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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LUCIANO RODRIGUEZ, Defendant and Appellant.	B279786 (Los Angeles County Super. Ct. No. BA437060)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert J. Perry, Judge. Affirmed.

C. Matthew Missakian, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

Luciano Rodriguez (defendant) was convicted by jury of one count of voluntary manslaughter (Pen. Code,[1] § 192), a lesser included offense of the charged crime of murder. The jury found true the allegation that defendant used a deadly weapon, a knife, in the commission of the crime. (§ 12022, subd. (b)(1).) The trial court sentenced defendant to the low term of three years for the manslaughter conviction plus a one-year enhancement term for the deadly weapon allegation.

Defendant appeals from the judgment of conviction, contending the trial court erred prejudicially in denying his request for an instruction on involuntary manslaughter and abused its discretion in allowing the prosecution to call as a rebuttal witness an expert who should have been called in the case-in-chief. There is insufficient evidence to support an involuntary manslaughter instruction, and there is no reasonable probability that defendant would have achieved a more favorable result in the absence of the rebuttal witness's equivocal testimony. Accordingly, we affirm the judgment of conviction.

BACKGROUND

A few weeks before May 22, 2015, Jose Orellana (Orellana) and his girlfriend Cynthia Rodriguez (Cynthia) were walking along North Broadway in the city of Los Angeles when they passed an apartment building. Three Hispanic men were sitting on the steps. According to Cynthia, one of the men asked Orellana where he was from. Orellana told the men not to disrespect him because he was with Cynthia. As the couple walked away, one of the men yelled either "DBT" or "Down Brown Thugs," the name of a tagging crew. Orellana was in the "AV" tagging crew.

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1 Further undesignated statutory references are to the Penal Code.

Ernesto Chavez, a member of DBT, testified at trial that about a week before May 22 he was on the front steps of his apartment building when Orellana and Cynthia walked by. Orellana looked at him "the wrong way" and Chavez said, "What are you looking at?" Orellana cursed out Chavez and they "had a conflict. And that's when he was like, oh, I'll come back." Chavez understood this as a threat. According to Chavez, defendant, who lived in the building, came outside at the end of this encounter.

On May 22, Orellana and Cynthia texted each other about breaking up. About 4:30 p.m., he texted her that he might do something that would cause him to be put in jail. Orellana then called Cynthia, said that he was going to do something "dumb" and if something happened to him, he still loved her. Cynthia told Orellana not to do something dumb. He hung up on her and did not respond to her subsequent calls or texts.

Sometime after 3:30 p.m. that day, Orellana sent a friend a message with a photo of Griffin Avenue near defendant's apartment building. He later sent another text that read, "Tht foo Woody. A bitch don't want to come out, ah." Defendant's nickname is Woody.

Surveillance video from businesses near defendant's apartment shows Orellana walking down North Broadway near defendant's apartment and sitting down on a bench. After a short time, Orellana gets up and walks back down the sidewalk. The video shows defendant walking toward Orellana. The men pass each other, then stop and turn around to face each other. A brief fight ensues, then the men separate. Orellana walks away, and defendant enters his apartment building.

The video shows that Chavez and defendant came out of the building some time later and got into a car. Defendant was carrying a baseball bat. Chavez provided background to the men's departure. He testified that

defendant came to his apartment and told Chavez he had been pepper sprayed and assaulted. Defendant's face was red. Chavez poured milk on defendant's face to help with the pepper spray. He then pressured defendant to go look for the man who assaulted him. They drove around in the car, but did not find the man. Defendant told Chavez he had defended himself with a knife. According to Chavez, defendant "knew that he struck him, but he didn't know that he, in fact, stabbed him."

A separate video shows Orellana's actions after the fight. Orellana walked around a corner and fell to the ground. Pedestrians, paramedics and police soon arrive. When paramedics arrived, Orellana was nonresponsive. They saw a blood smear on the wall and so they removed Orellana's clothing. They discovered a penetration wound on the left side of his chest. Orellana later died from the wound.

One of the responding paramedics, Mark Moyer, testified that he had experience treating victims who had been exposed to pepper spray. Moyer explained that pepper spray on a patient could cause tearing of a medic's eyes, a burning sensation around the mouth and lips and a runny nose. When Moyer examined Orellana, he did not smell anything and was not affected "by any kind of secondary contact that would indicate [Orellana] was pepper sprayed."

Los Angeles Police Department (LAPD) Officer Guillermo Calleros helped secure the crime scene and looked for evidence. Among other things, Officer Calleros searched the area for weapons. He did not find any weapons, including pepper spray canisters, in the search area, which consisted of both sides of North Broadway to Griffin, the intersection of Broadway and Griffin, and the area around the Taco King restaurant where blood was found. LAPD Detective Stephanie Carrillo obtained Orellana's backpack from his family

several days after the stabbing. At that point, there were no weapons or pepper spray in the backpack.

Defendant testified on his own behalf at trial. On May 22, 2015, he was walking home from work when he crossed paths with Orellana. Orellana asked him where he was from. Defendant was frightened because he had been shot a year earlier immediately after being asked this exact question. Defendant replied, "Down Brown Thugs." According to defendant, Orellana immediately sprayed him in the face with pepper spray.

Defendant was thrown back. He felt pain and could barely open his eyes. Defendant thought Orellana might have another weapon and might try to kill him.

Defendant was wearing a knife from work on his belt. He pulled the knife off his belt, opened it and began swinging it around. He was not really thinking, but was just reacting and trying to protect himself. He testified that he did not intend to hurt or kill Orellana, but rather to keep him away. Defendant could see only blurry shapes due to the effects of the pepper spray, but he felt that Orellana was still in front of him. Defendant still felt he was in danger and so he moved toward Orellana. They both fell down. Orellana got up and ran away.

Defendant testified he did not realize he had stabbed Orellana, or made any contact with him at all. Defendant returned to his apartment building and knocked on the door, yelling that he had been pepper sprayed. Bryan Maria (Maria) let him in. Defendant washed his face. Maria gave a similar account of events. He described defendant's eyes as "bloodshot red" with pink color on his face around his eyes. Defendant appeared to be in pain. According to Maria, defendant washed his face for five to 10 minutes.

After washing his face, defendant went upstairs to Chavez's apartment. Defendant told Chavez he had been pepper sprayed. He washed his face again. Defendant wanted Chavez to help him find the man who had attacked him because he was worried the man would come back. Defendant and Chavez drove around for a while but did not find Orellana.

Defendant testified that some of Chavez's testimony at trial was not accurate. Chavez did not pour milk on defendant's face and did not pressure defendant to look for Orellana. Defendant had no recollection of the incident Chavez described involving Cynthia and Orellana. The first time defendant remembered seeing Orellana was on May 22.

DISCUSSION

I. Involuntary Manslaughter Instruction

Defendant asked the trial court to instruct the jury on involuntary manslaughter on the basis of Justice Kennard's concurring opinion in *People v. Bryant* (2013) 56 Cal.4th 959 (*Bryant*). He contended the jury could find that he did not intend to kill Orellana "when he arguably committed the crime of assault with a deadly weapon." In such circumstances, defendant asserted, he would be guilty of involuntary manslaughter.

The trial court denied the request, stating, "I just don't think the case that you're citing—and what you're citing is the concurring opinion by a Supreme Court justice and I just—I do not see involuntary manslaughter is an appropriate instruction and I don't think that's what the *Bryant* majority held. This is a concurring opinion that talks about how perhaps we should give involuntary manslaughter instructions. But in that case, it was a little different. You had a cohabitation situation. There was testimony from the defendant that she, in essence, accidentally stabbed her common-law

husband during the fracas they were experiencing. This is a different situation. I don't see it fits."

A. Law

In *Bryant*, the defendant fatally stabbed her boyfriend in the chest when he moved toward her during an altercation. She claimed she did not intend to kill him. Defendant was convicted of second degree murder, and appealed. The Court of Appeal reversed, holding the trial court erred in failing to instruct the jury that an unintentional killing without malice in the course of an inherently dangerous assaultive felony was voluntary manslaughter. (*Bryant, supra*, 56 Cal.4th at p. 963.)

The Supreme Court reversed the Court of Appeal, holding that a defendant "who has killed without malice in the commission of an inherently dangerous assaultive felony must have killed without either an intent to kill or a conscious disregard for life. Such a killing cannot be voluntary manslaughter because voluntary manslaughter requires either an intent to kill or a conscious disregard for human life." (*Bryant, supra*, 56 Cal.4th at p. 970.)

The majority declined to address the defendant's alternative contention that the trial court erred in failing to instruct the jury on involuntary manslaughter. (*Bryant, supra*, 56 Cal.4th at pp. 970-971.) In a concurring opinion, Justice Kennard noted that under the reasoning of *People v. Rios* (2000) 23 Cal.4th 450, a killing without malice can only be manslaughter. (*Bryant,* at p. 974.) She reasoned that since the majority in *Bryant* held that a killing without malice in the commission of an inherently dangerous assaultive felony is not voluntary manslaughter, it must be involuntary manslaughter. (*Ibid.*)

Our colleagues in Division Seven recognized that *Bryant* did not reach the issue of whether a homicide committed without malice during the course of an inherently dangerous assaultive felony not otherwise amounting to felony murder was involuntary manslaughter and that Justice Kennard's concurring opinion in *Bryant* was not controlling. (*People v. Brothers* (2015) 236 Cal.App.4th 24, 33 (*Brothers*).) They found, however, that her logic was unassailable: if an unlawful killing in the course of an inherently dangerous assaultive felony without malice must be manslaughter under *People v. Hansen* (1994) 9 Cal.4th 300, and the offense is not voluntary manslaughter under *Bryant, supra*, 56 Cal.4th at page 970, the necessary implication of the majority's decision in *Bryant* is that the offense is involuntary manslaughter. (*Brothers, supra*, 236 Cal.App.4th at pp. 33-34.)

We agree with our colleagues that "an instruction on involuntary manslaughter as a lesser included offense must be given when a rational jury could entertain a reasonable doubt that an unlawful killing was accomplished with implied malice during the course of an inherently dangerous assaultive felony." (*Brothers, supra,* 236 Cal.App.4th at p. 34.) "Nevertheless, 'the existence of "*any* evidence, no matter how weak," will not justify instructions on a lesser included offense . . . .' [Citation.] Such instructions are required only where there is 'substantial evidence' from which a rational jury could conclude that the defendant committed the lesser offense, and that he is not guilty of the greater offense." (*People v. DePriest* (2007) 42 Cal.4th 1, 50.) "In deciding whether there is substantial evidence of a lesser offense, courts should not evaluate the credibility of witnesses, a task for the jury." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

B. Analysis

There is no substantial evidence from which a rational jury could conclude that defendant committed involuntary manslaughter and was not guilty of voluntary manslaughter.

As defendant acknowledges, assault with a deadly weapon is an inherently dangerous assaultive felony. (See *Bryant, supra,* 56 Cal.4th at p. 966; *People v. Ireland* (1969) 70 Cal.2d 522, 539; *People v. Chun* (2009) 45 Cal.4th 1172, 1181.) Since defendant engaged in an act which was inherently dangerous to human life, he has satisfied the objective component of implied malice as a matter of law. (*Brothers, supra,* 236 Cal.App.4th at p. 35.)

To the extent defendant contends he did not commit an assault because he did not intend to hurt the victim, defendant is mistaken about the mental state required for an assault. Assault "does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur." (*People v. Williams* (2001) 26 Cal.4th 779, 790 (*Williams*).) "[A] defendant who honestly believes that his act was not likely to result in a battery is still guilty of assault if a reasonable person, viewing the facts known to defendant, would find that the act would directly, naturally and probably result in a battery." (*Id.* at p. 788, fn. 3.)

For a defendant to be guilty of assault, he "must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct." (*Williams*, *supra*, 26 Cal.4th at p. 788.) Defendant's testimony conclusively demonstrates he was aware that he had a knife in his hands, aware that he was swinging the knife around in the air, and aware that he was in close proximity to Orellana, and chose to move toward Orellana even though his vision was seriously

impaired. As a matter of law, these facts would lead a reasonable person to realize that a battery would directly, naturally and probably result from the defendant's conduct.

Implied malice also has a subjective component. A defendant must actually appreciate the danger to human life his conduct posed. (*Brothers, supra,* 236 Cal.App.4th at p. 35.) Here, there is no material issue as to defendant's subjective awareness of the danger.

Defendant never claimed he believed there was no danger to Orellana from defendant's wielding of the knife. To the contrary, his testimony demonstrated he was aware of the danger of swinging a knife around. Defendant testified that he felt Orellana "was there to attack" him and he wanted to defend himself, so he took out the knife, opened it and started swinging it. Defendant testified, "I knew I had to protect myself." He added that although his vision was very blurry when he was swinging the knife, "I sensed the guy and I knew that I was being attacked." Thus, defendant believed swinging the knife would deter Orellana from approaching him, precisely because he knew that Orellana could be seriously injured if he came into contact with the knife. Even assuming defendant believed it would not be dangerous to stand still and swing the knife through empty air, that is not what he did. When he realized that Orellana was "still there," he moved toward Orellana. He continued to move forward even as Orellana moved backwards.

Since the objective element of implied malice was satisfied as a matter of law and there is no material issue concerning defendant's subjective

awareness of the danger, the trial court did not err in refusing defendant's request for an involuntary manslaughter instruction.[2]

II. Rebuttal Witness

At the close of the defense case, the prosecution announced its intention to call Officer Wirth, a training officer responsible for pepper spray training at the police academy, as a rebuttal witness. The prosecution indicated that Officer Wirth would testify about "the effects of the different types of pepper spray, what it can do, and basically whether or not getting blasted with pepper spray would have that much impairment, as the defendant testified to, the ability to see what the defendant said he was able to see."

Defense counsel objected that there was no evidence about the level of exposure suffered by defendant, and so Wirth's testimony would be speculation. Counsel also objected that the prosecution had been aware that defendant claimed to have been pepper sprayed in the face for more than a year before trial and that the expert testimony "would have been properly brought through discovery means and in its case-in-chief rather than rebuttal evidence." Defense counsel pointed out that "the defense would have had an opportunity to—if it was aware that expert testimony was going to be elicited, to get an expert of our own so we can discuss . . . the People's expert testimony."

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[2] The day before oral argument in this matter, counsel for defendant filed a written request that the Court obtain and review trial exhibits 28 through 31; he renewed that request at argument. These exhibits are neighborhood surveillance videos that contain views of the encounter between defendant and Orellana. As defendant acknowledges in his request, both parties summarized and cited these exhibits in their briefs. We grant that request. Following argument, the court viewed the four DVD's. They do not add anything to the facts and arguments in the parties' briefs.

The court allowed the testimony, stating "it seems to me that there is a real issue in this case as to whether your client was pepper sprayed." The court added, "I think it might be helpful to the jury to hear from someone who deals with pepper spray. . . . I think it's probably appropriate for somebody to say I've worked with pepper spray and if you've been pepper sprayed, you're going to be more than a little disoriented. You're going to be gasping for breath and you're going to not be able to go punch somebody. I think that's really the point of calling the witness."

A. Law

"The decision to admit rebuttal evidence rests largely within the discretion of the trial court and will not be disturbed on appeal in the absence of demonstrated abuse of that discretion." (*People v. Young* (2005) 34 Cal.4th 1149, 1199 (*Young*).) The erroneous admission of such evidence is reviewed to determine if there is a reasonable probability the jury would have reached a more favorable outcome in the absence of the error. (*People v. Crew* (2003) 31 Cal.4th 822, 854.)

"'[P]roper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt.'" (*Young, supra,* 34 Cal.4th at p. 1199.) "Testimony that repeats or fortifies a part of the prosecution's case that has been impeached by defense evidence may properly be admitted in rebuttal. [Citations.]" (*Ibid.*)

"Restrictions are imposed on rebuttal evidence (1) to ensure the presentation of evidence is orderly and avoids confusion of the jury; (2) to prevent the prosecution from unduly emphasizing the importance of certain

evidence by introducing it at the end of the trial; and (3) to avoid 'unfair surprise' to the defendant from confrontation with crucial evidence late in the trial." (*Young, supra,* 34 Cal.4th at p. 1199.)

"Unfair surprise" related to rebuttal witnesses can often be prevented by compliance with discovery procedures. As our Supreme Court has explained, "'the disclosure by the defense of its witnesses under section 1054.3 signals to the prosecution that the defense "intends" to call those witnesses at trial. It follows that the prosecution must necessarily "intend" to call any of its witnesses who will be used in refutation of the defense witnesses if called. A prosecutor cannot "sandbag" the defense by compelling disclosure of witnesses the defense intends to call, and then in effect redefining the meaning of "intends" when it comes time to disclose rebuttal witnesses.'" (*People v. Gonzalez* (2006) 38 Cal.4th 932, 956.) When a defendant claims a violation of his pretrial discovery right, he must establish that """"there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different."""""" (*Id*. at p. 960.)

B. Analysis

The prosecution was aware well before trial that one of its own witnesses, Chavez, would testify that defendant told him shortly after the killing that the victim had pepper sprayed him and that the defendant's eyes were red. The prosecution had possession of and intended to play surveillance video of the encounter between defendant and the victim. Further, the prosecution was aware before trial that defendant intended to call Maria to testify that defendant stated that he had been pepper sprayed by the victim and that defendant's face and eyes were red shortly after the killing.

This knowledge did not require the prosecution to introduce any evidence negating the use of pepper spray in its case-in-chief. The use or non-use of pepper spray was not "a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime" and was not implicit in defendant's general denial of guilt. (See *Young, supra*, 34 Cal.4th at p. 1199.) The prosecutor could properly have waited to see if defendant in fact called Maria as a witness and/or if defendant himself testified about the use of pepper spray before calling any witnesses to impeach the defense evidence. Absent such testimony, the prosecutor might have elected not to highlight the pepper spray issue by challenging it. If, however, the prosecutor intended to wait and challenge the use of pepper spray after the defense testimony, the prosecutor was required to disclose the witnesses he intended to call to do that. (See *Gonzalez, supra,* 38 Cal.4th at p. 956.)

The prosecution was also free to "split" the witnesses, calling some in the case-in-chief and waiting to see if others would be necessary in light of the defense testimony. (See *Young, supra*, 34 Cal.4th at p. 1199 [when defense impeached prosecution witness on cross-examination and then offered defense witnesses who also impeached the prosecution witness, it was proper for prosecution to offer rebuttal witness to rehabilitate initial prosecution witness].) Such a split would not relieve the prosecution from disclosing all the potential witnesses, however.

Here, the defendant's behavior after allegedly being pepper sprayed was known to the prosecution because it was shown in the surveillance video. If the prosecution intended to call a rebuttal expert witness such as Officer Wirth to testify that defendant's behavior in the video was inconsistent with

a person who has been pepper sprayed, the prosecution should have disclosed such a witness before trial.[3]

Thus, there is merit to defendant's contention that permitting Officer Wirth to testify in rebuttal was an "unfair surprise" and was contrary to the purpose of the restrictions on rebuttal evidence.

C. Prejudice

Any error in permitting the testimony was harmless, however. Defendant contends the testimony was damaging because it attacked the substance of his self-defense claim and suggested that he had committed perjury and persuaded a friend to commit perjury as well. Defendant also complains of prejudice from Wirth's testimony that pepper spray is not a lethal weapon.

Wirth did opine that "the person in the video" was not pepper sprayed based on what was shown in the surveillance video, but that opinion was based at least in part on the fact that the video does not show any pepper spray. When asked directly if it was "consistent that someone, after getting say pepper sprayed in the face, full blast of pepper spray in the face, would quickly pull out a knife and be able to go directly at the person that pepper sprayed them?" Wirth replied, "[I]t's always possible, but with most of the recruits that we dose, they wouldn't be able to." Wirth acknowledged, however, that he had no way of knowing if defendant received a direct hit in

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[3] Of course, not every detail of a defense witness's testimony can be anticipated by the prosecution. When defendant testified, he provided details of how the pepper spray affected his vision, stating that he was able to see to a very limited degree. It was not apparent from the video that defendant would make such a claim, and so the prosecutor might well not have intended to call an expert witness on this topic. If Officer Wirth had testified only on the effect of pepper spray on vision, there would have been no "unfair surprise" from his testimony.

the face as his recruits did. He also acknowledged that the effect of pepper spray on a person depended on how much of the pepper spray actually reached the person's face, and he was unable to assess that by looking at the video.

Wirth's testimony was not the only evidence concerning pepper spray use. The prosecutor presented other evidence, less equivocal than Wirth's testimony, that no pepper spray was used: officers did not find any pepper spray containers, the paramedic did not detect any signs of pepper spray on the victim and the surveillance video did not show the victim using pepper spray. Thus, there is no reasonable probability the jury would have reached a different conclusion about the victim's use of pepper spray, or of the related issue of defendant's credibility, in the absence of Wirth's testimony.

There is likewise no reasonable probability that defendant would have received a more favorable result in the absence of Wirth's testimony. Defendant was convicted of voluntary manslaughter. As we explain in section I above, he was not entitled to an instruction on involuntary manslaughter. Thus, the only potentially more favorable outcome would be an acquittal on the ground that defendant acted in "perfect" self-defense.

The jury was instructed pursuant to CALCRIM No. 505 that self-defense requires a "reasonable" belief of imminent danger and a "reasonable" belief that the immediate use of deadly force was necessary. The jury was further instructed, "When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed."

Taking defendant's testimony as true, no reasonable person in a situation similar to defendant's with similar knowledge would have believed

that death was imminent from being sprayed with pepper spray. Defendant did not present any evidence that the use of pepper spray could result in death or great bodily injury. He did not testify that he believed that pepper could cause death or great bodily injury. Rather, he testified that he believed Orellana must have had another weapon. There was, however, no evidence that Orellana did have another weapon.

Defendant identified a significant amount of his fear as arising from a previous incident in which he was shot after being asked where he was from. In that prior incident, however, the challenger drew a firearm before asking defendant where he was from. Once defendant responded, his challenger began shooting.

A reasonable person with knowledge similar to defendant's would not have equated the threat posed in this case with the threat experienced in the prior shooting incident. Here, an apparently unarmed person challenged defendant, then immediately used relatively harmless pepper spray on him. In the prior incident, a visibly armed person challenged defendant, then immediately fired his weapon at defendant. The two threats are not comparable. A reasonable person would not believe that every apparently unarmed person who challenged him must have a firearm or other lethal weapon concealed on his person and intend to use it, but only after first using a nonlethal weapon. Even if defendant actually believed that Orellana had another weapon, a reasonable person in his position would hot have harbored such a belief.

DISPOSITION

The judgment of conviction is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

GOODMAN, J.*

We concur:

ASHMANN-GERST, Acting P.J.

HOFFSTADT, J.

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