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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

PIERRE ARMOND GILBERT,

Defendant and Appellant.

B233985

(Los Angeles County
Super. Ct. No. YA064567)

APPEAL from a judgment of the Superior Court of Los Angeles County, John V. Meigs, Judge. Affirmed.

Robert L. S. Angres, 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, Senior Assistant Attorney General, Eric E. Reynolds and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Pierre Armond Gilbert of second degree murder and firearm allegations, and the trial court sentenced Gilbert to 60 years to life in state prison. Gilbert appeals, and we affirm.

BACKGROUND

An information filed August 2, 2006 charged Gilbert with murder, in violation of Penal Code¹ section 187, subdivision (a) (count 1) and arson of an inhabited structure or property, in violation of section 451, subdivision (b) (count 3). The information also alleged that Gilbert personally used and intentionally discharged a handgun, proximately causing great injury and death (§ 12022.53, subds. (b), (c) & (d)), that a principal was armed with a handgun (§12022, subd. (a)(1)), and that Gilbert had suffered one prior serious or violent felony conviction (§§ 1170.12, subds. (a)–(d), 667, subds. (b)–(i), 667, subd. (a)(1)). Gilbert pleaded not guilty and denied the special allegations, and the trial court granted a defense motion to dismiss count 3.

At trial, Samuel Mason² testified that beginning on the evening of March 25 and extending into March 26, 2006, there was a gathering at his apartment on La Cienega Boulevard. Earlier, Mason had been at the club that Gilbert worked at or owned. Gilbert and Ricardo Reid arrived at the apartment around 8:30 p.m. or 9:00 p.m.; Crystal Harris and Lynn Hall were already there. Prescott or Preston Thompson arrived at around 9:30 p.m., with someone waiting in the car. An hour later, Gilbert's girlfriend or wife Debra King (who was in and out) entered; Terry Stanton then entered the apartment. King left after a few minutes.

The people at the gathering were drinking, and everyone except Stanton was also using powder cocaine, some of which Gilbert brought with him. Everyone was seated around a table in the small kitchen, except Stanton, who was seated on the borderline of

¹ All further statutory references are to the Penal Code.

² Mason and Ricardo Reid were charged with murder, arson, and accessory after the fact, in count 2 and both pleaded guilty to accessory after the fact, contingent on their truthful testimony at Gilbert's trial.

the kitchen and the living room. Gilbert sat in a chair across the table from and facing Stanton. Mason's girlfriend, Lula Mae Johnson, was moving around the house.

Mason noticed that the atmosphere changed when Stanton entered; he thought Gilbert and Stanton were upset. The two men began to argue, with Stanton saying, "fuck a bitch" and Gilbert saying, "how can you keep saying fuck a bitch when I ain't even ever seen your bitch. For all I know you might have a punk [female impersonator]." Things calmed down a little, and then Gilbert said: "I should shoot both of you bitch ass niggas," referring to Mason and Stanton. Stanton stood up, flexed his muscles and said, "I ain't no bitch," and Gilbert told him "Sit your punk ass down, bitch." Stanton continued to say, "I ain't no bitch," and Gilbert told him to sit down again. Stanton sat down, humbling himself by saying, "Big homey, you know that I got love for you," and putting his hands in his pants pockets, which looked like an aggressive movement, although Mason did not see anything in his pockets.³ Stanton again said, "Man, fuck a bitch. Fuck a bitch," and suddenly Mason heard a gunshot. Mason knew that Gilbert, who always carried a gun, was armed, and realized Gilbert had shot Stanton from about 12 feet away. The shooting occurred at about 10:00 p.m. Gilbert, who had a gun in his hand, put the gun down on the table and said it was an accident.

Harris, Hall, and Thompson ran out of the apartment. Stanton was sitting in the chair as if he were asleep. Stanton fell off the chair 20 or 30 minutes later, and Mason could hear Stanton "like blowing bubbles" in the puddle of his blood on the carpet.

Everyone remaining was "dumbfounded." Mason suggested reporting the shooting as an accident, but when he was met with silence he began to worry "I was fixin' to be in Mr. Stanton's shoes next," and was afraid to call 911. Gilbert, who was "cool as a cucumber," said, "What's wrong with you, man? You act like you ain't never killed nobody before." Gilbert handed his gun to Mason, who put the gun in the bedroom, making sure not to leave fingerprints on it.

³ The sheriff's detective who recovered the gun from Mason's apartment testified that no weapon was found on Stanton.

Gilbert's brother arrived, and Gilbert told him, "'Man, he was acting like he wouldn't take his hands out his pockets.'" He also told his brother that Stanton was flexing his muscles when he said he wasn't a bitch, and that was why Gilbert shot him. Mason had not seen Stanton do anything to make Gilbert fear for his life.

After a discussion about what to do with Stanton's body, Gilbert told Mason that he wanted Reid and Mason to get the body into Gilbert's truck, putting \$100 next to each of them; Mason took the money. At Gilbert's direction, Reid went out and came back with a can of gasoline. Early in the morning, Gilbert, Johnson and Reid wrapped Stanton in plastic (cut off of a couch) and carpet (cut from the floor with a knife). Mason and Reid dragged Stanton out, coached by Gilbert. Stanton was too heavy for the two men to lift him into Gilbert's truck. Mason tied a phone cord around Stanton's ankles and lay down inside the truck, holding on to the phone cord as Gilbert drove, in an attempt to drag the body away. The cord broke twice. Deciding there was nothing else they could do, Mason went in the house, got the gasoline, poured it on Stanton and ignited it. Gilbert had intended to take the body to a nearby park and burn it there.

Mason changed out of his bloody clothes in the house, and put the clothes and his shoes in a bag with Reid's clothes and shoes. Gilbert drove them to his club. They spent the night in a hotel.

Crystal Harris testified that the conversation between Gilbert and Stanton was an argument, in which the men used "bitch" several times. Stanton stood up, tried to "humble himself" (saying "it wasn't a big deal"), and she heard Gilbert tell him to take his hands out of his pocket and to take it easy and sit down. Then, "when [Stanton] jumped up I jumped up and moved and then when I turned around he was shot." She saw Gilbert with the gun. She immediately ran out of the house.

Reid testified that he and Gilbert arrived at the apartment after spending "a couple days" drinking and doing cocaine at Gilbert's club. Stanton and Gilbert had argued at the club before Gilbert and Reid went over to Mason's apartment. When they were arguing at the apartment, Gilbert asked Stanton, "'what's in your pocket'" and Stanton replied: "'Ain't nothing in my pocket,'" but didn't take his hands out. Gilbert appeared afraid of

Stanton. After the shooting, Gilbert said it was an accident, and he was upset. Reid went to get the gasoline because Gilbert said they needed to burn their clothes and get rid of the DNA. When Reid returned, Stanton was wrapped up in plastic and the carpet had been mostly cut. After they couldn't get Stanton's body into Gilbert's truck, Reid said he'd had it, and Gilbert drove Reid down to his car, which was at the club.

Stanton's body was discovered early in the morning of March 26, after an off-duty firefighter saw smoke from the area near La Cienega and found the burning body near Mason's apartment. The Inglewood police were called and observed the smoldering body on a driveway just west of the apartment, with Stanton's wallet and driver's license in the pocket. When arrested, Gilbert told the police he was not at Mason's apartment that night.

A forensic pathologist testified that Stanton died from a gunshot wound to the right side of his forehead. Stanton could have lived for up to an hour after being shot. His body was charred; Stanton was dead before the burning. A bullet recovered from Stanton's body was turned over to the police. A sheriff's department criminalist examined the handgun recovered from Mason's apartment and concluded that the revolver had fired the expended .38-special caliber casing inside the cylinder, and the rifling characteristics on a test fired bullet were similar to those on the bullet recovered from Stanton's body. The revolver could be fired in double action mode, in which pulling the trigger both cocks the hammer and releases it, causing the gun to fire, or in single action mode, in which the hammer is cocked first and then pulling the trigger causes the gun to fire. The trigger pull required for single action mode was three pounds; for double action mode, the trigger pull was between 9.5 and 9.75 pounds of pressure.

The parties stipulated that Stanton's blood tested negative for alcohol and positive for cocaine.

In closing, Gilbert's counsel argued that Gilbert might have acted in self-defense, and had said it was an accident after the shooting ("Now, what did he mean? Accident that I pulled the trigger? Accident that I hit him in the head instead of the shoulder? The whole thing, an accident."). The evidence did not show beyond a reasonable doubt that

he had the intent for murder or manslaughter, and the evidence required a not guilty verdict.

The jury found Gilbert guilty of second degree murder, and found the firearm allegations true. Gilbert admitted suffering one prior strike conviction. The trial court sentenced Gilbert to a total term of 60 years to life in state prison.

DISCUSSION

After the close of testimony, the trial court denied Gilbert's request for jury instructions on accident, self-defense, and involuntary manslaughter. Gilbert claims that the failure to instruct on involuntary manslaughter and accident was prejudicial error.

The trial court must instruct the jury on general principles of law that are commonly or closely and openly connected to the facts before the court and are necessary for the jury's understanding of the case, including lesser included offenses supported by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 148–149.) A court is not, however, obligated to instruct on theories without substantial evidentiary support. (*Id.* at p. 162.) Substantial evidence is evidence sufficient to deserve the jury's consideration, “““evidence that a reasonable jury could find persuasive.”” [Citation.]” (*People v. Benavides* (2005) 35 Cal.4th 69, 102.) An instruction on an affirmative defense is required only if the defense carries the burden to produce evidence supporting the defense, and if it is not inconsistent with the defense theory of the case. (*People v. Cole* (2007) 156 Cal.App.4th 452, 484.) We do not weigh the credibility of the witnesses, and we resolve doubts as to the sufficiency of the evidence in favor of the defendant. (*People v. Tufunga*, 21 Cal.4th 935, 944.) We review independently whether the trial court erred by failing to instruct on lesser included offenses and defenses. (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.)

Involuntary manslaughter is a killing committed “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.” (§ 192, subd. (b).) Involuntary manslaughter is a lesser included offense of murder. (*People v. Lewis* (2001) 25 Cal.4th 610, 645.) Accident is an affirmative defense.

(*People v. Thurmond* (1985) 175 Cal.App.3d 865, 871–872.) “All persons are capable of committing crimes except [inter alia] [¶] . . . [¶] [p]ersons who committed the act . . . through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence.” (§ 26, subd. Five.) Homicide is excusable “[w]hen committed by accident and misfortune, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent.” (§ 195, subd. (1).)

Involuntary manslaughter

The jury found Gilbert guilty of second degree murder. The court instructed the jury that second degree murder “is the unlawful killing of a human being with malice aforethought when the perpetrator intended unlawfully to kill a human being but the evidence is insufficient to prove deliberation and premeditation,” and that second degree murder “is also the unlawful killing of a human being when: [¶] 1. the killing resulted from an intentional act; [¶] 2. the natural consequences of the act are dangerous to human life; and [¶] 3. the act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. [¶] When the killing is the direct result of such an act, it is not necessary to prove that the defendant intended that the act would result in the death of a human being.”

Gilbert argues that the facts of the case show that the jury likely convicted him on the second, implied malice theory of second degree murder. He suggests that the evidence allowed the jury to rationally conclude that Gilbert was angry at Stanton, indifferent to the apparent danger of pulling and pointing the gun, and fired it not intending that it would kill Stanton.

From the same evidence, Gilbert argues that the jury could also have concluded that he did not subjectively realize that holding a gun in his hand, pointing it at Stanton and firing posed a danger to human life. “An essential distinction between second degree murder based on implied malice and involuntary manslaughter based on criminal negligence, is that in the former the defendant subjectively realized the risk to human life created by his conduct, whereas in the latter the defendant’s conduct objectively

endangered life, but he did not subjectively realize the risk.” (*People v. Brito* (1991) 232 Cal.App.3d 316, 321, fn. 4.) We cannot agree.

All the evidence indicates that Gilbert pointed a gun from approximately twelve feet away and fired a single shot at Stanton, who died from a gunshot wound to his forehead. This is inconsistent with an argument that Gilbert did not consciously realize that his conduct in aiming the gun directly at Stanton’s head and pulling the trigger endangered Stanton’s life. The only conclusion to be drawn from the evidence is that Gilbert knew the apparent danger of pointing a loaded gun at Stanton and firing, and acted in total disregard of the danger, supporting the jury’s finding of second degree murder. Gilbert’s statement that the shooting was an accident does not, without more, change this conclusion. “The court is not even required to give an involuntary manslaughter instruction where the defendant’s self-serving statements denying intent to kill are deemed insubstantial in character. [Citation.]” (*People v. Evers* (1992) 10 Cal.App.4th 588, 597–598.)

Further, even if there was substantial evidence supporting an involuntary manslaughter instruction, the error in not giving the instruction was harmless. “[I]n a noncapital case, error in failing sua sponte to instruct . . . on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under [*People v.*] *Watson* [(1956) 46 Cal.2d 818]. A conviction of the charged offense may be reversed in consequence of this form of error only if, ‘after an examination of the entire cause, including the evidence’ (Cal. Const., art VI, § 13), it appears ‘reasonably probable’ the defendant would have obtained a more favorable outcome had the error not occurred [citation].” (*People v. Breverman, supra*, 19 Cal.4th at p. 178.)

The jury found true the allegations that Gilbert personally used and *intentionally* discharged a handgun, proximately causing great injury and death. The jury was instructed that they must find that the defendant himself intentionally discharged the handgun. When the jury found the allegation true, it necessarily determined that Gilbert discharged the handgun purposefully, and so any purported error in failing to instruct the

jury on involuntary manslaughter was harmless. (See *People v. Beames* (2007) 40 Cal.4th 907, 928.)

Accident

Gilbert argues that the testimony by Mason and Reid that he said the shooting was an accident constitutes substantial evidence triggering the trial court's duty to give an accident instruction. Section 26 allows the defense when a defendant acted with "no evil design, intention, or culpable negligence," and section 195 is based on the defendant having committed a "lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent." "[T]he burden is on the defendant to establish the absence of evil design, intention and culpable negligence." (*People v. Thurmond, supra*, 175 Cal.App.3d at p. 871.)

The evidence shows that Gilbert and Stanton began to argue; that things calmed down, and Gilbert renewed his insults; that Stanton attempted to placate Gilbert as he sat down; and that Gilbert shot him moments later, delivering a fatal bullet to Stanton's forehead. As we stated in our discussion of involuntary manslaughter, the evidence shows that Gilbert was at least culpably negligent in pointing and firing the firearm. As the trial court stated, there was no indication that Gilbert did not believe the gun was loaded, and there was no evidence that the gun had a hair trigger (the expert testimony was that significant pressure was required to make the gun go off). Further, Mason testified that Gilbert always carried a gun, so he was not inexperienced with firearms. Gilbert raised a loaded gun he was carrying and fired at Stanton, after the two men exchanged hostile words. Even viewing the evidence in the light most favorable to the defense, the evidence does not support a conclusion that Gilbert was acting with usual and ordinary caution.

An extrajudicial statement which lends credibility to the defendant's asserted state of mind is competent evidence. (*People v. Thurmond, supra*, 175 Cal.App.4th at p. 872.) Gilbert's statement that the shooting was an accident, however, without more, does not constitute substantial evidence of the legal definition of the accident defense, given that it is in conflict with all the other evidence. Certainly, by all accounts the shooting showed

at least culpable negligence. Further, Gilbert's behavior after the shooting was inconsistent with an accident defense. Although Mason suggested they report the shooting as an accident, Gilbert did not respond, nor did he seek help for the dying Stanton, or express concern or remorse. Instead, he said, "'What's wrong with you man? You act like you ain't never killed nobody before,'" handed the gun to Mason, told his brother he shot Stanton because Stanton was flexing his muscles, paid Mason and Reid to help him get rid of the body, and proceeded with the grisly business of wrapping Stanton in plastic and carpet and trying to hoist the dead body into his truck. We conclude that the defense did not carry its burden to produce evidence supporting an accidental shooting defense. (*People v. Cole, supra*, 156 Cal.App.4th at p. 484.)

Moreover, any error in failing to give an accident instruction was harmless, even under the more rigorous test of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. (See *People v. Salas* (2006) 37 Cal.4th 967, 984.) The accident defense is a claim that the mental state required to commit the offense is absent. (*People v. Bohana* (2000) 84 Cal.App.4th 360, 370.) The jury was instructed on the elements of murder and manslaughter, and even absent an accident instruction, Gilbert was free to argue (and did argue) that the shooting was accidental and that the jury should therefore acquit him. Instead, the jury convicted him of second degree murder, which necessarily included a finding of malice based on an intent to kill or, at least, an intent to commit and act whose natural consequences are dangerous to human life. (See *People v. Cortez* (1998) 18 Cal.4th 1223, 1229.) Given this verdict, the jury would not have accepted an accident theory even if given an instruction. And as we explained above, the jury found true the allegation that Gilbert intentionally discharged the handgun, which is entirely inconsistent with a killing by accident. Any error was therefore harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.