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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. EDGAR GARCIA, Defendant and Appellant.	B231083 (Los Angeles County Super. Ct. No. BA358998)

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

Tanya Dellaca, 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, Scott A. Taryle, Supervising Deputy Attorney General, Russell A. Lehman, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Edgar Garcia (defendant) was convicted of involuntary manslaughter (Pen. Code, § 192, subd. (b)[1]) and battery with serious bodily injury (§ 243, subd. (d)). On appeal, defendant contends that there is insufficient evidence, apart from his extrajudicial admissions, to establish the corpus delicti for his convictions; there is insufficient evidence that he acted with criminal negligence and that he was the proximate cause of the victim's death to support his conviction of involuntary manslaughter; the trial court erred in failing to instruct the jury, sua sponte, on excusable homicide pursuant to CALCRIM 511; his conviction for battery with serious bodily injury must be reversed because it is a lesser included offense of involuntary manslaughter; and the trial court abused its discretion by failing to grant him probation or, in the alternative, imposing a middle term on the involuntary manslaughter count. We affirm the judgment.

BACKGROUND

A. Factual Background

1. Prosecution Evidence

On July 3, 2009, Felicitas Gatica hosted a dinner party for her boyfriend, Jose Nufio, at their home, attended by, inter alia, longtime friends Bryant Matute, Emilio Valle, and Gloria Velasquez. Velasquez, the mother of defendant's former girlfriend, brought defendant and three of Velasquez's younger daughters to the party. Beer was served at the party.

During the party, Velasquez told Gatica that Velasquez's eight-year old daughter said that Matute had touched her on her buttocks. Gatica said that it was a serious

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[1] All statutory citations are to the Penal Code unless otherwise noted.

accusation and they needed "to get to the bottom of" it. Gatica was upset by Velasquez telling her about the accusation, and therefore Gatica told everyone to leave the party.

When they were outside of the house, Velasquez told Gatica that something "needed to be done" about the alleged incident. Gatica told Velasquez to call the police if she believed that something inappropriate had happened, and Velasquez replied that she was going to call the police. Gatica testified that she told Velasquez that "Matute's drunk right now and he needs to sober up" before Gatica could find out what, if anything, had occurred between him and Velasquez's daughter. By "drunk" Gatica meant "buzzed," not drunk because Gatica did not hear Matute slur his word, or see him fall on the floor or throw up. Gatica thought Matute should be "100 percent sober when [they are] talking about an issue like that." Gatica, Nufio, and Valle testified that they did not see Matute drunk or intoxicated. Gatica said that Matute did not have any trouble walking.

Gatica testified that shortly after everyone exited the house as she instructed, defendant approached her and said "he can't get away with doing something like that" and "something needed to be done." Gatica said to defendant that she agreed with him "but don't go and do anything. . . . [M]ake the call and we'll settle it like that. . . . Don't do anything stupid." Gatica told defendant that if he "did anything" that he was going to get in trouble for it.

While outside of Gatica's house, Matute, Velasquez, Gatica, Nufio, and Vale talked about the purported incident. Matute denied the accusation made against him. Velasquez said she was going to get defendant, and left the conversation. About 5 to 10 minutes later, Velasquez came back to the house with defendant and they spoke with Matute and Valle in the front yard of the house about the purported incident.

Valle testified that after they talked about five minutes, he saw defendant put his arm around Matute's shoulder and "escorted" Matute to the corner of Alice Street and San Fernando Road. Valle heard defendant tell Matute that they were going to talk. Valle started to follow them, but defendant "brushed [him] off" by motioning for him to

stay back. Valle testified that Matute did not have any trouble walking—he was not weaving or tripping. Valle saw them stop and talk, and turned his attention elsewhere.

Valle testified that later he saw defendant sprinting back toward the house with a look on his face that he made a mistake. As defendant was sprinting, he told Valle that, "Sorry bro, I knocked your friend out." Valle ran to Matute and found him lying in the street almost parallel to the curb— his feet were closer to the curb than his head. Matute had blood coming out his nose and the back of his head. Valle saw a mark, like a bruise or redness, on Matute's left cheek, which he did not recall having seen before Matute walked down the street with defendant. Matute was unconscious, but started to moan when Valle talked to him. Matute vomited.

At some point, defendant was next to Nufio in front of the house. Defendant told Nufio that defendant had hit Matute and Nufio should tend to Matute because Matute was hurt and was "out there on the floor." Nufio went down the street and saw Matute lying face up on the ground, with his head and upper in the street, and the lower part of his body on the sidewalk. It looked like Matute had fallen and hit his head. Matute was still breathing. Nufio and Valle moved Matute out of the street to the curb and against a pole. Matute appeared to wake from unconsciousness. "White stuff" that looked to Nufio like "suds" came out of Matute's mouth. Nufio went back to the house to get Gatica.

Gatica saw Nufio walking toward the house with a scared look on his face. Down the street, Gatica saw Matute lying on the ground with Valle kneeling over him, and defendant and Velasquez on the sidewalk in the same area. Gatica approached Nufio and asked him what happened. Nufio replied that defendant told him that defendant just knocked out Matute.

Gatica ran down the street and saw Matute on the ground with blood on the back of his head. Gatica looked at defendant and asked him, "What did you do?" Defendant replied, "You didn't see me do anything, what are you going to do?"[2] Gatica called 911

[2] At the preliminary hearing, Gatica testified that she only asked defendant, "What did you do?," and that she could not recall if defendant said anything in response.

as defendant stood there. Velasquez took her children into her vehicle. Defendant and Velasquez looked at Gatica as she was calling 911. Defendant got into the vehicle and he and Velasquez drove away from the scene.

When the police and paramedics arrived, Gatica told a police officer that Matute "looked like" he was having a seizure because she saw "his body tense" and he was vomiting, but she had no knowledge of Matute having a history of seizures. Gatica testified that she did not know if in fact Matute had a seizure during the incident.

Los Angeles Police Department Officers Michael Briones and his partner, Officer Torres,[3] interviewed Valle and a "woman" at the scene. Neither Valle nor the woman told Officer Briones that Matute had been hit or punched. After being at the scene for about 10 to 15 minutes, Officer Briones believed that he did not have any information that a crime occurred, and he and Officer Torres left the scene and did not file a report.

Matute died on July 11, 2009. Officer Briones was later contacted by Los Angeles Police Department Detective Jose Carrillo, who told Officer Briones of Matute's death. At Detective Carrillo's request, Officers Briones and Torres each prepared a report, more than a week after the incident. Officer Briones testified, with his recollection refreshed by the reports, that Valle and the woman stated that Matute was extremely intoxicated the evening of the incident, which concerned them because he suffered from seizures when he drank heavily. According to Officer Briones, however, Valle and the woman stated that they were not too concerned about Matute at first because they thought he had passed out from drinking too much. Officer Briones said that the paramedics told him that Matute's "friends" told them that Matute had a history of seizures. Officer Briones testified that sometimes an initial report turns out to be inaccurate because information was withheld from him by a witness.

Valle testified that he does not remember telling Officer Briones that Matute was extremely intoxicated, and denied saying that Matute suffered from seizures when he drank heavily or that he was not concerned about Matute because he thought Matute

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[3] The record does not disclose Officer Torres' first name.

passed out from drinking too much. Valle denied that he told the police that Matute ever had a seizure or that Matute took medication for seizures. Valle testified he told the police the night of the incident that Matute had fallen, but that he did not tell the police everything he knew about what occurred then because he was afraid that defendant would retaliate against him if he did.

Gatica was upset at learning that Matute had died, went to defendant's house, and told him she was going to file a police report. Defendant replied that he did not care because Gatica did not see anything that occurred during the incident and there was nothing that she could prove. According to Gatica, afterward she went to the police and told a detective everything she knew about what happened the night of the incident.

On July 13, 2009, Nufio was interviewed by Detective Carrillo. Nufio told Detective Carrillo that defendant had told him that Matute "was passed out over there," and Matute "is over there, knocked out." Nufio did not tell Detective Carrillo that defendant told Nufio that defendant punched or knocked out Matute. Defendant was arrested on July 13, 2009.

On July 19, 2009, eight days after Matute died, Los Angeles County Coroner's Office Deputy Medical Examiner Vladimir Levicky performed an autopsy on him. Dr. Levicky found bleeding on the back of Matute's head and bruises on his chest. Matute's chest bruises were not the type that would typically result from someone performing CPR on him, although the bruises "could be related" to it. Matute's chest bruises were consistent with someone kicking him while he was on the ground.

Dr. Levicky found fractures on the back and left side of Matute's skull, a subdural hematoma, and lacerations on portions of Matute's brain. Dr. Levicky testified that it is unusual for someone to have sustained these injuries as a result of falling on their own. Dr. Levicky did not see any marks on Matute's hands or arms indicative of his attempt to break his fall. Dr. Levicky opined that "probably" more force was necessary to cause Matute's injuries than would be caused by his falling on his own.

Dr. Levicky opined that the cause of Matute's death was his sustaining a blunt-force injury to his head. Dr. Levicky did not see any marks on Matute's face indicating

that he had been punched. When Dr. Levicky performs an autopsy one week after a person's death, in most, but not all occasions he would see indications that the person had been punched.

Dr. Levicky did not find any evidence that Matute suffered from seizures. Skull and brain injuries can cause foaming at the mouth or vomiting.

2. Defense Evidence

Defendant testified that when he arrived at the July 3, 2009, dinner party, Matute, Nufio and Valle appeared to be drunk. During the dinner party, Velasquez told defendant and Nufio that Velasquez's daughter said that Matute had touched her. Defendant did not know what to think about the situation and remained to talk about it, but was not angry. Nufio walked away.

Defendant approached Nufio and Matute as they were discussing the matter. At some point Matute said, "I can't believe this shit. I've been a friend and I don't need this," and walked away through the front gate of the house and down Alice Street toward San Fernando Road. Nufio yelled at Matute asking where he was going and requesting that he come back to talk, but Matute "waiv[ed] [him] off." Defendant told Nufio, "Let me talk to him, you know, let me bring him back to clear up this matter up," and defendant walked down the street after Matute.

Defendant testified that Matute appeared to be drunk because he had slurred speech, and was stuttering and walking in a "zig-zag" manner. As defendant started to walk down the street after Matute, he turned his attention to one of Velasquez's daughters who was calling his name and asking him where he was going. When defendant turned back around, he no longer saw Matute. Defendant continued to walk down the street and then he saw Matute lying down like he was passed out. Matute's feet were on the curb and his upper body was on the street. Defendant testified that he did not hit or touch Matute. Defendant thought Matute was passed out from being drunk, so he turned around, picked up Velasquez's daughter, and headed back to the house.

On defendant's way back to the house, Valle asked him where was Matute, and defendant responded, "Your buddy is knocked out over there." Valle asked defendant what he meant, and defendant stated, "He's passed out over there in the street." Valle went down the street to Matute. Defendant also told Nufio that Matute "was passed out in the street over there." Defendant testified that he did not tell Valle that he had knocked out Valle's friend.

Velasquez gathered her daughters because Gatica said the part was over and they should leave. Defendant, Velasquez, and Velasquez's daughters headed toward their vehicle, which was parked near where Matute lay on the ground. As they headed to the vehicle, defendant saw that Matute had been moved to the curb. When Velasquez's daughters saw the blood and heard Valle yelling at Matute, they began to cry. Because Velasquez's daughters were crying, when Gatica called 911, defendant told Velasquez that they needed to leave. Defendant did not stay to help because he thought everything was under control—Nufio and Valle were tending to Matute and Gatica was calling the paramedics.

B. Procedural Background

The District Attorney of Los Angeles County filed an amended information charging defendant with involuntary manslaughter in violation of section 192, subdivision (b) (count 1), and battery with serious bodily injury in violation of section 243, subdivision (d) (count 3).[4] The District Attorney alleged as to counts 1 and 3 that defendant was released from custody on bail or on his own recognizance within the meaning of section 12022.1.

Following trial, the jury found defendant guilty on both counts. Defendant admitted the truth of the section 12022.1 allegation. The trial court denied probation and sentenced defendant to state prison for a term of five years, consisting of the middle term

[4] Velasquez is a codefendant charged with being an accessory after the fact in violation of section 32, but she is not a party to this appeal. Following a trial, the jury found Velasquez not guilty of this charge.

of three years on count 1, and two years on the section 12022.1 allegation. The trial court stayed imposition of sentence on count 3.

DISCUSSION

A. Corpus Delicti

Defendant claims that, apart from his extrajudicial admissions, there is insufficient evidence to establish the corpus delicti for his convictions of involuntary manslaughter and battery with serious bodily injury. We disagree.

1. Standard of Review

"'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 701.) "We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence. [Citation.]" (*People v. Medina* (2009) 46 Cal.4th 913, 919.) "Substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom." (*People v. Ugalino* (2009) 174 Cal.App.4th 1060, 1064.) "We 'must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]' [Citation.] . . . '[I]t is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.]'" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357-358.)

Our sole function is to determine if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Marshall* (1997) 15 Cal.4th 1, 34; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Barnes* (1986) 42 Cal.3d 284, 303; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) "A reversal

for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict. [Citation.]" (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 357.)

2. Forfeiture

The Attorney General argues that defendant forfeited his claim on appeal that there is insufficient evidence to establish corpus delicti because defendant did not object in the trial court "that the evidence did not satisfy the corpus delicti rule." We disagree.

"In June 1982 the voters, by adopting Proposition 8, added section 28, subdivision (d) (section 28(d)), the 'Right to Truth-in-Evidence' provision, to article I of the California Constitution. This section provides that except [as stated in other] statutes . . . 'relevant evidence shall not be excluded in any criminal proceeding.'" (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1165.) "Because of the adoption of section 28(d) through Proposition 8, there no longer exists a trial objection to the *admission in evidence* of the defendant's out-of-court statements on grounds that independent proof of the corpus delicti is lacking. If otherwise admissible, the defendant's extrajudicial utterances may be introduced in his or her trial without regard to whether the prosecution has already provided, or promises to provide, independent prima facie proof that a criminal act was committed. [¶] However, section 28(d) did not eliminate the independent-proof rule insofar as that rule prohibits *conviction* where the only evidence that the crime was committed is the defendant's own statements outside of court. Thus, section 28(d) did not affect the rule to the extent it . . . allows the defendant, on appeal, [to] directly to attack the sufficiency of the prosecution's independent showing." (*People v. Alvarez*, *supra*, 27 Cal.4th at p. 1180.) "No decision of this court . . . has suggested that an evidentiary objection at trial is a prerequisite to raising . . . *sufficiency* claims on appeal." (*Id.* at p. 1172, fn. 8.) "Generally 'issues of sufficiency of the evidence are never waived.' [Citation.]" (*People v. Rodriguez* (2004) 122 Cal.App.4th 121, 129.) We therefore address the merits of defendant's contention.

3. Analysis

Defendant argues that the sole evidence that defendant touched or hit Matute was defendant's statements to various witnesses, and without this evidence there is insufficient evidence to establish the corpus delicti. Even without those statements, however, there is sufficient evidence to establish the corpus delicti.

"In any criminal prosecution, the corpus delicti must be established by the prosecution independently from the extrajudicial statements, confessions or admissions of the defendant. [Citations.] The elements of the corpus delicti are (1) the injury, loss or harm, and (2) the criminal agency that has caused the injury, loss or harm. (*Jones v. Superior Court* (1979) 96 Cal.App.3d 390, 393 [157 Cal.Rptr. 809].) 'The independent proof may be by circumstantial evidence [citation], and it need not be beyond a reasonable doubt. A slight or prima facie showing, permitting the reasonable inference that a crime was committed, is sufficient. [Citations.]' [Citation.] It is not necessary for the independent evidence to establish that the defendant was the perpetrator. [Citations.]" (*People v. Wright* (1990) 52 Cal.3d 367, 403-404, overruled on other grounds as stated in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

"We reemphasize that the quantum of evidence the People must produce in order to satisfy the corpus delicti rule is quite modest; case law describes it as a 'slight or prima facie' showing. [Citations.] This minimal standard is better understood when we consider that the purpose of the corpus delicti rule is 'to protect the defendant against the possibility of fabricated testimony which might wrongfully establish the crime and the perpetrator.' [Citation.] As one court explained, 'Today's judicial retention of the rule reflects the continued fear that confessions may be the result of either improper police activity or the mental instability of the accused, and the recognition that juries are likely to accept confessions uncritically.' [Citation.] [¶] Viewed with this in mind, the low threshold that must be met before a defendant's own statements can be admitted against him makes sense; so long as there is some indication that the charged crime actually happened, we are satisfied that the accused is not admitting to a crime that never

occurred." (*People v. Jennings* (1991) 53 Cal.3d 334, 368; see also *People v. Jones* (1998) 17 Cal.4th 279, 301-302.)

There was evidence that Velasquez, the mother of defendant's former girlfriend, told defendant that Velasquez's daughter said that Matute had touched her inappropriately. Defendant told Gatica that "he can't get away with doing something like that" and "something needed to be done." Defendant spoke with Matute about the incident, and shortly thereafter, defendant put his arm around Matute's shoulder and "escorted" Matute down the street. Matute did not have any trouble walking—he was not weaving or tripping. Although Valle started to follow them, defendant "brushed [him] off."

Moments later, defendant sprinted back toward the house with a look on his face like he had made a mistake. When Valle, Gatica, and Nufio went down the street, they saw Matute's bloody body lying unconscious in the street. Defendant left quickly with Velasquez when they saw Gatica calling 911.

Dr. Levicky testified that it is unusual for someone to have sustained the nature and extent of Matute's injuries as a result of falling on their own. Dr. Levicky did not see any marks on Matute's hands or arms indicative of his attempt to break his fall.

As Matute lay in the street, Valle saw a mark, like a bruise or redness, on Matute's left cheek, which he did not recall having previously seen. Although Dr. Levicky did not see any marks on Matute's face indicating that he had been punched, he would not always see indications that a person had been punched when the autopsy is performed on that person one week after his or her death.

Dr. Levicky also found bruises on Matute's chest that were consistent with someone kicking him while he was on the ground. Those typically would not result from someone performing CPR on him.

Defendant's claim fails because evidence independent of any extrajudicial admission by defendant established the corpus delicti. The evidence supported a reasonable inference that defendant hit Matute. The "slight or prima facie" evidence needed to meet the "low threshold" of the corpus delicti rule was met in this case.

(*People v. Jennings, supra*, 53 Cal.3d at p. 368; *People v. Wright, supra*, 52 Cal.3d at p. 404.)

B. Criminal Negligence and Proximate Cause

Defendant contends that there is insufficient evidence that he acted with criminal negligence and that he was the proximate cause of Matute's death to support his conviction of involuntary manslaughter. We disagree.

"[C]riminal negligence is the governing mens rea standard" for the commission of involuntary manslaughter. (*People v. Butler* (2010) 187 Cal.App.4th 998, 1007; *People v. Penny* (1955) 44 Cal.2d 861, 869.) "In *People v. Penny, supra*, 44 Cal.2d at page 879, the court explained: '"[C]riminal negligence'" exists when the defendant engages in conduct that is '"aggravated, culpable, gross, or reckless"'; i.e., conduct that is '"such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to consequences."' Similarly, in *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440, the court stated that criminal negligence exists 'when a man of ordinary prudence would foresee that the act would cause a high degree of risk of death or great bodily harm.'" "The act must be one which has knowable and apparent potentialities for resulting in death. Mere inattention or mistake in judgment resulting even in death of another is not criminal unless the quality of the act makes it so. The fundamental requirement fixing criminal responsibility is knowledge, actual or imputed, that the act of the accused tended to endanger life. [Citation.]" (*Id*. at p. 440.)

Viewing the evidence in the light most favorable to the verdict, the jury could reasonably find that defendant acted with criminal negligence. Defendant testified that Matute appeared to be drunk because he had slurred speech, and was stuttering and walking in a "zig-zag" manner, but there was also evidence that Matute did not have any trouble walking, and he was not stumbling, tripping, or weaving. A trier of fact could

reasonably infer that Matute was intoxicated so as to be vulnerable to being hit thereby falling on the ground, but not so intoxicated that he would fall to the ground on his own.

As stated above, even without defendant's extrajudicial admissions, a finder of fact could reasonably infer that defendant hit Matute. Defendant, however, also made extrajudicial admissions that further support a reasonable inference that he hit Matute. As defendant sprinted back up the street to the house, returning from having "escorted" Matute down the street, defendant told Valle that defendant "knocked [Matute] out." Defendant told Nufio that defendant had hit Matute. Defendant told Gatica, "You didn't see me do anything, what are you going to do?" In response to Gatica's statement that she was going to file a police report, defendant stated that he did not care because Gatica did not see anything that occurred during the incident and there was nothing that she could prove.

In *People v. Cravens* (2012) 53 Cal.4th 500, defendant and others confronted the victim, and a fight ensued. Defendant's friend fought the victim first, and then all of the men kicked the victim. The victim was able to get up but was unsteady. Defendant "coldcocked" the victim and the victim went immediately unconscious, fell, and his head hit the concrete. (*Id*. at p. 504-505.) Defendant bragged to friends after the fight that he had "'punched [the victim] out'" and "'put [the victim] to sleep.'" (*Id*. at p. 506.) The victim died of a skull fracture. (*Id*. at p. 505.)

The California Supreme Court held that there was implied malice to support defendant's conviction for second degree murder. (*People v. Cravens*, *supra*, 53 Cal.4th at p. 512.) The court concluded that the manner of the assault and the circumstances under which it was made rendered the natural consequences of defendant's conduct dangerous to life. It relied on the fact that defendant was taller and bigger than the victim, defendant inflicted a hard "sucker punch," and the victim was vulnerable—he was intoxicated and exhausted from the altercation. (*Id*. at pp. 508-509.)

There was evidence that Matute, like the victim in *People v. Cravens*, *supra*, 53 Cal.4th 500, was intoxicated and vulnerable, and defendant knew it. There was also evidence that Matute's head struck the hard street, and his feet were close to the curb,

reasonably implying that defendant was on the curb, thereby gaining a height or leverage advantage over Matute, when defendant struck Matute standing in the street. "Defendant's conduct . . . guaranteed that [the victim] would fall on a very hard surface, such as the pavement or the concrete curb. 'The consequences which would follow a fall upon a concrete walk must have been known to [defendant].' [Citations.]" (*Id*. at pp. 509.) Viewing the record in the light most favorable to the judgment, the jury could reasonably find that a person of ordinary prudence would foresee that defendant's act of striking Matute "tended to endanger life." (*People v. Rodriguez, supra*, 186 Cal.App.2d at p. 440.)

Defendant contends that there is insufficient evidence that he was the proximate cause of Matute's death to support his conviction of involuntary manslaughter. "Involuntary manslaughter, like other forms of homicide, . . . requires a showing that the defendant's conduct proximately caused the victim's death. (*People v. Sanchez* (2001) 26 Cal.4th 834, 845 [111 Cal.Rptr.2d 129, 29 P.3d 209]; *People v. Brady* (2005) 129 Cal.App.4th 1314, 1324 [29 Cal.Rptr.3d 286].) [¶] [T]he jury need not decide whether the defendant's conduct was the primary cause of death, but need only decide whether the defendant's conduct was a substantial factor in causing the death. [Citations.] [¶] [P]roximate causation requires that the death was a reasonably foreseeable, natural and probable consequence of the defendant's act, rather than a remote consequence that is so insignificant or theoretical that it cannot properly be regarded as a substantial factor in bringing about the death. (*People v. Catlin* [2001] 26 Cal.4th [81,] 155; *People v. Penny, supra*, 44 Cal.2d at p. 880; *People v. Briscoe* (2001) 92 Cal.App.4th 568, 583-584 [112 Cal.Rptr.2d 401].) Whether the defendant's conduct was a proximate, rather than remote, cause of death is ordinarily a factual question for the jury unless '"undisputed evidence . . . reveal[s] a cause so remote that . . . no rational trier of fact could find the needed nexus."' (*People v. Brady, supra*, 129 Cal.App.4th at p. 1326.) A jury's finding of proximate causation will be not disturbed on appeal if there is 'evidence from which it may be reasonably inferred that [the defendant's] act was a substantial factor in

producing' the death. (*People v. Scola* (1976) 56 Cal.App.3d 723, 726 [128 Cal.Rptr. 477].)" (*People v. Butler*, *supra*, 187 Cal.App.4th at p. 1009.)

There is sufficient evidence that defendant was the proximate cause of Matute's death. We have concluded above that the jury could reasonably infer from the evidence that defendant hit Matute. Dr. Levicky opined that the cause of Matute's death was his sustaining a blunt-force injury to his head. Dr. Levicky testified that he did not see any marks on Matute's hands or arms indicative of his attempt to break his fall, and that it is unusual for someone to have sustained these injuries as a result of falling on their own. Dr. Levicky did not find any evidence that Matute suffered from seizures, and testified that Matute's skull and brain injuries can cause foaming at the mouth or vomiting.

C. Sua Sponte Jury Instruction on Excusable Homicide

Defendant contends that the trial court erred in failing to instruct the jury, sua sponte, on the excusable homicide "in the context of accident and heat of passion" pursuant to CALCRIM 511. We disagree.

CALCRIM 511 provides in pertinent part that, "The defendant is not guilty of (murder/ [or] manslaughter) if (he/she) killed someone by accident while acting in the heat of passion."[5] Typically, "[a] trial court has a duty to instruct the jury 'sua sponte on

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[5] CALCRIM 511 provides that, "The defendant is not guilty of (murder/ [or] manslaughter) if (he/she) killed someone by accident while acting in the heat of passion. Such a killing is excused, and therefore not unlawful, if, at the time of the killing: [¶] 1. The defendant acted in the heat of passion; [¶] 2. The defendant was (suddenly provoked by _____ <insert name of decedent> / [or] suddenly drawn into combat by _____ <insert name of decedent>); [¶] 3. The defendant did not take undue advantage of _____ <insert name of decedent> ; [¶] 4. The defendant did not use a dangerous weapon; [¶] 5. The defendant did not kill _____ <insert name of decedent> in a cruel or unusual way; [¶] 6. The defendant did not intend to kill _____ <insert name of decedent> and did not act with conscious disregard of the danger to human life; [¶] AND [¶] 7. The defendant did not act with criminal negligence. [¶] A person acts *in the heat of passion* when he or she is provoked into doing a rash act under the influence of intense emotion that obscures his or her reasoning or judgment. The provocation must be sufficient to have caused a person of average disposition to act

general principles which are closely and openly connected with the facts before the court.' [Citation.]" (*People v. Abilez* (2007) 41 Cal.4th 472, 517.) "In the absence of a request for a particular instruction, a trial court's obligation to instruct [sua sponte] on a particular defense arises '"only if [1] it appears that the defendant is relying on such a defense, or [2] if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case."' [Citations.]" (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1148; *People v. Maury* (2003) 30 Cal.4th 342, 424.) "[A] trial court has no obligation to provide a sua sponte instruction on

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rashly and without due deliberation, that is, from passion rather than from judgment. [¶] Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection. [¶] In order for the killing to be excused on this basis, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time. [¶] It is not enough that the defendant simply was provoked. The defendant is not allowed to set up (his/her) own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than judgment. [¶] [*A dangerous weapon* is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.] [¶] [*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.] [¶] *Criminal negligence* involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with *criminal negligence* when: [¶] 1. He or she acts in a way that creates a high risk of death or great bodily injury; [¶] AND [¶] 2. A reasonable person would have known that acting in that way would create such a risk. [¶] In other words, a person acts with criminal negligence when the way he or she acts is so different from how an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act. [¶] The People have the burden of proving beyond a reasonable doubt that the killing was not excused. If the People have not met this burden, you must find the defendant not guilty of (murder/ [or] manslaughter)."

accident where . . . the defendant's theory [at trial] is an attempt to negate [an] element of the charged crime." (*People v. Anderson* (2011) 51 Cal.4th 989, 992, 996-999.[6])

Defendant did not rely on a defense that he killed Matute by accident while acting in the heat of passion. Defendant testified that he did not hit or touch Matute, and did not tell anyone he had. Defendant testified that Matute walked away on his own. Defendant said he did not see Matute fall, and discovered Matute after he was already on the ground. Not only did defendant not rely on the defense of excusable homicide, defendant's defense was an attempt to negate an element of homicide—that defendant killed Matute. (§ 192.) Because defendant's theory of the case was that he did not kill Matute, that theory is inconsistent with the defense of excusable homicide—that defendant killed Matute, but he did so accidently while acting in the heat of passion. The trial court did not err in failing to instruct the jury, sua sponte, on the defense of excusable homicide.

D. Battery With Serious Bodily Injury as Lesser Included Offense of Involuntary Manslaughter

Defendant contends that his conviction for battery with serious bodily injury must be reversed because it is a lesser included offense of involuntary manslaughter. We disagree.

"In general, a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act or course of conduct. 'In California, a single act or course of conduct by a defendant can lead to convictions "of *any number* of the offenses charged." [Citations.]' [¶] [However,] [a] judicially created exception to the general rule permitting multiple conviction 'prohibits multiple convictions based on necessarily included offenses.' [Citation.] '[I]f a crime cannot be committed without also

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[6] Defendant states that we are "bound by the California Supreme Court's decision in *People v. Anderson* (2011) 51 Cal.4th 989, wherein the Court held a trial court no longer has a *sua sponte* duty to instruct on accident . . . . [T]he United States Supreme Court has not spoken on the issue, and it is, of course, the final arbiter of federal constitutional issues. . . . As a result, [defendant] seeks to preserve this issue for federal review."

necessarily committing a lesser offense, the latter is a lesser included offense within the former.' [Citation.]" (*People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227.)

"There are two tests for determining whether one offense is necessarily included in another: the 'elements' test and the 'accusatory pleading' test. [Citation.] We apply the 'elements' test [w]here [the] case involves the conviction of multiple alternative *charged* offenses. . . . Under the 'elements' test, we look strictly to the statutory elements, not to the specific facts of a given case. [Citation.] We inquire whether all the statutory elements of the lesser offense are included within those of the greater offense. In other words, if a crime cannot be committed without also committing a lesser offense, the latter is a necessarily included offense. [Citations.]" (*People v. Ramirez* (2009) 45 Cal.4th 980, 984-985.)

One may commit involuntary manslaughter without committing a battery with serious bodily injury. Involuntary manslaughter may be based on the commission of a "lawful" act which might produce death. (§ 192, subd. (b); *People v. Murray* (2008) 167 Cal.App.4th 1133, 1140.) By contrast, battery, as defined by section 242, is an "unlawful" act. Battery with serious bodily injury, therefore, is not a lesser included offense of involuntary manslaughter.

Defendant contends that, "logic dictates that an involuntary manslaughter premised on a harmful or offensive touching cannot occur without a harmful or offensive touching that resulted in serious bodily injury." Defendant's contention is without merit because, as noted above, "[u]nder the 'elements' test, we look strictly to the statutory elements, not to the specific facts of a given case." (*People v. Ramirez*, *supra*, 45 Cal.4th at p. 985.)

E. Denial of Probation and Imposition of Middle Term of Imprisonment

Defendant contends that the trial court abused its discretion by failing to grant him probation or, in the alternative, by imposing middle term, as opposed to the low term, on count 1, involuntary manslaughter in violation of section 192, subdivision (b). We disagree.

1. Standard of Review

We review a trial court's sentencing choice for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.) In doing so, "we are guided by two fundamental precepts. First, '"[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."' [Citations.] Second, a '"decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'"' [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Ibid*.)

The abuse of discretion standard applies to our review of a denial of probation. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120-1121; *People v. Edwards* (1976) 18 Cal.3d 796, 807.) "[A] grant of probation is not a matter of right but an act of clemency." (*People v. Covington* (2000) 82 Cal.App.4th 1263, 1267.) Trial courts have "wide discretion" in granting or denying probation, and a defendant bears a "heavy burden" in showing that a trial court abused its discretion. (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 364-365.) "Unless the record affirmatively shows otherwise, a trial court is deemed to have considered all relevant criteria in deciding whether to grant or deny probation or in making any other discretionary sentencing choice. [Citation.]" (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1313.)

2. Background Facts

At the sentencing hearing, after hearing statements from Matute's family and defendant's parents, the trial court stated that it reviewed the sentencing memoranda

submitted by the parties and California Rules of Court, rule 4.414.[7] The trial court stated, "I do not think [this is] a probation case. . . . I know you talk about this in your sentencing memo, but the nature, seriousness and circumstances of the crime—I mean, while it was charged as an involuntary manslaughter, the fact remains that a person died as a consequence. Whether the defendant inflicted physical injury, whether the defendant was an active versus passive participant, prior record of criminal conduct—now he has this identity theft felony that was committed before, but he wasn't convicted until after, and we talked a little bit earlier off the record about [defense counsel's] suggestion that we order a supplemental report regarding his performance on probation on that case. [¶] I have to say candidly, even if the [supplemental] report came back and saying he performed very well on probation, I don't think that outweighs the other factors. [¶] The last factor I should mention under subparagraph (B)(7) is whether the defendant is remorseful. I have not seen any acceptance of responsibility or any remorse and, you know, in fact family members were standing here telling me he's innocent and the people's witnesses are liars."

Defendant's counsel argued that it is difficult for defendant to maintain at trial his innocence and also exhibit remorse, and "even if we assume [defendant] committed this act, the underlying charge is a simple battery." Defendant's counsel also argued that there was "a perfect storm" of circumstances culminating in Matute's death. Defendant's counsel acknowledged the need to punish defendant and proposed that defendant waive his approximately 126 days of custody credits if the trial court were to grant him probation and one year in county jail.

The trial court denied probation and sentenced defendant to the middle term of three years on count 1, involuntary manslaughter in violation of section 192, subdivision (b), stating, "Well, as I say, I don't think it's a probation case, and I should say, I certainly feel for his parents, particularly his mother who apparently is ill. [¶] Any time somebody goes to prison, that person's family suffers. The responsibility for that

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[7] All rules citations are to the California Rules of Court.

suffering lies, however, not with the District Attorney's Office or the court, but with the defendant who committed the crime of causing his family to be left without him for at least a period of time. [¶] I do not think it's a probation case for all the reasons I've said, in addition to the fact that, in my opinion, he committed perjury at trial, lied under oath. He had no obligation, of course, to testify and the jurors obviously rejected that testimony in convicting him. And so the lying under oath to the jury, I don't think that's a good thing. [¶] I don't think the People's request for the mid term is unreasonable given the way the mitigating and aggravating factors weigh out and the fact that he did have another felony, albeit identity theft is nothing involving physical injury to anybody. But I think the People's recommendation is reasonable . . . ." The trial court denied defense counsel's request for the imposition of the lower term.

3. Analysis

The trial court did not abuse its discretion by failing to grant defendant probation or by imposing middle term, as opposed to the low term, on his sentence for involuntary manslaughter. The trial court stated that it reviewed the sentencing memoranda submitted by the parties and rule 4.414. The record shows that the trial court considered relevant criteria pursuant to rule 4.414,[8] and counsel's arguments, in exercising its

[8] Rule 4.414 provides, "Criteria affecting the decision to grant or deny probation include facts relating to the crime and facts relating to the defendant. [¶] (a) Facts relating to the crime[.] Facts relating to the crime include: [¶] (1) The nature, seriousness, and circumstances of the crime as compared to other instances of the same crime; [¶] (2) Whether the defendant was armed with or used a weapon; [¶] (3) The vulnerability of the victim; [¶] (4) Whether the defendant inflicted physical or emotional injury; [¶] (5) The degree of monetary loss to the victim; [¶] (6) Whether the defendant was an active or a passive participant; [¶] (7) Whether the crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur; [¶] (8) Whether the manner in which the crime was carried out demonstrated criminal sophistication or professionalism on the part of the defendant; and [¶] (9) Whether the defendant took advantage of a position of trust or confidence to commit the crime. [¶] (b) Facts relating to the defendant[.] Facts relating to the defendant include: [¶] (1) Prior record of criminal conduct, whether as an adult or a juvenile, including the recency and frequency of prior crimes; and whether the prior record indicates a pattern of regular

discretion in imposing defendant's sentence, including the nature, seriousness, and circumstances of the crime as compared to other instances of the same crime (rule 4.414(a)(1)), whether defendant inflicted physical injury (rule 4.414(a)(4)), whether the defendant was an active versus passive participant (rule 4.414(a)(6)), defendant's prior record of criminal conduct (rule 4.414(b)(1)), and whether defendant was remorseful (rule 4.414(b)(7)).

Defendant argues that other criteria under rule 4.414 are applicable, requiring the grant of probation, including that defendant did not use a weapon (rule 4.414(a)(2)), the crime was committed because of an unusual circumstance which is unlikely to recur (rule 4.414(a)(7)), and the crime was not particularly sophisticated as compared to other instances of the same crime (rule 4.414(a)(8)). Because the record does not "affirmatively show[] otherwise," the trial court "is deemed to have considered all relevant criteria in deciding whether to grant or deny probation or in making any other discretionary sentencing choice." (*People v. Weaver*, *supra*, 149 Cal.App.4th at p. 1313.) Defendant has not carried his "heavy burden" (*People v. Kronemyer*, *supra*, 189 Cal.App.3d at p. 365) to "clearly show that the sentencing decision was irrational or arbitrary." (*People v. Carmony*, *supra*, 33 Cal.4th at p. 376.)

The trial court in discussing the nature, seriousness and circumstances of the crime, noted that "a person died." Involuntary manslaughter, is the "unlawful killing of a human." (§ 192.) Citing *People v. Parrott* (1986) 179 Cal.App.3d 1119, 1124-1125, defendant contends that the trial court erred in basing its denial of probation on an

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or increasingly serious criminal conduct; [¶] (2) Prior performance on probation or parole and present probation or parole status; [¶] (3) Willingness to comply with the terms of probation; [¶] (4) Ability to comply with reasonable terms of probation as indicated by the defendant's age, education, health, mental faculties, history of alcohol or other substance abuse, family background and ties, employment and military service history, and other relevant factors; [¶] (5) The likely effect of imprisonment on the defendant and his or her dependents; [¶] (6) The adverse collateral consequences on the defendant's life resulting from the felony conviction; [¶] (7) Whether the defendant is remorseful; and [¶] (8) The likelihood that if not imprisoned the defendant will be a danger to others."

element of the offense—i.e. that a person died. Defendant, however, has forfeited this claim by his failure to object on this basis before the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 353, 356 [arguments about manner in which trial court exercises sentencing discretion cannot be raised for first time on appeal].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.