Gana* (2015) 236 Cal.App.4th 598, 607.)

We are not convinced by Perez's argument that there was evidence his conduct amounted only to misdemeanor brandishing. Instead, the evidence showed he committed at least assault with a deadly weapon. Assault with a deadly weapon, a general intent crime, requires proof that the defendant willfully and knowingly committed an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person, with the present ability to apply such force. (*People v. Chance* (2008) 44 Cal.4th 1164, 1167–1168; *People v. Wyatt*, *supra*, 55 Cal.4th at p. 702; *People v. Aznavoleh* (2012) 210 Cal.App.4th 1181, 1186–1187; *People v. Golde* (2008) 163 Cal.App.4th 101, 108–109; CALCRIM No. 875.) In *People v. Bryant*, for example, the defendant testified that during a physical altercation with the victim, she grabbed a knife, threatened to hurt him unless he allowed her to leave, struggled with him over the knife, and made a thrusting motion with it

when he came toward her, unintentionally killing him. (*People v. Bryant*, *supra*, 56 Cal.4th at p. 963.) Our Supreme Court stated, "defendant, . . . if she committed any crime at all, committed at least assault with a deadly weapon, an offense we assume to be inherently dangerous." (*Id.* at p. 966.)

The same is true here. Perez did not simply display his knife. He admitted *chasing* the victim with the knife *after* the victim said, " 'No, no' " and ran away. He admittedly continued chasing the victim with the knife *after* he stabbed him and the victim was bleeding profusely. Nor did the evidence suggest Perez's initial display of the knife occurred during a quarrel. Perez testified that, when he was approximately 10 feet away from Ramirez, Ramirez stood in his path; nothing blocked Perez from going around Ramirez; Ramirez "didn't do anything," but Perez assumed Ramirez would hit him; therefore, Perez pulled out his knife; and Ramirez immediately ran away. Thus, the evidence demonstrated Perez committed at least assault with a deadly weapon, rather than mere brandishing within the meaning of section 417.

This does not entirely answer the question, however. As explained in *People v. Brothers*, and in Justice Kennard's concurring opinion in *People v. Bryant*, an unlawful killing in the course of an inherently dangerous assaultive felony, without malice, is involuntary manslaughter. (*People v. Brothers*, *supra*, 236 Cal.App.4th at pp. 33–34; *People v. Bryant*, *supra*, 56 Cal.4th at pp. 971, 974 [conc. opn. of Kennard, J.) Thus, "an instruction on involuntary manslaughter as a lesser included offense must be given when a rational jury could entertain a reasonable doubt that an unlawful killing was accomplished with implied malice during the course of an inherently dangerous assaultive felony."

(*People v. Brothers*, *supra*, at p. 34.) Furthermore, assault with a deadly weapon is not necessarily a felony; it is a "wobbler."[5] (*People v. Park*, *supra*, 56 Cal.4th at p. 790; *People v. Bryant*, *supra*, 56 Cal.4th at p. 972, fn. 2 [conc. opn. of Kennard, J.) Therefore, if regarded as a misdemeanor, assault with a deadly weapon qualifies as an unlawful act, not amounting to a felony, for purposes of section 192, subdivision (b). (*People v. Bryant*, *supra*, at p. 972, fn. 2, conc. opn. of Kennard, J.)

Nevertheless, these precepts do not assist Perez here, for three reasons. First, the parties assume that defense counsel requested an involuntary manslaughter instruction. In fact, the record is ambiguous on this point. Defense counsel did not make such a request on the record. It appears the court and parties may have discussed such an instruction off the record, but it is not clear defense counsel requested the instruction. Defense counsel asked a question regarding the court's ruling, but we cannot glean from that query that counsel was making a request.[6] To the contrary, when the trial court opined that the defense theory of the case was self-defense, "[o]r in the alternative that at most it's a [voluntary manslaughter]," defense counsel replied, "Correct." This exchange strongly suggests defense counsel did *not* request an involuntary manslaughter instruction. Prior to *People v. Bryant*, *supra*, 56 Cal.4th 959 and *People v. Brothers*, *supra*, 236 Cal.App.4th 24, it was not clear

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[5] A "wobbler" is an offense chargeable as either a felony or a misdemeanor. (*People v. Park* (2013) 56 Cal.4th 782, 789.)

[6] Defense counsel asked: "In other words, the testimony of Mr. Perez that, when he leaned back and had his arm extended, it doesn't come into that?"

that an unintentional killing accomplished during an inherently dangerous assaultive felony could constitute involuntary manslaughter. (*People v. Bryant* (2013) 222 Cal.App.4th 1196, 1206 (*Bryant II*).) Indeed, *People v. Garcia* had held that a killing committed in the commission of an inherently dangerous assaultive felony was *voluntary* manslaughter. (*People v. Garcia* (2008) 162 Cal.App.4th 18, 31, disapproved by *People v. Bryant*, *supra*, 56 Cal.4th at p. 970.) A "trial court has no sua sponte duty to instruct on a legal principle that has been 'obfuscated by infrequent reference and inadequate elucidation.' [Citations.]" (*Bryant II*, at p. 1200; *People v. Bryant*, *supra*, 56 Cal.4th at p. 975 [conc. opn. of Kennard, J.].) When Perez's case was tried in 2010, neither *People v. Brothers* nor *People v. Bryant* had been decided. There was "no authority holding that an unlawful killing committed without malice in the course of an assaultive felony constitute[d] the crime of involuntary manslaughter." (*Bryant II*, at p. 1200.) Thus, the trial court here had no sua sponte duty to instruct on involuntary manslaughter on such a theory. (*Id.* at pp. 1200–1201; *People v. Bryant*, at p. 975 [conc. opn. of Kennard, J.].)

Second, there was not substantial evidence showing the absence of malice sufficient to warrant an involuntary manslaughter instruction. "[W]hen . . . the defendant indisputably has deliberately engaged in a type of aggravated assault the natural consequences of which are dangerous to human life, thus satisfying the objective component of implied malice as a matter of law, and no material issue is presented as to whether the defendant subjectively appreciated the danger to human life his or her conduct posed, there is no sua sponte duty to instruct on involuntary manslaughter." (*People v. Brothers*,

supra, 236 Cal.App.4th at p. 35.) No evidence here suggested Perez was oblivious to the danger posed by his conduct of chasing a victim, with a knife, through a playground.

Third, assuming arguendo the trial court erred by failing to instruct on involuntary manslaughter, reversal is not required. The failure to instruct on a lesser included offense in a noncapital case is, at most, an error of California law alone, and reversal is required only if an examination of the entire record establishes a reasonable probability the error affected the outcome. (*People v. Wyatt*, *supra*, 55 Cal.4th at p. 698; *People v. Cady* (2016) 7 Cal.App.5th 134, 149; *People v. Brown* (2016) 245 Cal.App.4th 140, 155.) " 'Such posttrial review focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.' [Citation.]" (*People v. Thomas*, *supra*, 53 Cal.4th at p. 814.)

No such probability exists here. Involuntary manslaughter is the unlawful killing of a human being *without malice.* (§ 192; *People v. Rangel* (2016) 62 Cal.4th 1192, 1227; *People v. Brothers*, *supra*, 236 Cal.App.4th at p. 31.) There was overwhelming evidence of malice in the instant matter. The jury was unlikely to credit Perez's testimony that he merely wanted to frighten the victim; had that been the case, his objective would seem to have been accomplished as soon as Ramirez said, " 'No, no,' " and ran off upon seeing the knife. Two eyewitnesses testified to Perez's

persistent chase and repeated attempts to stab Ramirez, conduct entirely inconsistent with a mere desire to frighten. The eyewitnesses also contradicted Perez's story that the victim tried to punch him at the playground. Two weeks before the murder, Perez told Huerta that Ramirez would "pay" for punching him, demonstrating Perez was motivated to do more than scare Ramirez. This evidence suggested Perez intentionally stabbed the victim.

Even if the jury believed Perez lacked *express* malice – that is, if it believed he did not intend to kill Ramirez and stabbed him accidentally – there was overwhelming evidence of *implied* malice. *People v. Thomas* is instructive. There, the defendant got in an argument with the victim, placed his gun between the victim's eyes, and threatened to blow the victim's brains out. The victim grabbed the gun, a struggle ensued, and two shots were fired. (*People v. Thomas*, *supra*, 53 Cal.4th at p. 781.) As here, on appeal the defendant argued that the trial court had erred by failing to instruct on involuntary manslaughter because the jury could have concluded the shooting occurred while the defendant was engaged in the misdemeanor of brandishing a weapon, and the gun went off accidentally. (*Id.* at pp. 813–814.) Rejecting this contention, our Supreme Court reasoned: "Even if the jury believed that defendant did not intend to pull the trigger, the evidence strongly supported a conclusion that defendant acted with malice. As the jury was instructed, malice is implied when the killing resulted from an intentional act, the natural consequences of which are dangerous to human life, performed with knowledge of and conscious disregard for the danger to human life. [Citations.] An unintentional shooting resulting from the brandishing of a weapon can be murder if the jury

concludes that the act was dangerous to human life and the defendant acted in conscious disregard of life. [Citations.]" (*Id.* at pp. 814–815.) The defendant's conduct of putting a gun to the victim's head and threatening to kill him was "highly dangerous and exhibit[ed] a conscious disregard for life. In order to find defendant guilty of only involuntary manslaughter, the jury would have had to conclude *both* that the shooting was accidental and that defendant had acted without malice. Based on the evidence presented, the jury was not reasonably likely to have convicted defendant of the lesser offense if instructions on involuntary manslaughter had been given." (*Id.* at p. 815.)

The same is true here. Perez ran after the victim, with a knife in his hand, chasing him through a playground crowded with children and park patrons. When Ramirez attempted to hide behind Hernandez, Perez attempted five or six times to reach around her and stab Ramirez, placing her in danger. According to two eyewitnesses, Perez repeatedly stabbed at Ramirez, including when Ramirez was on the ground and when he frantically attempted to shield himself behind the playground equipment. Perez admittedly continued to chase Ramirez around the playground *after* he stabbed him, and as Ramirez was bleeding profusely. This was corroborated by the eyewitnesses, who recounted Perez's repeated attempts to stab the bleeding victim, and by the blood trails that wove through the playground equipment. According to the medical examiner, running and fright both increase one's heart rate and blood flow, hastening blood loss. Given the copious amount of blood on the playground, the fact the victim was bleeding out could not have been lost on Perez. As in *People v. Thomas*, given this evidence, Perez's jury

would have been hard pressed to find the absence of implied malice.

DISPOSITION

The judgment is affirmed**.**

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EDMON, P. J.

We concur:

LAVIN, J.

EGERTON, J.