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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. PIERRE ANDRE WHITE, Defendant and Appellant.	B235378 (Los Angeles County Super. Ct. No. BA359200)

APPEAL from a judgment of the Superior Court of Los Angeles County. Judith L. Champagne, Judge. Affirmed.

Thomas T. Ono, 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, Victoria B. Wilson, Supervising Deputy Attorney General, and Corey J. Robins, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Pierre Andre White appeals from the judgment entered following a jury trial in which he was convicted of second degree murder with firearm enhancements. Defendant contends insufficient evidence supports his conviction and the trial court was required to instruct sua sponte on voluntary manslaughter based on an unintentional killing without malice during the commission of an inherently dangerous assaultive felony. We affirm.

BACKGROUND

On the night of July 17, 2009, Stinson Brown went to a pool party at a home on Don Tapia Place in Baldwin Hills with Kevin Riven, Jordan Vaillant, Derricka Johnson, and Tatiana Jacobs. Riven drove the group to the party. Jacobs and Johnson testified that the party was quite crowded, mostly with teenage girls, but there were some gang members present. Johnson testified there was a group of young men outside the party's location who may have been Bloods gang members, had a gun, and looked like they might cause trouble, but there were no problems at the party. Brown's group all left together around 10:30 p.m. and walked back to Riven's car. A lot of other people were leaving at the same time. Some of them appeared scared and were running. Johnson testified she saw people with weapons and was nervous and scared.

Riven drove about a block, then parked the car. He, Vaillant, and Brown got out and ran back up the hill toward the location of the party to check on other friends whom they had left behind. Johnson and Jacobs remained in the car. Brown returned to the car after a few minutes. He was joking and did not appear to be frightened. At Johnson's request, Brown worked to fix the handle on the rear passenger door, which had fallen off. Brown kneeled while fixing the handle, and when he finished, he stood between the open front passenger door and the car body, facing the car.

Just as Brown finished repairing the door handle, a group of five young men, including defendant, walked downhill past Riven's car, as if coming from the party. Neither Brown nor the young women said anything to the group, looked at them, or made any gestures toward them. Defendant and one companion turned around and walked

back toward Riven's car. Defendant pulled a gun from his pocket, angrily shouted, "Fuck Naps," and immediately fired multiple shots at Brown, who was still standing in the open door, facing the car. Brown was shot twice in his left arm and once in his abdomen, with the shot entering from his right flank. The abdominal wound was fatal. Before Brown collapsed, he ran across the street, leaving behind one blue shoe. Defendant and his companions ran down the hill as Johnson and Jacobs ran the opposite direction.

Gerrid Hughes, who lived down the hill from the location of the party, found defendant and Bernard Gillis hiding in shrubbery at Hughes's house. Hughes testified that the boys seemed nervous. Los Angeles Police Department officers arrived and detained defendant, Gillis, and Hughes, though they eventually released Hughes. Officer James Holliman testified that defendant and Gillis were sweating profusely and had high pulse rates. Defendant appeared to be nervous, and Hughes told the police that defendant and Hughes appeared to be frightened when he found them. In the shrubbery the police found a .25-caliber semiautomatic handgun with an empty magazine and one round chambered. The police swabbed defendant and Gillis for gunshot residue. Defendant was positive for gunshot residue, but Gillis was not.

The police recovered five casings and one fired bullet near Riven's car. Another bullet, which was not recovered, appeared to have entered the exterior of the front passenger door and lodged within the door. Four days later, the police recovered another fired bullet in the street about four houses down from the site of the shooting. The medical examiner recovered two bullets during Brown's autopsy. Ballistics testing established that all five casings and all four recovered bullets had been fired from the .25-caliber gun recovered in Hughes's yard.

Johnson and Jacobs testified that they did not belong to a gang or associate with gang members. As far as they knew, Brown, Vaillant, and Riven also had no gang ties. They did not see Brown with a weapon or see a weapon in Riven's car. No one in their group said anything about a weapon. Inglewood Police Detective Kerry Tripp testified

that he investigated whether Brown had been a gang member and found no indication that he had been a member of any gang.

Tripp further testified that Baldwin Hills was not claimed by any gang, and gang shootings were rare there. Gillis was an admitted member of the Neighborhood Piru gang, which is a Blood gang based in Inglewood. Tripp opined, based on information provided by other officers, that defendant was also a member of the gang. All Crips gang members are enemies of Neighborhood Piru gang members, who refer to members of the Neighborhood Crips gang as "Naps." Tripp opined that a Blood gang member might view Brown's blue shoes as an indication that Brown was a Crips gang member. In response to a hypothetical question based upon the prosecution's evidence, Tripp opined that the shooting was done for the benefit of the Neighborhood Piru gang.

Defendant testified that he joined the Neighborhood Piru gang when he was 15. He was 17 at the time of the charged offenses. Defendant attended the party with Gillis and three other friends. Gillis and another member of the group were not gang members, but merely "affiliated" with the Neighborhood Piru gang at that time. At defendant's instigation, the group took Gillis's gun to the party for protection. Defendant admitted that he knew that guns can kill and that if he fired the gun, someone might get hurt. Defendant initially carried the gun, but members of his group passed it from one to another at the party. Defendant saw a lot of people at the party whom he believed to be Neighborhood Crips gang members. When they left the party a group of men standing next to a car stared at everyone. Then there was a gunshot from somewhere near the party's location. Defendant hid behind a car, then heard four or five more gunshots from farther up the hill. After the shooting stopped, defendant's four friends rejoined him and gave him the gun. They then walked down the hill together, with defendant and Gillis behind the other three. As they passed Riven's car, Brown had his back to defendant's group and was reaching down toward the car. Brown stared at the group and made eye contact with defendant. Gillis repeatedly looked behind him, which frightened defendant. When they were five to ten steps past the car, Gillis tapped defendant on the

shoulder and said, “Look, look, look.” Defendant immediately stopped and turned around. Brown had just stood up from bending or kneeling. Defendant pulled the gun from his sweatshirt pocket, said “Fuck Naps,” and shot Brown multiple times from a distance of five to ten steps. Defendant did not see the color of Brown’s shoes, did not think Brown was a Crips gang member, and denied that the shooting had anything to do with defendant’s gang. He shot because he feared for his life, but he did not know why he said “Fuck Naps,” which he admitted was a derogatory term for Neighborhood Crips gang members. Defendant admitted that he never saw Brown with a gun. Defendant hid in Hughes’s shrubbery because he was scared. Defendant spoke to detectives after his arrest but did not tell them he said “Fuck Naps” until they confronted him on that point. He never told the detectives he had heard gunshots before he shot Brown, and instead told them he shot Brown because he thought Brown was “a Neighborhood,” meaning a Neighborhood Crips gang member, and was “gang banging on me.” Defendant claimed he got along well with Neighborhood Crips gang members. His father, brothers, and cousins were members of the Neighborhood Crips gang and he was housed with Neighborhood Crips gang members at the jail.

Three days after the shooting, a police officer responding to a tip by a resident recovered a nine-millimeter casing from the street in front of a house on Don Tapia Place. It appeared fresh, that is, not “banged up” or dirty.

A defense investigator who spoke to Hughes in October of 2009 testified that Hughes said that when he found defendant and Gillis in his yard they appeared to be “scared for their lives” and they said shots had been fired at them.

The jury convicted defendant of second degree murder and found he personally and intentionally fired a gun, causing death, personally and intentionally fired a gun, and personally used a gun (Pen. Code, § 12022.53, subds. (b)–(d); undesignated statutory references are to the Penal Code). The jury found a gang enhancement allegation not true. The trial court sentenced defendant to prison for 40 years to life, consisting of 15

years to life for second degree murder and 25 years to life for the section 12022.53, subdivision (d) enhancement.

DISCUSSION

1. Sufficiency of evidence

Defendant contends that there was insufficient evidence that he acted with express or implied malice. We disagree.

To resolve this issue, we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable jury could find guilt beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.)

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) 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." (§ 188.) "[M]alice is implied when the killing resulted from an intentional act, the natural consequences of which are dangerous to human life, performed with knowledge of and conscious disregard for the danger to human life." (*People v. Thomas* (2012) 53 Cal.4th 771, 814.)

Defendant argues that the evidence was insufficient to support a finding of express malice because defendant "never stated his intent to unlawfully kill" Brown and "no evidence contradict[ed] [defendant's] testimony that he acted spontaneously from fear when he fired the gun." "Intent to unlawfully kill and express malice are, in essence, 'one and the same.'" (*People v. Smith* (2005) 37 Cal.4th 733, 739.)

An express statement or admission of intent is not required. There is rarely direct evidence of a defendant's intent; intent must generally be established by circumstantial evidence and reasonable inferences therefrom. (*People v. Thomas* (2011) 52 Cal.4th 336, 355.) "[T]he act of purposefully firing a lethal weapon at another human being at close range, without legal excuse, generally gives rise to an inference that the shooter acted

with express malice." (*Smith*, at p. 742.) Jurors could reasonably infer that defendant intended to kill Brown when he fired a loaded .25-caliber semiautomatic handgun at Brown five times from about five to ten steps away, striking him once in the abdomen and twice in the left arm. Defendant's purported fear provided a partial basis for potential self-defense or unreasonable self-defense findings (on which the jury was instructed), but the jury was not required to accept that testimony, and its verdict indicates that it did not believe that defendant acted from fear. Defendant also argues that the jury's failure to convict him of first degree murder and failure to find the gang enhancement allegation true establish the insufficiency of evidence of malice. He is wrong for several reasons. Malice differs from premeditation and deliberation. Malice also differs from the elements of the gang enhancement allegation. In addition, even if there were some arguable logical inconsistency in the jury's findings, we would view it as the product of compromise, mistake, or leniency, of which defendant would not be permitted to take further advantage. (*People v. Santamaria* (1994) 8 Cal.4th 903, 911; *People v. Pahl* (1991) 226 Cal.App.3d 1651, 1657.)

Alternatively, the record provided substantial evidence in support of a finding of implied malice. Defendant admitted that he intentionally fired a loaded gun at Brown from about five to ten steps away, and the record showed he fired five times, striking Brown with three shots. The natural consequences of shooting a loaded gun at a person are unquestionably dangerous to human life, and defendant admitted that he knew both that guns can kill and that if he fired the gun, someone might get hurt. This demonstrated that defendant knew and consciously disregarded the danger to human life inherent in shooting a gun at a person. Defendant argues that his fear somehow precluded a finding that he knew of and consciously disregarded the danger to human life, but these mental states are not mutually exclusive. In any event, the jury's rejection of a potential verdict of voluntary manslaughter on an unreasonable self-defense theory indicates that the jury did not believe defendant's testimony.

2. Failure to instruct sua sponte upon *Garcia* theory of voluntary manslaughter

The trial court instructed upon first and second degree murder, self-defense, and voluntary manslaughter based upon unreasonable self-defense. Defendant contends that the trial court had a duty to instruct sua sponte on voluntary manslaughter based upon the theory addressed in *People v. Garcia* (2008) 162 Cal.App.4th 18 (*Garcia*).

Even in the absence of a request, a trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1021.)

In *Garcia,* the victim and Garcia, who was holding a shotgun, were involved in a confrontation. The victim lunged at Garcia. Garcia feared the victim would take the shotgun, so he swung the butt of the gun at the victim to make him back off, but struck the victim in the face. This caused the victim to fall and hit his head on the sidewalk, which later caused the victim's death. (*People v. Garcia*, *supra*, 162 Cal.App.4th at pp. 23, 25.) Garcia was charged with second degree murder, and the trial court instructed the jury on voluntary manslaughter based upon heat of passion and unreasonable self-defense as a lesser included offense. A jury convicted Garcia of voluntary manslaughter. On appeal, Garcia contended that the trial court erred by refusing to instruct on *involuntary* manslaughter on the theory that the killing "was committed without malice and without either an intent to kill or conscious disregard for human life." (*Id.* at p. 26.) The court in *Garcia* thus addressed whether an unintentional killing without implied malice during commission of an inherently dangerous felony (aggravated assault) could support an instruction for *involuntary* manslaughter where the merger doctrine applied to preclude application of the second degree felony-murder rule. (*Id.* at pp. 28–29.) The court ultimately rejected Garcia's instructional error claim, stating that "an unlawful killing during the commission of an inherently dangerous felony, even if unintentional, is at least voluntary manslaughter." (*Id.* at p. 31.)

Neither *Garcia* nor any other citable authority establishes the theory of voluntary manslaughter upon which defendant argues the trial court was required to instruct sua sponte. Well established principles limit voluntary manslaughter to an unlawful killing upon sudden quarrel or heat of passion or in an actual, but unreasonable, belief in the need to defend against imminent death or great bodily injury. (§ 192, subd. (a); *In re Christian S.* (1994) 7 Cal.4th 768, 783.) The trial court in *Garcia* so instructed, the jury convicted Garcia of voluntary manslaughter, apparently based upon one of the two recognized theories, and the appellate court did not purport to add a new category of offense constituting voluntary manslaughter. It instead made the statement upon which defendant relies in the course of its analysis rejecting Garcia's claim that his offense was involuntary manslaughter. Thus, the statement upon which defendant relies was dictum. The only case that has held that a trial court was obliged to instruct upon the *Garcia* theory of voluntary manslaughter was decided in August of 2011, four months after defendant's trial. That case is now on review before the California Supreme Court. (*People v. Bryant* (2011) 198 Cal.App.4th 134, review granted Nov. 16, 2011, S196365.) Accordingly, even if the theory articulated in *Garcia* is ultimately recognized as a valid third basis for voluntary manslaughter, it cannot be said that at the time of defendant's trial it was a general principle of law upon which the trial court was required to instruct sua sponte. "Given the undeveloped state of the . . . rule, we cannot impose upon the instant trial court so formidable a duty as to conceive and concoct an instruction embodying that rule. 'The duty of the trial court involves percipience—not omniscience.' [Citations.]" (*People v. Flannel* (1979) 25 Cal.3d 668, 683.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.