Filed 9/17/13 P. v. Sente CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. CELSO SENTE, Defendant and Appellant.	B242758 (Los Angeles County Super. Ct. No. BA376044)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald H. Rose, Judge. Affirmed.

Donna L. Harris, 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, Steven D. Matthews and Linda C. Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Celso Sente appeals from a judgment of conviction entered after a jury found him guilty of the second degree murder (Pen. Code, § 187, subd. (a)) of his wife, Manuela Leticia De Leon, and found true the allegation he personally used a knife in the commission of the crime (*id*., § 12022, subd. (b)(1)). The trial court sentenced him to 16 years to life in state prison. On appeal, Sente contends the trial court erred in failing to instruct the jury on the lesser included offense of involuntary manslaughter based on unconsciousness due to voluntary intoxication. We find no evidence of unconsciousness requiring such an instruction and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Killing*

Sente and De Leon lived in a one-bedroom apartment on Rosalind Place in Los Angeles. Alexander Gonzalez, Pedro Hernandez, and Juan Gonzalez shared the apartment with them and slept in the living room.

At approximately 11:00 p.m. on September 16, 2010 Alexander,[1] Juan, and Hernandez heard Sente and De Leon arguing in the bedroom. The screaming woke up Juan, who had been sleeping. Both Sente and De Leon sounded angry. Alexander testified that the argument lasted for about five minutes, and Juan testified it lasted about an hour, with De Leon doing most of the yelling. Hernandez heard Sente ask De Leon why she did not love him.

The arguing stopped and De Leon went into the kitchen. Sente followed her into the kitchen a little while later. As soon as Sente entered the kitchen De Leon started

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1 We refer to Alexander and Juan Gonzalez by their first names to avoid confusion and mean no disrespect. (*People v. Camino* (2010) 188 Cal.App.4th 1359, 1366, fn. 3; *Estate of Hastie* (2010) 186 Cal.App.4th 1285, 1290, fn. 2.)

yelling again. Sente was arguing with her and sounded loud and drunk, although he was not slurring his words. After De Leon said she was "going with [her] brother" she began screaming for help. De Leon sounded scared, and Alexander thought Sente was hitting her. Alexander, Juan, and Hernandez went into the kitchen to help De Leon. They saw her sitting in a chair and screaming, with blood on her arm, shirt, and pants. Alexander saw wounds on her arm and hand. Sente had a knife in his hand and made a striking or jabbing motion toward De Leon. Juan saw the knife go into De Leon's hand.

When De Leon got up and started to leave the kitchen, Sente, "walking normally," attempted to follow her. Alexander and Hernandez helped De Leon into the bedroom, where she sat down. Juan, who was bigger than both Sente and Alexander, grabbed Sente and kept him from entering the bedroom, although Sente stood at the doorway still holding the knife. Juan asked, "Celso, what are you doing?" Sente then dropped the knife and left the apartment running or walking quickly. Alexander testified that Juan made Sente drop the knife. Alexander called 911.

B. *The Response*

When paramedics arrived at the apartment, they found a trail of blood leading from the kitchen to the bedroom, where two of the men were holding up De Leon in a chair. De Leon was "sitting in a chair slumped over," very pale and unresponsive to questions, and the paramedics observed that she had multiple stab wounds, including one above her left breast. Joaquin La Pastora, one of the paramedics who responded, observed that "the patient appeared to be in bad shape, but there wasn't . . . enough blood to cause us to think the patient bled out." The paramedics were unable to get a pulse. They laid her on the floor and worked on her for about 30 minutes before pronouncing her dead.[2]

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[2] The cause of death was the three- to four-inch stab wound above De Leon's left breast, which "went through the chest, . . . hit the second rib and the space between the second rib and the third rib and then it went through the left lung, into the heart."

Los Angeles Police Officer Jaime Gonzalez and his partner responded to the scene at approximately 12:15 a.m. and began searching for Sente. They saw him about an hour later, two blocks from his apartment, walking across the street. He had blood on his clothing, which he made no attempt to conceal. The officers approached him and asked him his name. He did not respond, and they asked again. He then stated, "You already know who I am, you know what I did, go ahead and take me into court."[3]

Officer Gonzalez smelled alcohol on Sente's breath and noted that Sente's eyes were bloodshot and watery and his speech was slightly slurred. Although Sente's walk was not noticeably unsteady, he was swaying back and forth slightly when the officer detained him. When Officer Gonzalez gave Sente commands, Sente responded appropriately. Officer Gonzalez concluded that Sente was under the influence of alcohol but was not "extremely drunk."

C. *The Trial*

Following the prosecution's case-in-chief, counsel for Sente made a motion to dismiss the murder charges pursuant to Penal Code section 1118.1, based in part on evidence of heat of passion and voluntary intoxication. The trial court denied the motion, stating it was "not convinced at this stage that there is even an instruction to be given to the jury on voluntary manslaughter. An argument between spouses does not . . . require the court to give a voluntary manslaughter instruction. . . . Just because there's an argument, even if there's heated words, that does not in and of itself rise to the level of voluntary manslaughter. Otherwise, every single murder case would result in a voluntary manslaughter instruction." The court added: "As for the voluntary intoxication, the testimony I recall is that an hour and a half after the incident, that the defendant was under the influence of alcohol," and that Alexander's testimony that Sente appeared

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3 Officer Gonzalez later testified that Sente said, "just go ahead and take me and deport me."

drunk in the apartment was "not sufficient to dismiss [the] charges," but was "enough to give an instruction on it."

In the subsequent discussion on jury instructions, the trial court agreed to give the jury CALCRIM No. 625 on voluntary intoxication.[4] At the People's request, the court agreed to omit the portion of the instruction regarding unconsciousness, because there was no evidence that Sente was unconscious.[5] Although most of the argument regarding jury instructions concerned the issue of instructing the jury on heat of passion as a basis for manslaughter, the court also discussed with counsel an instruction on voluntary manslaughter. After extensive argument, the court agreed to instruct on voluntary manslaughter as well as voluntary intoxication. The court stated: "So if there's some drinking and we have all of this yelling and screaming, if there was any, it's up to a jury to sort this out and to examine the evidence presented. So I will give the instruction on voluntary manslaughter. I will give the instruction on intoxication. On intoxication, we do know that the defendant was under the influence of alcohol to some degree at his arrest. It was an hour and a half later. But there is that evidence that has some corroboration to the first witness [Alexander] that he'd been drinking."

The next day, just before the trial court read the jury instructions, counsel for Sente asked the court to revise CALCRIM No. 625, which stated "that the jury may consider that evidence of voluntary intoxication only in deciding whether defendant acted with an intent to kill or the defendant acted with deliberation and premeditation when he

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4 CALCRIM No. 625 provides: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill[,] [or] [the defendant acted with deliberation and premeditation[,]] [[or] the defendant was unconscious when (he/she) acted . . . . [¶] A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] You may not consider evidence of voluntary intoxication for any other purpose."

5 Defense counsel did not object to the omission.

acted," so that the instruction would state that the jury could consider voluntary intoxication in deciding whether the defendant acted with "malice aforethought." The trial court denied the request.[6]

The trial court instructed the jury pursuant to CALCRIM No. 570 on voluntary manslaughter based on sudden quarrel or heat of passion. The court then instructed the jury pursuant to CALCRIM No. 625 on voluntary intoxication, omitting the section on unconsciousness. The court did not instruct the jury pursuant to CALCRIM No. 626 on voluntary intoxication leading to unconsciousness that reduces the killing to involuntary manslaughter.[7]

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[6] Sente does not challenge this ruling on appeal.

[7] CALCRIM No. 626 provides: "Voluntary intoxication may cause a person to be unconscious of his or her actions. A very intoxicated person may still be capable of physical movement but may not be aware of his or her actions or the nature of those actions. [¶] A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] When a person voluntarily causes his or her own intoxication to the point of unconsciousness, the person assumes the risk that while unconscious he or she will commit acts inherently dangerous to human life. If someone dies as a result of the actions of a person who was unconscious due to voluntary intoxication, then the killing is involuntary manslaughter. [¶] Involuntary manslaughter has been proved if you find beyond a reasonable doubt that:

"1. The defendant killed without legal justification or excuse;

"2. The defendant did not act with the intent to kill;

"3. The defendant did not act with a conscious disregard for human life;

"AND

"4. As a result of voluntary intoxication, the defendant was not conscious of (his/her) actions or the nature of those actions.

"The People have the burden of proving beyond a reasonable doubt that the defendant was not unconscious. If the People have not met this burden, you must find the defendant not guilty of (murder/ [or] voluntary manslaughter)."

DISCUSSION

Sente argues on appeal that the trial court committed prejudicial error by failing "to instruct on the effects of voluntary intoxication as applied to unconsciousness and involuntary manslaughter." Sente asserts that substantial evidence "supported a conclusion that [Sente] was unconscious or unaware of the nature of his actions due to his intoxication," and that a "jury could also reasonably conclude from [Sente's] initial contact with police officers that he was so intoxicated that he acted without consciousness of what he was doing during the stabbing incident."

The trial court has a duty to "instruct on lesser offenses necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser." (*People v. Kraft* (2000) 23 Cal.4th 978, 1063.) If, however, "'there is no proof, other than an unexplainable rejection of the prosecution's evidence, that the offense was less than that charged, such instructions [on lesser included offenses] shall not be given.' [Citation.]" (*People v. Abilez* (2007) 41 Cal.4th 472, 514; see *People v. Friend* (2009) 47 Cal.4th 1, 51-52.) An offense is a lesser necessarily included offense if the statutory elements of the greater offense include all of the elements of the lesser offense, so that the greater offense cannot be committed without also committing the lesser offense. (*People v. Smith* (2013) 57 Cal.4th 232, 240; *People v. Jennings* (2010) 50 Cal.4th 616, 667-668.) For the purposes of instruction on a lesser included offense, substantial evidence is evidence from which a jury could reasonably conclude that the defendant committed only the lesser offense. (*People v. Oritz* (2012) 208 Cal.App.4th 1354, 1367; *People v. Medina* (2007) 41 Cal.4th 685, 700.)

Involuntary manslaughter is a lesser included offense of murder. (*People v. Abilez*, *supra*, 41 Cal.4th at p. 515; *People v. Heard* (2003) 31 Cal.4th 946, 981.) "'When a person renders himself or herself unconscious through voluntary intoxication and kills in that state, the killing is attributed to his or her negligence in self-intoxicating to that point, and is treated as involuntary manslaughter.' [Citation.] Unconsciousness does not mean that the actor lies still and unresponsive. Instead, a person is deemed

'unconscious' if he or she committed the act without being conscious thereof. [Citation.]" (*People v. Haley* (2004) 34 Cal.4th 283, 313, quoting from *People v. Ochoa* (1998) 19 Cal.4th 353, 423-424; see *People v. Rogers* (2006) 39 Cal.4th 826, 887.) The "trial court must instruct the jury 'sua sponte on involuntary manslaughter based on unconsciousness' whenever 'there is evidence deserving of consideration that the defendant was unconscious due to voluntary intoxication.' [Citations.]" (*People v. Turk* (2008) 164 Cal.App.4th 1361, 1371-1372, fn. omitted, quoting from *People v. Halvorsen* (2007) 42 Cal.4th 379, 418.)

Here, the evidence was that Sente may have consumed some alcohol, although there was no evidence of how much he consumed or when he consumed it. There was no evidence, however, that Sente was intoxicated anywhere close to the point of unconsciousness. He was arguing with De Leon, followed her into the kitchen, continued the argument, and then stabbed her. When she left the kitchen, he attempted to follow her, was stopped by Juan, then dropped the knife and fled. The other occupants of the apartment testified that he sounded loud and drunk. About two hours later, when he was apprehended, police officers asked his name and he responded, "You already know who I am, you know what I did, go ahead and take me into court." Officer Gonzalez smelled alcohol on Sente's breath, noted that Sente's eyes were bloodshot and watery and his speech was slightly slurred, and that Sente was swaying back and forth slightly when the officer detained him. Sente responded appropriately to Officer Gonzalez's commands, and Officer Gonzalez concluded that Sente was under the influence of alcohol but was not "extremely drunk."

As in *People v. Abilez*, *supra*, 41 Cal.4th 472, the evidence in this case shows that Sente "had consumed some unknown amount of alcohol, but there was no evidence he was so intoxicated that he could be considered unconscious." (*Id.* at p. 516.) Neither the other occupants of his apartment nor Officer Gonzalez observed anything that indicated Sente was severely intoxicated. The evidence that Sente appeared drunk, without more, was insufficient to warrant an instruction on involuntary manslaughter based on unconsciousness. (See, e.g., *People v. Halvorsen*, *supra*, 42 Cal.4th at pp. 418-419

[evidence the defendant "habitually drank to excess with resultant memory losses" and had blood alcohol level that could have "approached .20 percent at the time of the shootings" was insufficient to support an involuntary manslaughter instruction based on unconsciousness]; *People v. Turk*, *supra*, 164 Cal.App.4th at pp. 1368, 1379-1380 [evidence the defendant was highly intoxicated, with a loss of coordination and nausea, was insufficient for an involuntary manslaughter instruction based on unconsciousness].) Sente's statement to Officer Gonzalez reflects an awareness of what he had done, indicating that he was not unconscious at the time he stabbed De Leon. (*People v. Haley*, *supra*, 34 Cal.4th at p. 313; *People v. Ochoa*, *supra*, 19 Cal.4th at pp. 423-424.)

In the absence of "direct evidence indicating unconsciousness of the defendant at the time and place of the charged offense" or "evidence from which the jury could reasonably infer that defendant was unconscious at the time of the charged crime," the trial court was not required to instruct the jury sua sponte on involuntary manslaughter based on unconsciousness. (*People v. Barrick* (1982) 33 Cal.3d 115, 132 [trial court properly refused "to instruct on the defense of unconsciousness by involuntary intoxication" caused by "consumption of beer and marijuana mixed with PCP" where "[t]here was no direct evidence indicating unconsciousness of the defendant at the time and place of the charged offense"]; accord, *People v. Halvorsen*, *supra*, 42 Cal.4th at p. 418; *People v. Turk*, *supra*, 164 Cal.App.4th at pp. 1371-1372.)

DISPOSITION

The judgment is affirmed.

SEGAL, J.*

We concur:

WOODS, Acting P. J

ZELON, J.

* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.