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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.

CHARLES A. ALLENDER,

Defendant and Appellant.

B282737

(Los Angeles County
Super. Ct. No. BA433582)

APPEAL from judgment of the Superior Court of Los Angeles County, Laura Priver, Judge. Affirmed.

Leslie Conrad, under appointments by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Rama R. Maline, Deputy Attorney General, for Plaintiff and Respondent.

The jury convicted defendant and appellant Charles A. Allender of second degree murder. (Pen. Code, § 187, subd. (a))¹ [count 1].² The trial court found true the allegations that Allender suffered a prior conviction for a serious or violent felony within the meaning of section 667, subdivision (a)(1), and the three strikes law (§§ 667, subds. (b)–(j), 1170.12, subds. (a)–(d)), and suffered two prior convictions under section 667.5, subd. (b).

The court sentenced Allender to 35 years to life, consisting of 15 years to life in count 1, doubled pursuant to the three strikes law (§§ 667, subds. (b)–(j), 1170.12, subds. (a)–(d)), plus 5 years pursuant to section 667, subdivision (a)(1). It struck the section 667.5, subdivision (b) allegations.

Allender contends California’s standard for determining causation, which is based on proximate causation and not but-for causation, is unconstitutional in light of the Supreme Court’s decision in *Burrage v. United States* (2014) 571 U.S. 204 (*Burrage*), and that as a consequence, the trial court erred when instructing the jury on causation, leading it to reach a verdict that was not supported by substantial evidence. He further contends the

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

² Count 2, assault by means of force likely to cause great bodily injury (§ 245, subd. (a)(4)), was dismissed before trial on the prosecution’s motion.

evidence in the record was insufficient to support the jury's finding that he acted with malice aforethought.

We affirm the judgment.

FACTS

Prosecution

On February 7, 2015, at approximately 7:40 p.m., Allender and Derek Miller³ had an altercation with Derrick Hamilton in the Burger King parking lot at the corner of Cesar Chavez Avenue and Grand Avenue in Los Angeles. Edgar Alexander, who was in the restaurant, said that Hamilton had been eating and minding his own business prior to the fight. He believed that Allender and Miller were homeless.

Annette De Anda and Yvette Daly were also present during the confrontation, and saw both men kick and stomp on Hamilton while he lay on the ground. De Anda said that Hamilton did not defend himself or try to strike his attackers. She heard either Allender or Miller yell, "You have a gun," or "You were going to shoot me." Hamilton did not appear to have a weapon, however. Both Allender and Miller said, "I'm going to kill you fucking [racial epithet]."⁴

³ Miller was also charged in this case but entered a plea before trial.

⁴ Allender and Miller are White. Hamilton was Black.

Daly also heard Allender say, “I’m gonna kill you fucking [racial epithet].” One of the men tried to pull Hamilton’s shirt over his head. Allender was more active in the attack than Miller. The fight lasted for a few minutes. Allender gave one final kick to Hamilton’s head and then left him on the sidewalk. Allender and Miller laughed as they were leaving. Daly called the police. De Anda went over to Hamilton. She saw him die.

Officers Edward Lopez and Jessy Gutierrez responded to the scene. They apprehended Allender and Miller as they were walking east on Cesar Chavez Avenue. Allender looked like he had been in a fight. He was sweaty and his pants and knuckles were bloody.

Officer Lopez approached Hamilton, whose face was “pretty beat up.” Hamilton was bleeding from the nose and mouth. He was not breathing. When the paramedics arrived, Hamilton was “biologically” dead. He was unconscious and had no pulse. They performed CPR and transported him to the hospital.

Dr. Vadim Poukens performed the autopsy. He observed multiple abrasions and lacerations, mostly to Hamilton’s face, and bruises on his scalp. Hamilton had rib fractures that may have been caused by the attack or resulted from the CPR, which is a common result in the life-saving procedure. Hamilton also had an enlarged heart, which put him at risk of sudden cardiac death. The blood in Hamilton’s heart contained cocaine, benzoylecgonine, and

methamphetamine. His femoral blood also contained methamphetamine.

Dr. Poukens concluded that Hamilton died from the effects of multiple drugs (cocaine and methamphetamine), blunt force trauma, and hypertrophic heart disease. The blunt force injuries alone would not have caused death, but they were a substantial contributing factor and accelerated Hamilton's death. Hypertrophic heart disease was also a substantial contributing factor.⁵ The stimulating effect of cocaine and methamphetamine increases blood pressure and adds to stress on the heart. Hamilton was more likely to die because of the drugs' effects. Blunt force trauma would also increase stress on the heart. A person with an enlarged heart is predisposed to die as a result of blunt force trauma. Hamilton would likely have survived his blunt force trauma injuries if he had not ingested the drugs and did not have hypertrophic heart disease.

Surveillance footage showed Hamilton gesturing for someone to leave the premises at 7:41 p.m. At 7:43 p.m., Miller and Allender hit Hamilton, knocking him to the ground. The men hit, kicked, and stomped on Hamilton for

⁵ In the autopsy report Dr. Poukens ascribed the death to the effects of multiple drugs. He noted that nonfatal blunt force injuries and hypertrophic heart disease contributed but were not related to the immediate cause of death. Detective Steve Chung testified that when asked whether Hamilton would have died had he not been beaten, Dr. Poukens responded, "Maybe, I don't know," and, "Nobody knows what happened to this man."

approximately two or three minutes. When Hamilton attempted to get up, they knocked him down again and continued kicking him.

Defense

Detective Ignacio Mendez interviewed Daly and De Anda on February 7, 2015. De Anda said she heard both white males say, “You fucking [racial epithet]. You were going to shoot me?” She did not say Allender said, “[Racial epithet] I’m going to kill you.” Daly did not say that Allender said, “You fucking [racial epithet], I’m going to kill you.” If they had made these statements, the detective would have included them in his report.

Allender testified that he and Miller were homeless on February 7, 2015. They were going to the Burger King to have dinner. Hamilton rode up on a bicycle and got into a brief verbal confrontation with Allender. He did not want Allender on the premises. He told Allender to leave and threatened him. Hamilton told Allender to empty his pockets, and demanded money. He said he was going to shoot Allender and then reached under his jacket in a menacing manner.

Outside of the surveillance camera’s view, Hamilton hit Miller and knocked him to the ground. Allender was afraid for his life and had to defend himself. He jumped on Hamilton to stop Hamilton from killing him. When

Hamilton backed up and fell to the ground, Miller entered the fight.

Allender admitted that he hit and kicked Hamilton in the face during the fight. He knew that stomping on someone and kicking them was dangerous, but he was not trying to kill Hamilton. Hamilton provoked the men by threatening to shoot them. Throughout the fight Allender believed Hamilton was going to shoot him. He wanted to make sure Hamilton could not hurt him. Hamilton was still alive when Allender left. Although he was sitting up, he no longer posed a threat.

DISCUSSION

Proximate Causation

Allender contends the United States Supreme Court's decision in *Burrage, supra*, 571 U.S. 204, requires that causation be evaluated under the "but-for" standard employed by the majority of states, rather than under the "substantial factor" standard articulated by our Supreme Court in *People v. Jennings* (2010) 50 Cal.4th 616 (*Jennings*). Assuming that the majority standard applies, Allender argues the trial court erred in instructing the jury regarding substantial factor causation under CALCRIM Nos. 240 and 620, and that the jury's causation finding is not supported by substantial evidence. We reject the contention that *Burrage* mandates adoption of the but-for standard, and

therefore necessarily reject Allender’s claims of instructional error and insufficient evidence, which are wholly dependent on the applicability of that standard.

In *Burrage*, the Supreme Court interpreted a provision of the Controlled Substances Act. The statute imposes a 20-year mandatory minimum sentence on any person who distributes schedule I or schedule II drugs when death or great bodily injury “results from the use” of the substance sold. (*Burrage*, *supra*, 571 U.S. at p. 206, citing 21 U.S.C. § 841(a)(1), (b)(1)(A)–(C) (2012 ed.).) Burrage sold heroin to the victim, but the victim died from an overdose of multiple drugs—the heroin was simply a contributing factor in the death. (*Id.* at pp. 206–208.) The Supreme Court considered the issue of whether the “results from” element could be satisfied when the heroin use was a concurrent cause, but not a but-for cause, of death. The court concluded it could not. (*Id.* at pp. 210–214.) In reaching its holding, the Supreme Court interpreted the specific “results from” language Congress used in the federal statute. It found that, in the absence of a “textual or contextual indication to the contrary,” the ordinary meaning of the words imposed a requirement of but-for causation. (*Id.* at p. 212.) The court did not impose a definition of causation as a matter of constitutional mandate. To the contrary, the Supreme Court recognized that “Congress could have written [the statute] to impose a mandatory minimum when the underlying crime ‘contributes to’ death . . . , or adopted a modified causation test tailored to cases involving concurrent causes” (*Id.*

at p. 216.) Furthermore, the Supreme Court recognized a minority of jurisdictions have adopted the principle that an act “is considered a cause-in-fact if it was a ‘substantial’ or ‘contributing’ factor in producing a given result.” (*Id.* at p. 215.) It acknowledged California was one such jurisdiction, citing *Jennings, supra*, 50 Cal.4th at page 643. (*Burrage, supra*, at p. 215.) *Burrage* did not purport to overrule California law by adopting a constitutionally mandated definition of causation applicable for all criminal statutes. The Supreme Court simply concluded that Congress, in enacting the mandatory minimum sentencing provision of the Controlled Substances Act, had intended the narrower definition, because “[i]t chose . . . to use language that imports but-for causality.” (*Id.* at p. 216; see *Camacho v. English* (7th Cir. 2017) 872 F.3d 811, 814 [noting that “*Burrage* is a statutory-interpretation case” and declining to extend *Burrage* to impose a but-for causation requirement to the federal kidnapping statute, which provides enhanced penalties “if the death of any person results”].)

Defendant argues that the Legislature’s employment of the phrase “resulted from” in California’s murder statute is unconstitutionally vague, and that *Burrage* requires it to be interpreted to require but-for causation. As the Attorney General points out, the provision defining murder is section 187, which states in pertinent part that “Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.” (§ 187, subd (a).) It does not contain the phrase “results from.” That language is included in section

188, the provision that defines malice, the mental state required for certain types of murder. Section 188 provides, “When it is shown that the killing *resulted from* the intentional doing of an act with express or implied malice . . . no other mental state need be shown to establish the mental state of malice aforethought.” (Italics added.) It clarifies that malice alone may be a sufficient mens rea finding to support a murder conviction under the specified circumstance. It has no relevance to the causation arguments defendant raises here.⁶

In California, “it 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 (*Sanchez*); see, e.g., *People v. Kemp* (1957) 150 Cal.App.2d 654.) “[I]t is proximate causation, not direct or actual causation, which, together with the requisite culpable mens rea (malice), determines defendant’s liability for murder.” (*Sanchez*, *supra*, at p. 845.) Our Supreme Court has held that “““When the conduct of two or more persons *contributes concurrently as the proximate cause of the death*, the conduct of each is a proximate cause of the death if that conduct was also a

⁶ Given that defendant fails to identify specific statutory language regarding the element of causation that is ambiguous, and potentially subject two reasonable interpretations that stand in relative equipoise, his arguments regarding the rule of lenity also have no relevance. (See *People v. Nuckles* (2013) 56 Cal.4th 601, 611.)

substantial factor contributing to the result. A cause is concurrent if it was operative at the time of the death and acted with another cause to produce the death.” [Citation.]’ (*People v. Sanchez*[, *supra*, at p.] 847; see also 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, § 37, p. 243 [‘The defendant may also be criminally liable for a result directly caused by his or her act, even though there is another contributing cause.’].) ‘To be considered the proximate cause of the victim’s death, the defendant’s act must have been a substantial factor contributing to the result, rather than insignificant or merely theoretical.’ (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 583–584.) ‘[A]s long as the jury finds that without the criminal act the death would not have occurred when it did, it need not determine which of the concurrent causes was the principal or primary cause of death.’ ([*People v.*] *Catlin* [(2001)] 26 Cal.4th [81], 155 [(*Catlin*)].)” (*Jennings, supra*, 50 Cal.4th at p. 643.)

The trial court correctly instructed the jury regarding the substantial factor standard under CALCRIM Nos. 240 and 620. (*Catlin, supra*, 26 Cal.4th at p. 155 [holding it was not error to instruct the jury it could return a guilty verdict if it found concurrent causes of death “even if the victim’s preexisting physical condition also was a substantial factor causing death”].) Moreover, the jury’s causation finding was supported by substantial evidence, as the physician who performed the autopsy testified that in his professional opinion the beating was a “substantial cause” of Hamilton’s death. (See *People v. Leigh* (1985) 168 Cal.App.3d 217, 221

[testimony of a single witness is sufficient to uphold a finding “even if it is contradicted by other evidence, inconsistent or false as to other portions”].)⁷

Malice

Defendant contends there was insufficient evidence to support the jury’s finding that he acted with either implied or express malice. This contention also lacks merit.

“In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we “examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] . . . “[I]f the circumstances reasonably justify the jury’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.” [Citation.]

⁷ Defendant also makes a claim of ineffective assistance of counsel based on trial counsel’s failure to object to the jury instructions regarding causation. Given our ruling that these instructions were proper, counsel’s failure to object is not a basis for ineffective assistance. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1135.)

We do not reweigh evidence or reevaluate a witness's credibility. [Citation.]' [Citations.]" (*People v. Scott* (2011) 52 Cal.4th 452, 487 (*Scott*).)

The jury was instructed on both express malice and implied malice. "Murder is the unlawful killing of a human being . . . with malice aforethought.' [Citation.] 'Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.' [Citation.] 'Murder that is committed with malice but is not premeditated is of the second degree.' [Citations.]" (*People v. Prince* (2007) 40 Cal.4th 1179, 1265–1266.) "Malice will be implied 'when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life. [Citations.]' [Citations.]" (*People v. Taylor* (2010) 48 Cal.4th 574, 623–624.)

Allender acknowledges that De Anda testified she heard Allender and Miller repeatedly say, "I'm going to kill you fucking [racial epithet]," as they kicked and beat Hamilton, and that Daly testified he heard Allender say, "I'm gonna kill you [racial epithet]," and concedes the testimony "would suggest that appellant acted with express malice." Notwithstanding, he argues the testimony is

“isolated evidence” taken out of context, and not sufficient to support a malice finding in light of the record as a whole. His argument is an attempt to persuade us to reweigh the evidence and make a contrary finding in his favor, which is inconsistent with the governing standard of review. (See *Scott, supra*, 52 Cal.4th at p. 487 [“We do not reweigh evidence or reevaluate a witness’s credibility”].) Two witnesses testified that Allender said he was going to kill Hamilton while kicking him and stomping on his head. It is hard to imagine that Allender could have been any clearer regarding his intent to take Hamilton’s life. Viewing the evidence in the light most favorable to the judgment, substantial evidence supports the jury’s malice finding.

DISPOSITION

We affirm the judgment.

MOOR, J.

We concur:

BAKER, Acting P.J.

KIM, J.*

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