Filed 5/1/17 P. v. Benson CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. AARON DANIEL BENSON, Defendant and Appellant.	B270212 (Los Angeles County Super. Ct. No. MA065673)

APPEAL from a judgment of the Superior Court of Los Angeles County. Christopher Estes, Judge. Affirmed.

John A. Colucci, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, William H. Shin, Deputy Attorney General, for Plaintiff and Respondent.

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Aaron Daniel Benson (defendant) drove his truck through the side of an elderly woman's house, killing her. A jury convicted him of second degree murder and gross vehicular manslaughter. On appeal, he argues that the trial court erred in refusing to instruct the jury on the defenses of imminent peril and necessity after he testified that he drove while drunk to get away from another man who had grabbed his buttocks. Because defendant had other options available for removing himself from the situation, but opted not to pursue them because he did not "want to be rude," the court did not err in declining to instruct on those defenses. Accordingly, we affirm his conviction.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

One evening in March 2015, defendant went to a bar and downed two shots of whiskey and two 24-ounce mugs of Fat Tire beer containing an above-average concentration of alcohol. Defendant's blood-alcohol content was between 0.21 and 0.24 percent, and he admitted to feeling the effects of that alcohol "moderate[ly]" or "mild[ly]." He nevertheless got into his truck to make the quarter-mile drive home. He ended up sideswiping two cars, and then plowed into the side of a house. A 71-year-old woman was sleeping in the house, and was crushed to death by defendant's truck and the wall it went through. When defendant was interviewed by police afterwards, he provided no explanation of why he was driving while drunk and lied about where he had been and where he was going.

II. Procedural Background

A. Charges

The People charged defendant with (1) murder (Pen. Code, § 187, subd. (a))[1]; (2) gross vehicular manslaughter while intoxicated (§ 191.5, subd. (a)); (3) driving under the influence (DUI) causing injury within 10 years of another DUI offense (Veh. Code, §§ 23153, subd. (a) & 23560); and (4) driving with a 0.08 percent blood-alcohol content causing injury within 10 years of another DUI offense (Veh. Code, §§ 23153, subd. (b) & 23560). As to the last two counts, the People further alleged that defendant personally inflicted great bodily injury (§ 12022.7) and that he had been convicted of misdemeanor DUI in 2011 (Veh. Code, § 23152, subd. (b)).

B. Trial

The matter went to trial.

Defendant testified, and for the first time provided an explanation as to why he was driving that evening. Specifically, defendant stated that he closed down the bar that night with Greg Mellinger (Mellinger), an acquaintance of his. Mellinger is roughly the same size as defendant, but is 30 years older. The two men spent about 15 to 20 minutes in the bar's parking lot discussing baseball. Mellinger offered defendant a ride home, and became "very aggressive, persistent and insistent" when defendant declined; defendant felt "uncomfortable." When Mellinger instead offered to follow defendant home in separate vehicles, defendant agreed. Defendant recognized that he could have walked the quarter-mile to his house or called a family

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1 All further statutory references are to the Penal Code unless otherwise indicated.

member or the police, but opted not to because he thought it would be "rude" to do so.

Defendant then drove to within 100 feet of his house, but stopped short because he did not want Mellinger to know where he lived. Defendant hopped out of his truck, intending to wave Mellinger by, but Mellinger pulled over and got out of his truck. The two men again talked for 15 to 25 minutes. When defendant said, "Goodnight," and went to shake Mellinger's hand, Mellinger grabbed defendant's hand, pulled him closer, and reached behind him to squeeze the cheek of his buttocks. Defendant pulled away, again said, "Goodnight," and shook Mellinger's hand a second time; Mellinger again grabbed defendant's buttocks. Defendant felt "embarrassed" and "shocked" by Mellinger's acts. Defendant walked back to his truck. Although defendant could have locked the truck's doors and called the police, he chose not to because he "didn't want to be rude" to Mellinger. Instead, defendant decided to drive around circuitously until he saw a house with the porch light on to seek assistance. Soon thereafter, he sideswiped the two cars and ran over the sleeping woman.

Defendant explained that he did not recount any of these events to the police because he was "embarrassed," but would have "absolutely" done so if they had just asked him about it specifically.

Defendant asked the trial court to instruct the jury on the defenses of imminent peril and necessity. The court declined. The court instructed the jury on all of the charged offenses, including first and second degree murder.

A jury found defendant guilty of second degree murder, gross vehicular manslaughter, and both DUI counts.

C. Sentencing

The trial court sentenced defendant to a term of 15 years to life in state prison on the second degree murder charge. The court imposed, but stayed under section 654, a 10-year prison term on the gross vehicular manslaughter charge; the court dismissed the two DUI counts "in furtherance of justice" under section 1385.

D. Appeal

Defendant filed this timely appeal.

DISCUSSION

Defendant argues that the trial court erred in denying his requests to instruct the jury on the defenses of imminent peril and necessity. In assessing these claims, we ask whether there was substantial evidence in the record—that is, "'evidence that a reasonable jury could find persuasive'"—to support either defense; if so, the court was obligated to instruct. (*People v. Landry* (2016) 2 Cal.5th 52, 120; *People v. Benavides* (2005) 35 Cal.4th 69, 102.) In undertaking this inquiry, we view the record in the light most favorable to the defendant. (*People v. Salas* (2006) 37 Cal.4th 967, 982.) Our review of these instructional issues is de novo. (*People v. Simon* (2016) 1 Cal.5th 98, 133.)

I. Imminent Peril

The defense of imminent or sudden peril relaxes the standard of care to which a civil or criminal defendant will be held when confronted with an actual or perceived "sudden[] and unexpected[] . . . peril." (*Leo v. Dunham* (1953) 41 Cal.2d 712, 714; *People v. Victor* (1965) 62 Cal.2d 280, 299 (*Victor*); *McShane v. Cleaver* (1966) 247 Cal.App.2d 260, 268-269; CALJIC No. 8.92.) More specifically, the defense applies when a defendant "is

presented" with "an unexpected physical danger" to himself or others "so suddenly as to deprive [him] of his power of using reasonable judgment," and, if applicable, means that he "is not expected nor required to use the same judgment and prudence that is required of him in the exercise of ordinary care in calmer and more deliberate moments." (*Pittman v. Boiven* (1967) 249 Cal.App.2d 207, 216; *Leo*, at p. 714; *Damele v. Mack Trucks, Inc.* (1990) 219 Cal.App.3d 29, 36; CALJIC No. 8.92.)

The trial court properly declined to give an imminent peril instruction with respect to the murder charge because the crime of murder (whether first or second degree) turns on proof of malice aforethought (§§ 187 & 189; *People v. Sandoval* (2015) 62 Cal.4th 394, 424), not on a defendant's failure to comply with any particular standard of care. Because the imminent peril defense functions to reduce the standard of care, it is irrelevant to murder. (Cf. *People v. Clark* (1962) 202 Cal.App.2d 513, 514-518 (*Clark*) [defense applicable to DUI charge, when it required proof of negligent violation of the law]; *People v. Wren* (1969) 271 Cal.App.2d 788, 792-793 [same]; *People v. Boulware* (1940) 41 Cal.App.2d 268, 269-270 (*Boulware*) [same].)

The trial court also correctly declined to instruct on imminent peril as a defense to gross vehicular manslaughter. Although that crime requires proof of a defendant's noncompliance with a standard of care (specifically, proof of "gross negligence") (§ 191.5, subd. (a); *People v. Batchelor* (2014) 229 Cal.App.4th 1102, 1109), an imminent peril instruction was still not warranted because defendant was not confronted with an *imminent* peril. For these purposes, "imminent" means ""'certain, immediate, and impending.'"" (*Victor*, *supra*, 62 Cal.2d at p. 299; see *People v. Manriquez* (2005) 37 Cal.4th 547, 581 [in the context

of an imperfect self-defense, "[an] imminent peril is one that, from appearances, must be instantly dealt with"], italics omitted). In other words, it is a peril necessitating a split-second decision.

The peril defendant faced—further sexual assault by Mellinger—did not meet this definition of imminence. Defendant testified that he actually considered several different options about how to proceed once Mellinger grabbed his buttocks. That defendant had the time to engage in such introspection means he was not faced with a split-second decision. (Cf. *Boulware*, *supra*, 41 Cal.App.2d at pp. 269-270 [defendant swerved to avoid another car]; *Clark*, *supra*, 202 Cal.App.2d at pp. 514-518 [same]; *People v. Tucker* (1948) 88 Cal.App.2d 333, 342 [same].) What is more, the peril of further sexual assault was not imminent. After Mellinger grabbed defendant's buttocks the first time, Mellinger allowed defendant to back away, and defendant then said goodbye and shook Mellinger's hand a second time. After Mellinger grabbed defendant's buttocks the second time, Mellinger allowed defendant to walk back to his truck and get in. There was no evidence that Mellinger followed defendant back to his truck or did anything that would have prevented defendant from calling 911 or his mother, who was in the house 100 feet away. Defendant's sole reason for not pursuing these options was his desire not to hurt Mellinger's feelings, not the fear of imminent sexual assault.

Defendant nevertheless argues that an imminent peril instruction was warranted because he subjectively perceived one to exist in his "shocked" state of mind. Apart from the fact that defendant's conduct belies this assertion, there must be sufficient evidence "to support the finding of the *objective* appearance of sudden and unexpected peril." (*Harris v. Oaks Shopping Center*

(1999) 70 Cal.App.4th 206, 210, italics added.) For the reasons explained above, there was no such evidence.

II. Necessity

The defense of necessity empowers a jury to find a defendant not guilty for a criminal act he has committed if his commission of that act was necessary to avoid an imminent, greater harm. (*People v. Trujeque* (2015) 61 Cal.4th 227, 273 (*Trujeque*) [‘“The defense of necessity generally recognizes that ‘“the harm or evil sought to be avoided by [the defendant’s] conduct is greater than that sought to be prevented by the law defining the offense charged”’”]; *In re Eichorn* (1998) 69 Cal.App.4th 382, 389 [‘“Necessity . . . represents a public policy decision not to punish . . . an individual despite proof of [a] crime”’].) Put differently, the necessity defense applies when a defendant is imminently confronted with—and forced to select between—the lesser of two evils, and chooses the lesser; if he does, he is not criminally liable for the lesser offense.

Consequently, a court must instruct on the defense of necessity only if substantial evidence establishes that the defendant committed the charged crime(s) ‘“(1) to prevent a significant evil, (2) with no adequate alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief in the necessity, (5) with such belief being objectively reasonable, and (6) under circumstances in which [the defendant] did not substantially contribute to the emergency.”’ (*Trujeque*, *supra*, 61 Cal.4th at p. 273.)

Here, defendant urged the trial court to instruct that he engaged in the crime of driving under the influence to avoid being

subject to the greater crime of sexual assault.[2] Although the defense of necessity can apply to the crime of driving under the influence (*People v. Pena* (1983) 149 Cal.App.3d Supp. 14, 22-23 (*Pena*)), the trial court did not err in declining to instruct on this defense in this case because substantial evidence did not support a finding that defendant had "no adequate alternative" to driving while intoxicated. We reach this conclusion for two reasons.

First, defendant had the alternative of calling the police. Absent proof that there was "no time" for such a call or that it would be "futile," that alternative is deemed to be adequate because "self-help by lawbreaking and violence cannot be countenanced where . . . the lawbreaker has made no attempt to enlist law enforcement on his side." (*People v. Miceli* (2002) 104 Cal.App.4th 256, 267-268; *Verlinde*, *supra*, 100 Cal.App.4th at pp. 1164-1165; *People v. Kearns* (1997) 55 Cal.App.4th 1128, 1135; *People v. Lovercamp* (1974) 43 Cal.App.3d 823, 831.) In this case, defendant had his cell phone with him and, as noted above, had the time to call the police when he went back to his truck after Mellinger's second assault. Although defendant speculates in his appellate briefs that the police would not have been responsive, he presented no such evidence. Indeed, defendant testified at trial that he did not contact the police because he did not want to be "rude" to Mellinger.

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2 We focus on the crime of driving under the influence rather than murder because the necessity defense requires us to focus on the risks attendant to the two crimes the defendant perceived he had to choose between at the time he made his choice rather than the crimes he may have, in hindsight, ultimately committed. (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1165, fn. 8 (*Verlinde*), disapproved on another ground in *People v. Cook* (2015) 60 Cal.4th 922, 939.)

Second, defendant had the time to pursue other alternatives, such as calling his mother. The availability of alternatives turns in part on whether the defendant had time to pursue them; "the more imminent the [greater evil]," the logic goes, "the less likely the existence of an alternative course of action." (*Pena*, *supra*, 149 Cal.App.3d at p. Supp. 26.) Because, as we have concluded in our discussion regarding the imminent peril defense, the evil of Mellinger's sexual assault was not imminent, defendant had sufficient time to consider and pursue alternatives other than driving while intoxicated, particularly in light of the "strong public policy against the nightmare of drunk driving." (*Carrey v. Department of Motor Vehicles* (1986) 183 Cal.App.3d 1265, 1270; cf. *State v. Shotton* (1983) 142 Vt. 558, 561-562 [458 A.2d 1105] [necessity instruction warranted when defendant drove to hospital while intoxicated to receive medical attention from domestic violence she had just suffered].)

DISPOSITION

The judgment is affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ