Filed 4/7/17 P. v. Cervantes CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. REGGIE CERVANTES, Defendant and Appellant.	B269457 (Los Angeles County Super. Ct. No. VA137338)

APPEAL from a judgment of the Superior Court for Los Angeles County, John A. Torribio, Judge. Affirmed.

Benjamin Owens, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Reggie Cervantes appeals from a judgment sentencing him to 13 years in state prison after a jury convicted him on one count of voluntary manslaughter (Pen. Code,[1] § 192, subd. (a)), and the trial court found prior strike (§§ 667, subds. (b)-(j), 1170.12, subds. (a)-(d)) and prior prison term (§ 667.5, subd. (b)) allegations to be true. He contends (1) there was insufficient evidence that his conduct–stabbing the victim–caused her death; (2) the trial court erred by failing to instruct the jury on attempted voluntary manslaughter because the evidence supported a reasonable doubt that his conduct caused the victim's death; (3) the trial court's instructing the jury with CALCRIM No. 620 on causation violated his right to due process because it was an argumentative pinpoint instruction that favored the prosecution; and (4) he received ineffective assistance of counsel because his counsel failed to object to the prosecutor's purportedly improper burden-shifting argument. We affirm the judgment.

BACKGROUND

On the evening of October 17, 2014, Elizabeth Yanez and her two adult children, Daniel Crable and Renee Crable, decided to go to the Santa Fe Springs swap meet. Yanez drove, with Daniel in the front passenger seat and Renee in the back seat. On the way, Yanez drank a 12 ounce beer and Daniel drank most of a 32 ounce beer.

That same evening, defendant and his girlfriend, Brenda Rangel, were at a dog park when defendant received a call from his mother. His

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1 Further undesignated statutory references are to the Penal Code.

mother told him that she and his sisters were going to the Santa Fe Springs swap meet, but she needed some cash. Defendant agreed to meet his mother at the swap meet to give some to her. He and Rangel drove to the swap meet in defendant's sister's car (for ease of reference, we will refer to it as defendant's car); Rangel drove, and defendant was in the front passenger seat.

The parking lot was very full when defendant and Rangel arrived. As they were driving around the lot, looking for an open space, Rangel saw a man walking down a row and asked him if he was leaving. He told her that he was. She followed him the wrong way down a one-way row; the parking spaces were angled, so she went past his car and waited for him to pull out so she could back into his space. There were no cars coming toward her when she first stopped to wait.

A few moments later, while Rangel and defendant were waiting for the parking space to open up, Yanez and her family turned into the same row, going in the correct direction. The row was only wide enough for one car to drive down. Yanez drove toward defendant's car and stopped 15 to 18 feet away from it. Daniel got out of the car and walked toward the driver's side of defendant's car, telling Rangel to "move the fucking car" and making gestures to her to back up.

The various parties gave different accounts about exactly what happened over the next few minutes,[2] but the differences are not

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[2] There was a cell phone video, taken by a bystander, of part of the confrontation; each party had a somewhat different interpretation of the acts depicted in the video.

relevant to the issues raised in this appeal. What is not disputed is that, eventually, everyone got out of their respective cars and engaged in some sort of physical altercation with one or more of the occupants of the other car. At some point, defendant pulled out a 12-inch screwdriver or knife[3] and was swinging it at Daniel. Defendant did not make contact with the screwdriver/knife, but did hit Daniel's mouth with his fist. Daniel fell to the ground, but got up quickly and ran to the next aisle while yelling for security.

In the meantime, Yanez (who was 43 years old, five-foot-eight-inches tall, and weighed 238 pounds) and Rangel (who was 18 years old, five-foot-three-inches tall, and weighed 120 pounds) were engaged in some kind of altercation. According to defendant, Rangel called out for help, and he saw that Yanez was holding Rangel by her hair and Renee was hitting her. He ran over to them and hit Yanez with his fist two or three times to try to get her to let go of Rangel. Renee then hit him, and he shoved her away. He turned back to Yanez, who had her back to him, and tried to push her away. When that did not work, he stabbed her with the screwdriver. Yanez fell face down. Defendant and Rangel got back into defendant's car and drove off.

Daniel came back to the scene after calling for security and saw his mother laying face down on the ground. He went over to her and

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[3] Daniel testified that it initially looked like a really long, shiny screwdriver, but when he saw it up close he realized it was a knife. Renee testified that it was a knife. Defendant testified that it was flat-head screwdriver. The police searched for the weapon at the scene of the incident and along the route defendant took when leaving the scene, but did not find it. Defendant testified that he did not remember what he did with the screwdriver.

rolled her over; her eyes were open, but she did not respond to him when he tried to get her to talk or grip his hand. Yanez was pronounced dead at U.C. Irvine Hospital shortly thereafter.

Forensic pathologist Yong-Son Kim performed an autopsy on Yanez. Dr. Kim reported there were two stab wounds on Yanez's back. One was located almost at the midline nape of Yanez's neck, just to the left and very close to the spinal cord. The wound was three-eighths inch wide and two and three-quarter inches deep. The second wound was located at the inner top of Yanez's left shoulder, and was five to six inches deep. There was bruising around the wound, most likely caused by the part of the hand holding the weapon. Both wounds mostly cut into fat tissue, and neither wound could explain the cause of death. Dr. Kim opined that the weapon used was a sharp force instrument that could be anything from scissors to a knife. When asked whether it could have been a screwdriver, Dr. Kim testified that was unlikely given the features of the wounds.

Dr. Kim testified that the cause of death was an acute cardiac event during an assault by another, and that the stabbing was a substantial factor in the death of Yanez. The doctor explained that stabbing not only inflicts extreme pain, but it "also [is] associated with high stress level. . . . So as a natural process, the heart will start to beat faster. There's an increased amount, an enormous amount of stress. [¶] Taking this all together, all the factors that are stressing the heart are directly initiating or actually causing an acute stress upon the heart and, therefore, when the heart is not equipped well enough to endure this amount of stress, then–then there is a high likelihood that

there will be an acute cardiac event." The doctor noted that Yanez's heart was a little wider and rounder than usual, which is associated with certain risk factors, and that she had narrowing of her coronary arteries, including a 70 or 80 percent narrowing of one artery. In addition, Yanez was in the morbidly obese category and had a blood alcohol level of 0.042. Dr. Kim opined that Yanez's weight and intake of alcohol were contributing factors to her death, but not direct causes of her death; rather, the cause was the altercation and stabbing, which led to acute cardiac stress.

Defendant was charged by information with one count of murder of Yanez (§ 187, subd. (a)) and one count of assault with a deadly weapon on Daniel (§ 245, subd. (a)(1)), with a prior strike allegation (§§ 667, subds. (b)-(j), 1170.12, subds. (a)-(d)) and a prior prison term allegation (§ 667.5, subd. (b)). The jury acquitted defendant of first and second degree murder, but found him guilty of voluntary manslaughter as a lesser included offense, and acquitted him of assault with a deadly weapon. After defendant waived his right to a jury trial on the prior strike and prior prison term allegations, the court found those allegations to be true.

Before sentencing, defendant filed a motion to strike his prior strike, and orally moved for a new trial on the ground that the jury should have been instructed on involuntary manslaughter because defendant's act did not actually cause Yanez's death. The court denied both motions. The court then sentenced defendant to the midterm of six years, doubled under the Three Strikes law, plus one year for the prior

prison term, for a total of 13 years in prison. Defendant timely filed a notice of appeal from the judgment.

DISCUSSION

A. *Sufficiency of the Evidence of Causation*

Defendant contends there was insufficient evidence that the stabbing caused Yanez's death because Dr. Kim admitted that (1) the stab wounds did not cause Yanez's death; (2) she could not determine when Yanez's heart attack started; and (3) other factors, such as anger, stress, or alcohol use, could have caused the heart attack. Therefore, defendant argues that Dr. Kim's testimony that the stabbing was a substantial factor in causing Yanez's death was speculative and thus insufficient to establish causation. Our reading of Dr. Kim's testimony does not support defendant's argument.

"[I]t has long been recognized that there may be multiple proximate causes of a homicide, even where there is only one known actual or direct cause of death." (*People v. Sanchez* (2001) 26 Cal.4th 834, 846.) "The People's burden of proving causation is met if evidence is produced from which it may be reasonably inferred that the defendant's act was a substantial factor in producing the result of the crime. [Citations.] The prosecution does not have to prove to a mathematical certainty that the killing would not have occurred absent the defendant's act. [Citation.]" (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 845.)

In this case, Dr. Kim testified, without qualification, that the stabbing caused extreme stress on Yanez's heart, which was not

equipped to endure that amount of stress, and therefore the stabbing was a substantial factor in Yanez's death due to an acute cardiac event. The purported "admissions" that defendant cites do not show that Dr. Kim's testimony was based upon speculation.

First, while defendant is correct that Dr. Kim "admitted" that the stab wounds themselves could not explain the cause of death, that "admission" does not contradict the doctor's testimony that the stress from the stabbing was a substantial factor in causing Yanez's death.

Second, Dr. Kim did not, as defendant asserts, admit that "she did not know when the heart attack started." She was asked, "[A]s a doctor, is it hard for you to determine when actually Ms. Yanez started feeling her heart attack?" The doctor responded, "It would be probably hard to tell. There are a lot of factors that–playing into the whole scenario, even if you can–yeah, starting from whether you can actually feel the sensation of a heart–heart attack. It's really highly variable as to when you feel the symptoms of the pain that [is] inflicted by the heart attack." This testimony, cited by defendant, does not support his assertion that Dr. Kim did not know when Yanez's heart attack started. Rather, it is an admission that Dr. Kim could not determine when Yanez *felt* the heart attack, because there are a lot of factors that go into when someone would feel the symptoms of a heart attack.

Finally, Dr. Kim did not admit that "other factors clearly present could have caused the heart attack, including mood, anger, stress, alcohol, or an altercation or other activity." In the testimony defendant cites in support of his assertion, Dr. Kim was asked by defense counsel "about certain factors, and you can tell me if they could contribute to

somebody's excitement and their heart being able to beat faster." Counsel then asked a series of questions about those factors (such as alcohol use, anger, drug use) and whether, generically, they could cause an increased heart rate and "could cause somebody who has a severely compromised heart to have a heart attack." But counsel did not ask whether, and therefore Dr. Kim did not "admit" that, those factors caused Yanez's heart attack. In fact, when Dr. Kim was asked directly about Yanez's intoxication and weight, she testified that those were contributing factors to her death, but not the direct cause of her death, and reiterated that the cause of death was "the acute cardiac stress and the very stressful event exerted onto the heart."

In short, Dr. Kim's testimony regarding the cause of death was not "speculative by her own admission." Rather, it constituted substantial evidence from which the jury could conclude that defendant's act was a substantial factor in causing Yanez's death.

B. *Failure to Instruct on Attempted Voluntary Manslaughter*

Defendant contends the trial court had a *sua sponte* duty to instruct the jury on attempted voluntary manslaughter as a lesser included offense of voluntary manslaughter. He argues there was reasonable doubt that the stabbing was a cause of Yanez's death in light of Dr. Kim's testimony that the stab wounds were not fatal, and the fact that other factors, such as Yanez's anger, alcohol use, weight, and clogged arteries could have triggered the heart attack. We find there was insufficient evidence to give rise to a duty on the part of the trial court to give an attempted voluntary manslaughter instruction.

"California decisions have held for decades that even absent a request, and even over the parties' objections, the trial court must instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 118.)

"'That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged.'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

In this case, defendant argues that substantial evidence supported giving an attempted voluntary manslaughter instruction because Dr. Kim's testimony "left room for a reasonable doubt that [defendant] caused the heart attack." He cites to the doctor's testimony that Yanez was morbidly obese and had been drinking, both of which contributed to her death, as well as testimony that, generally, alcohol use, being angry or upset, or being in an altercation can bring on a heart attack, and observes that a jury could have found an absence of causation based on this evidence.

In essence, defendant asserts that the jury could have disbelieved Dr. Kim's testimony that the stabbing was a substantial factor in causing Yanez's heart attack and that Yanez's weight and alcohol use were contributing factors but not causes of the heart attack, and instead could have concluded that, based upon Dr. Kim's testimony regarding the kinds of things that generally could cause heart attacks, Yanez's heart attack was caused by those things. But defendant presented no

evidence, such as expert medical testimony, that those things did cause the heart attack in this case while the stabbing did not. Therefore, any finding that Yanez's weight, alcohol use, anger, or other issues–but not the stabbing–caused her heart attack would be the result of pure speculation. As the Supreme Court has instructed, "'[s]peculation is an insufficient basis upon which to require the trial court to give an instruction on a lesser included offense.' [Citation.]" (*People v. Sakarias* (2000) 22 Cal.4th 596, 620.) Therefore, we hold the trial court had no duty to instruct on attempted voluntary manslaughter.

C. *CALCRIM No. 620*

The trial court instructed the jury with CALCRIM No. 620 on causation as follows: "There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A substantial factor is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death. [¶] Elizabeth Yanez may have suffered from an illness or physical condition that made her more likely to die from the injury than the average person. The fact that Elizabeth Yanez may have been more physically vulnerable is not a defense to murder or manslaughter. [¶] If the defendant's act was a substantial factor causing the death, then the defendant is legally responsible for the death. This is true even if Elizabeth Yanez would have died in a short time as a result of other causes or if another person of average health would not have died as a result of the defendant's actions. [¶] If you have a reasonable doubt

whether the defendant's act caused the death, you must find him not guilty."

Defendant contends that this instruction was an argumentative pinpoint instruction favoring the prosecution, and giving the instruction violated his right to due process. We disagree.

CALCRIM No. 620 is a correct statement of the law on proximate causation with regard to a vulnerable victim. It was derived from our Supreme Court's opinions in *People v. Caitlin* (2001) 26 Cal.4th 81 (*Caitlin*) and *People v. Phillips* (1966) 64 Cal.2d 574. Indeed, in *Caitlin*, a case in which the defendant was accused murdering his physically frail mother with poison, the Supreme Court found no error in instructing the jury with former CALJIC No. 8.58, an instruction that is very similar to CALCRIM No. 620.

As given to the jury in *Caitlin*, CALJIC No. 8.58 stated: "'If a person unlawfully inflicts a physical injury upon another person and that injury is a proximate cause of the latter's death, such conduct constitutes an unlawful homicide, even though the injury inflicted was not the only cause of the death. [¶] Moreover, that conduct constitutes unlawful homicide even if one, the person injured had been already weakened by disease, injury, physical condition or other cause. [¶] Two, it is probable that a person in sound physical condition injured in the same way would not have died from the injury and three, it's probable that the injury only hastened the death of the injured person and four, the injured person would have died soon thereafter from another cause or causes.'" (*Caitlin*, *supra*, 26 Cal.4th at p. 155.)

Defendant in this case asserts that, unlike CALCRIM No. 620, CALJIC No. 8.58 is "balanced" because it "related the prosecution's burden to the particular facts of the case, instead of only highlighting the manner in which the evidence weakened the defense case." We fail to see any meaningful difference between two instructions. While it is true that CALJIC No. 8.58 speaks in generalities and CALCRIM No. 620 uses more direct language, that difference does not render CALCRIM No. 620 an argumentative instruction favoring the prosecution.

An improper argumentative instruction is "an instruction 'of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence.'" (*People v. Mincey* (1992) 2 Cal.4th 408, 437.) CALCRIM No. 620 does no such thing. It merely explains that there may be more than one cause of death, instructs that an act causes death only if it is a substantial factor in causing the death, and explains the legal effect of any finding that Yanez was more physically vulnerable than the average person. Indeed, it emphasizes that "[i]f you have a reasonable doubt whether the defendant's act caused the death, you must find him not guilty." In short, the trial court did not err in instructing the jury with CALCRIM No. 620.

D. *Ineffective Assistance of Counsel*

In his closing argument, defense counsel spent the first part of his argument urging the jury to find a reasonable doubt as to the cause of Yanez's death. He noted that Dr. Kim was not sure when Yanez's heart attack started, and admitted that different things could trigger a heart

attack. He also pointed to the stress Yanez was in when she got out of her car and started screaming at Rangel, the fact that Yanez had been drinking, was morbidly obese, and had 80 percent blockage of an artery, and he noted that the fact that Yanez fell flat on her face, without attempting to break her fall, could indicate that she had the heart attack before she was stabbed. He argued that all of this evidence raises a reasonable doubt that the stabbing substantially caused Yanez's death.

In her closing argument, the prosecutor addressed defense counsel's causation argument as follows: "The defendant wants you to disregard the law in two particular areas. The first being causation, cause of death. [¶] What the law specifically states is that [Yanez] may have suffered from an illness or physical condition that made her more likely to die from that injury than an average person. The fact that she may have been more physically vulnerable is not a defense to murder or manslaughter. [¶] If the defendant's act was a substantial factor causing her death, then the defendant is legally responsible for her death. [¶] The coroner testified that the stabbing was a substantial factor. That evidence is uncontradicted. [¶] The defense has the subpoena power of the court and could have provided any number or another witness to testify to the contrary. You have no evidence of that. [¶] The only evidence that you have is that it was a substantial factor. Causation is not an issue for you if you follow the law."

On appeal, defendant argues that his defense counsel rendered ineffective assistance by failing to object to the prosecutor's argument, which he asserts improperly shifted the burden of proof to defendant.

We find there was no ineffective assistance of counsel because the prosecutor's argument was not objectionable.

"A prosecutor may fairly comment on and argue any reasonable inferences from the evidence. [Citation.] Comments on the state of the evidence or on the defense's failure to call logical witnesses, introduce material evidence, or rebut the People's case are generally permissible. [Citation.] However, a prosecutor may not suggest that 'a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence.' [Citations.]" (*People v. Woods* (2006) 146 Cal.App.4th 106, 112.)

In this case, the prosecutor did not suggest that defendant had a duty or burden to produce evidence or to prove his innocence. Nor did she, as defendant argues, shift the burden of proof by "suggest[ing] that the jury was legally bound to accept the pathologist's opinion on the cause of death." Rather, the prosecutor pointed out that defendant did not present any witness testimony to contradict Dr. Kim's testimony that the stabbing was a substantial factor, and reminded the jury that, if it found that the stabbing was a substantial factor, the law required it to find that defendant's act caused Yanez's death. Therefore, the prosecutor's argument was appropriate, and defense counsel did not render ineffective assistance by failing to object to it.

DISPOSITION

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.