Filed 3/20/12 P. v. Maldonado CA2/5

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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. EUGENIO MORA MALDONADO, Defendant and Appellant.	B228175 (Los Angeles County Super. Ct. No. PA017776)

APPEAL from an order of the Superior Court of Los Angeles County, Cynthia L. Ulfig, Judge. Affirmed as modified.

Marcia C. Levine, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka and Lance E. Winters, Senior Assistant Attorneys General, Mary Sanchez, Susan Sullivan Pithye and Robert S. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Following a jury trial, appellant[1] was found guilty of second degree murder in violation of Penal Code[2] section 187, subdivision (a). The jury also found appellant used a deadly and dangerous weapon in the commission of the offense (§ 12022, subd. (b)). Appellant was sentenced to a 1-year determinate term plus a term of 15 years to life.

Appellant maintains the trial court improperly neglected to instruct the jury with the lesser included offense of involuntary manslaughter on the theory that he committed the murder while committing a felony, i.e., assault with a deadly weapon, that was not inherently dangerous. In the alternative, he argues in a supplemental brief that if assault with a deadly weapon is determined to be an inherently dangerous felony, the trial court had a sua sponte duty to instruct the jury on the lesser included offense of voluntary manslaughter. Appellant also contends his conduct credit was not properly calculated and that the trial court improperly imposed monetary penalties. We agree with the claims regarding the credit and the financial penalties but reject the contentions related to the lesser included offense instructions. The judgment, as modified, is affirmed.

II. FACTS

A. Prosecution Case

After spending the early evening hours at various locations consuming several beers with his friend Emilio Sandoval, appellant and Sandoval arrived at Sandoval's Pacoima residence. Sandoval was renting a room in the home of Alberto Garcia. Appellant, Garcia, Sandoval, and David Ramirez (Garcia's friend) stood outside the home and drank beer for approximately two and one-half hours.

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1 The record indicates appellant used "Jose Maldonado" as an alias.

2 All further statutory references are to the Penal Code unless otherwise noted.

Sandoval became intoxicated and decided to enter the residence to go to sleep. As Sandoval was walking toward the residence, appellant asked Sandoval to drive him to San Fernando. Sandoval declined because he believed he was too inebriated to drive. However, Ramirez lived in San Fernando and offered to provide appellant with a ride. Garcia followed Sandoval into the residence.

Later that evening, Ramirez knocked on the door and told Garcia that appellant no longer wanted a ride to San Fernando. Ramirez suggested appellant wanted to be driven to Los Angeles but Ramirez did not want "to take him to Los Angeles." Ramirez returned to the front of the residence.

Garcia's wife, Rosario Ramos, heard shouting in the street and looked outside. She observed appellant and Ramirez fighting. Appellant was holding a knife and was on top of Ramirez. Garcia went outside, grabbed appellant, and pulled him off of Ramirez.

Sandoval later woke up and observed appellant in the street. Appellant had a knife in his hand. Sandoval remarked to appellant, "What did you do, buey?" In Spanish, the term "buey" pertains to someone who is not "in his right mind" or an ox. Appellant fled and was chased by Garcia[3] and Sandoval. The men stopped pursuing appellant after appellant said, "Don't follow me or I'll get you too."

Ramirez was on the ground bleeding. He told Ramos that he had been stabbed "really hard" by Sandoval's friend. Ramirez explained he was stabbed because appellant changed his ride request such that he wanted Ramirez to drive him to Los Angeles and Ramirez declined to drive appellant that far. Ramirez died in the hospital. His death was caused by a stab wound near to the left side of his chest, penetrating his heart and lung.

Appellant was arrested in Texas.

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[3] During his trial testimony, Garcia did not identify appellant as the assailant and indicated he never saw the face of the person who stabbed Ramirez. At the preliminary hearing, Garcia indicated appellant was not the person fighting with the victim.

B. Defense Case

Rosario Ramos described the person who stabbed Ramirez to a detective as "beerbelly . . . 5'6" to 5'9," 30 to 40 years old." She said she would not be able to identify the person if she saw him again. Alberto Garcia spoke to the same detective and indicated he would be able to identify the assailant if he saw him again.

III. DISCUSSION

A. Lesser Included Offenses

1. Applicable Law

Manslaughter is a lesser included offense to murder. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 422 [involuntary manslaughter]; *People v. Rios* (2000) 23 Cal.4th 450, 460 [voluntary manslaughter].) "'[I]t is the "court's duty to instruct the jury not only on the crime with which the defendant is charged, but also on any lesser offense that is both included in the offense charged and shown by the evidence to have been committed." [Citation.]' [Citations.] 'Conversely, even on request, the court 'has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction[.]" [Citation.]' [Citation.] Substantial evidence 'is not merely '*any* evidence . . . no matter how weak" [citation], but rather "'evidence from which a jury composed of reasonable [persons] could . . . conclude[]'" that the lesser offense, but not the greater, was committed. [Citations.]' [Citation.] '"On appeal, we review independently the question whether the court failed to instruct on a lesser included offense." [Citation.]' [Citation.]" (*People v. Castenada* (2011) 51 Cal.4th 1292, 1327-1328.)

2. Involuntary Manslaughter

Appellant argues the trial court had a duty to instruct the jury on the theory that involuntary manslaughter is established if the defendant unintentionally kills another in the commission of a noninherently dangerous felony perpetrated without due caution and circumspection. (See *People v. Burroughs* (1984) 35 Cal.3d 824, 835, overruled on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89.) He maintains the noninherently dangerous felony that triggered the need for the instruction was assault with a deadly weapon.

In analyzing whether the absence of an instruction on involuntary manslaughter was reversible error, this district has considered assault with a deadly weapon to be an inherently dangerous felony. (*People v. Garcia* (2008) 162 Cal.App.4th 18, 22, ("*Garcia*") ["Because an assault with a deadly weapon . . . is inherently dangerous, the trial court properly concluded the evidence would not support [the defendant's] conviction for involuntary manslaughter . . .]" (*ibid.*) ["As the trial court correctly observed, assault with a deadly weapon . . . [is an] inherently dangerous felon[y]" (*id.* at p. 28, fn. 4].) Appellant argues the above-referenced language in *Garcia* is dicta and unsupported by case authority. We disagree.

Garcia caused the death of his victim by striking the person in the face with the butt of a gun. (*Garcia, supra*, 162 Cal.App.4th at p. 23.) On appeal, the court devoted an entire section of the opinion to the following proposition: "An unintentional killing, without malice, during the commission of an inherently dangerous felony does not constitute involuntary manslaughter." (*Id.* at p. 26.) If *Garcia* reached the conclusion that assault with a deadly weapon was not an inherently dangerous felony, the quoted caption, and the discussion that followed, would have been meaningless. The assessment of whether assault with a deadly weapon constituted an inherently dangerous felony was a necessary component of the analysis.

In any event, apart from the decision reached in *Garcia*, we independently find assault with a deadly weapon is an inherently dangerous felony. "A felony is considered

inherently dangerous to human life when the felony, viewed in the abstract, 'by its very nature . . . cannot be committed without creating a substantial risk that someone will be killed' [citation], or carries a '"high probability" that death will result.' [Citations.]" (*People v. Robertson* (2004) 34 Cal.4th 156, 166-167, overruled on another point in *People v. Chun* (2009) 45 Cal.4th 1172, 1200-1201.)

Assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240; *People v. Licas* (2007) 41 Cal.4th 362, 366.) A deadly weapon is defined as an instrument that is either "inherently deadly or dangerous" or is used in such a "manner likely to produce death or great bodily injury." (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.)

Thus, in pertinent part, one commits an assault with a deadly weapon when he or she, with the use of an inherently dangerous instrument or an instrument that is being used in a manner likely to produce death or great bodily injury, attempts to commit a violent injury on another. This conduct is, by definition, inherently dangerous. It carries with it a substantial probability that it will cause the death of the person assaulted. Because assault with a deadly weapon is an *inherently* dangerous felony, the trial court had no duty to instruct the jury that appellant could be found guilty of involuntary manslaughter based on the commission of a *noninherently* dangerous felony.

3. Voluntary Manslaughter

In his supplemental brief, appellant takes the position that, if assault with a deadly weapon is an inherently dangerous felony, the trial court had a sua sponte duty to instruct the jury that he could be convicted of the lesser offense of voluntary manslaughter if it found that he killed unintentionally, and without malice, while committing the assault. He is incorrect.

In addressing the applicability of the merger doctrine,[4] *Garcia* concluded a person may be convicted of voluntary manslaughter if, without malice, he or she commits an unlawful and unintentional killing during the commission of an inherently dangerous felony. (*People v. Garcia, supra,* 162 Cal.App.4th at p. 31.) Appellant relies heavily on *People v. Bryant* (2011) 198 Cal.App.4th 134, 153-156 wherein the appellate court held the failure to sua sponte instruct the jury with the "*Garcia* theory" of voluntary manslaughter as a lesser included offense to murder amounted to instructional error. However, *Bryant* is no longer citable authority because the California Supreme Court granted a petition for review on November 16, 2011. (Cal. Rules of Court, rules 8.1105, subd. (e)(1), 8.1115, subd. (a).)

Nonetheless, even if the theory of manslaughter provided for in *Garcia* is legitimate, the evidence in this case did not warrant such an instruction. The "*Garcia* theory" of voluntary manslaughter requires the killing be committed *without* malice. "[M]alice may be [either] express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature." (§ 188.) Malice is implied "when a killing results from an intentional act, the natural consequences of which are dangerous to human life, and the act is deliberately performed with knowledge of the danger to, and with conscious disregard for, human life." (*People v. Cook* (2006) 39 Cal.4th 566, 596.)

Here, the evidence demonstrated appellant stabbed the victim "really hard" in the left side of his chest such that the victim's heart and lung were both pierced. Even if the "*Garcia* theory" survives Supreme Court review, there was no evidence from which a rational jury could have concluded appellant stabbed Ramirez without harboring implied malice. Accordingly, the trial court had no sua sponte duty to instruct the jury with the theory of voluntary manslaughter established by *Garcia*.

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[4] The merger doctrine, set forth in *People v. Ireland* (1979) 70 Cal.2d 522, 539, precludes the application of the second degree felony-murder rule to an unintentional killing that occurs during the commission of a felony if the felony is an integral part of the homicide.

B. Conduct Credit and Parole Fine

The trial court followed section 2933.2 and denied appellant conduct credit. However, that section was enacted after appellant committed the crime. We, therefore, accept respondent's concession that appellant is entitled to conduct credit under section 4019 because that was the applicable law when appellant committed the crime. (See *People v. Flores* (2009) 176 Cal.App.4th 1171, 1182.) The parties agree appellant had actual credit of 834 days. Pursuant to section 4019, he was entitled to 416 days of conduct credit. (*People v. Fry* (1993) 19 Cal.App.4th 1334, 1340-1341 [calculation requires actual days to be divided by four and, after rounding down to the nearest whole number, multiplying that figure by two].)

Similarly, we accept respondent's concession that the trial court incorrectly imposed a $10,000 parole fine and a $20 deoxyribonucleic acid (DNA) penalty pursuant to statutes that post-dated appellant's crime. (See § 1202.45 [parole fine]; Gov. Code, § 76104.7 [DNA penalty].) Accordingly, those fines must be deleted from the abstract of judgment. (See *People v. Callejas* (2000) 85 Cal.App.4th 667, 676.)

IV. DISPOSITION

The judgment is modified to: (1) delete the $10,000 parole revocation fine and the $20 DNA penalty; and (2) include 416 days of conduct credit. The trial court shall forward an amended abstract of judgment reflecting the revised conduct credit and financial penalties to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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KUMAR, J.*

We concur:

TURNER, P. J.

KRIEGLER, J.

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