Filed 8/28/18 P. v. Furguiele CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN MARCANTHO FURGUIELE, Defendant and Appellant.	B284692 (Los Angeles County Super. Ct. No. BA408513)

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

Lynda A. Romero, 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, Shawn McGahey Webb and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

In an information filed by the Los Angeles County District Attorney's Office, defendant and appellant Jonathan Marcantho Furguiele was charged with murder (Pen. Code, § 187, subd. (a); count 1)[1] and assault on a child causing death (§ 273ab, subd. (a); count 2). The jury found defendant guilty of both counts and determined count 1 to be second degree murder. Defendant was sentenced to 25 years to life in state prison on count 2. The sentence on count 1 (15 years to life) was imposed and stayed pursuant to section 654.

Defendant appeals, arguing that the trial court erred in failing to instruct the jury on accident (CALCRIM No. 3404).

We affirm.

FACTUAL BACKGROUND

Prosecution's Case

In 2013, defendant and Tracey McGowan (McGowan) lived together and had two children: Tatyana, born in October 2009, and J., born in 2013. The family lived in a two-bedroom apartment in Los Angeles. McGowan slept in one bedroom with Tatyana, and defendant slept in the other room with J. Defendant and McGowan were clients of Life Walk Services (LWS), a supportive living program that assists people with developmental and mental disabilities to live on their own.

Monique Evans (Evans), the director of LWS, was close with defendant, McGowan, and the children. Ashleigh Lee (Lee), an LWS counselor, met with McGowan every other day, and another counselor met with defendant. They would train

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

defendant and McGowan on everyday tasks and on how to take care of their children.

On occasion, when Lee asked defendant to perform a specific task, defendant would give her "attitude" or become argumentative. One time, Lee asked him and McGowan to clean the apartment and defendant threw a chair in response.

On the morning of February 28, 2013, McGowan tried to wake Tatyana up. She did not respond and was cold and stiff. She was facedown in her crib with her face in a pillow. McGowan told defendant that Tatyana was not waking up, but he did not respond. McGowan called 9-1-1 and went to get help from her neighbors.

Latoya Myvett, a neighbor and a nurse, conducted CPR on Tatyana until paramedics arrived. When the paramedics came, they moved Tatyana to the living room. The police also showed up and spoke with defendant. Defendant said that when he woke up, he tried to wake Tatyana up, but she was unresponsive. Defendant was sad and nervous, and he repeatedly asked the officers whether he was going to be arrested.

Courtney Morrow Castellino (Castellino), an investigator in the coroner's office, examined the scene. Pink froth had emerged from Tatyana's nose, which was consistent with someone who had struggled to breathe; Tatyana had been dead for many hours. She also had an abrasion on her lip, and her injuries were consistent with sudden constriction or pressure.

Castellino spoke with defendant. He did not admit to any form of child abuse. He said that the prior day had been a normal day, and the abrasion on Tatyana's lip was caused by a fall the night before. Defendant admitted that he made holes that were found on the walls and doors of the apartment. When

he was upset with McGowan, he would hit those areas instead of McGowan because he knew that he was not supposed to hit women.

On March 1, 2013, Evans contacted defendant because she had learned that defendant had been telling people that "it was an accident." Defendant told Evans that Tatyana would not stop running around the house. Consequently, he placed her in her crib, held her head down, and persisted until she stopped moving. Evans relayed this information to the police. During trial, Evans opined that she could not see defendant killing Tatyana on purpose.

Detectives arrived and interviewed defendant. On the night of the offense, defendant placed Tatyana in her crib, but she refused to go to sleep. He became upset and angry. He held her head down into a pillow and suffocated her. She was shaking, kicking, and moving. She tried to lift her head up, but defendant continued to apply pressure. He held her down for 10 minutes until she stopped moving.

When defendant turned Tatyana over, her body was stiff and cold. She was not breathing or moving, and she was dead. He did not wake McGowan or call 9-1-1 because he was scared. Instead, he went to sleep. He knew that what he did was wrong, and he admitted to having a short temper. Defendant was aware that he was very strong. He admitted to killing Tatyana, but repeated said that "[i]t was an accident."

Dr. James Ribe, a forensic pathologist from the coroner's office, testified that Tatyana died from asphyxia due to "imposed suffocation," and her injuries were consistent with asphyxia, suffocation, and strangulation. He concluded that her death did not result from an accidental suffocation.

Tatyana's pediatrician, Dr. Wayley Louie, testified that Tatyana was a healthy child. While she did suffer from febrile seizures, those seizures were temporary and fairly common in 2 to 5 percent of children.

Defense case

Dr. Stephen Greenspan testified as an expert witness. He said that an IQ of 70 to 75 would put someone in the "intellectually disabled" category. Defendant had an IQ of 56 in 1996, 61 in 1997, 69 in 2002, 59 in 2005, 59 in 2013, and 57 in 2017. Defendant's average IQ of 60 put him in the lower end of the "intellectually disabled" category. His adaptive function was very low; he functioned like an eight- or nine-year-old child. That said, someone in defendant's situation could be helped to become reasonably competent in the care of his children.

DISCUSSION

Defendant argues that the trial court erred when it denied his request to instruct the jury on accident (CALCRIM No. 3404).

I. *Relevant proceedings*

After the prosecution's case-in-chief, the trial court held a jury instruction conference. Defense counsel requested CALCRIM No. 3404, an accident instruction, for count 2. CALCRIM No. 3404 provides: "The defendant is not guilty of <insert crime[s]> if (he/she) acted [or failed to act] without the intent required for that crime, but acted instead accidentally. You may not find the defendant guilty of <insert crime[s]> unless you are convinced beyond a reasonable doubt that (he/she) acted with the required intent."

The prosecutor argued that substantial evidence did not support an accident instruction. Initially, the trial court stated, "Well, I think [defendant is] probably going to be entitled to it."

Defense counsel said that there was ample evidence in defendant's mind that this was an accident. The trial court replied, "No doubt, but does it make it an accident under the law?" The trial court continued: "The evidence shows [defendant] intended to silence the child. He didn't intend to kill the child. It was an accident that he killed the child, but his intent was to silence the child. He knew his own strength. He knew he had a temper issue, that's why he would knock holes in walls as opposed to attacking individuals. I have a lot of trouble giving [CALCRIM. No.] 3404. I don't think this is a classic accident case."

The prosecutor then argued that count 2, an assault charge, was a general intent crime. Accordingly, the intent to kill a child was irrelevant; all that was required was the intent to commit the act. As such, the accident instruction was irrelevant. The prosecutor further stated: "[T]he fact [that defendant] says in the statement it was an accident, well obviously what he means is that the child died was an accident, he didn't intend to kill her, but that doesn't make his act under the law an accident."

The trial court agreed: "An accident would have been if [defendant] put [Tatyana] to bed and somehow knocked the pillow on top of her and the pillow ended up [killing her]." The trial court explained that it was an accident in defendant's mind that he killed her, but it was not a legal accident. The trial court found that the evidence showed a "deliberate action to silence the child."

The trial court decided to withhold its decision until after the defense presented its evidence. But, it never revisited the issue, and it did not provide an accident instruction to the jury.

II. *Standard of review*

A trial court is required to instruct, sua sponte, on the general principles of law that are closely and openly connected to the evidence at trial necessary for the jury's understanding of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) The duty to instruct extends to defenses where substantial evidence supports such an instruction and the defense is not inconsistent with the defendant's theory.[2] (*Id.* at p. 157.) A trial court has no duty to instruct on a defense, even if requested to do so, unless the defense is supported by substantial evidence. (*People v. Curtis* (1994) 30 Cal.App.4th 1337, 1355.)

We review a claim of instructional error de novo. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569–570.)

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[2] Technically, defendant is "mistaken in [his] assertion that 'accident' is an affirmative defense. Instead, it is a request for an instruction that negates the intent element of malice murder." (*People v. Gonzalez* (2018) 5 Cal.5th 186, 215, fn. 3; see also *People v. Jennings* (2010) 50 Cal.4th 616, 675.) "Still, a trial court must provide a requested pinpoint instruction on such issues where '"there is evidence supportive of the theory."' [Citation.]" (*People v. Gonzalez*, *supra*, at p. 215, fn. 3.) "A trial court's responsibility to instruct on accident therefore generally extends no further than the obligation to provide, *upon request*, a pinpoint instruction relating the evidence to the mental element required for the charged crime." (*People v. Anderson* (2011) 51 Cal.4th 989, 997.)

III. *The trial court did not err by refusing to give an accident instruction*

Substantial evidence did not support an accident instruction. Defendant told detectives that he became upset when Tatyana refused to go to sleep, and he held her head down for 10 minutes until she stopped shaking and kicking. He held her down even when she tried to bring herself back up to breathe. He persisted until Tatyana suffocated to death.

Defendant was fully aware of his conduct, and he knew what he was doing when he held Tatyana's head face down. He knew that he had killed Tatyana and he knew that what he did was wrong. And, defendant initially lied, claiming that Tatyana's abrasion on her lip was caused by a fall. Defendant was sufficiently aware of his wrongful conduct to lie about it; he knew he would get in trouble if he admitted to killing her.

Defendant's short temper gave reason as to why he acted willfully in smothering Tatyana just because she refused to sleep. He admitted to having a short temper and a lack of patience.

In urging reversal, defendant directs us to the evidence that both he and Evans stated that Tatyana's death was an accident. But Evans was not present when the offense was committed. And her opinion that he would not intentionally kill Tatyana did not shed any light on whether he willfully engaged in an act that caused her death.

Moreover, when defendant said that "[i]t was an accident," he meant that killing Tatyana was an accident—not that committing the act that resulted in her death was an accident. Given that count 2 (assault on a child causing death) does not require an intent to kill, his comment does not support his claim on appeal that the killing of Tatyana was accidental as a matter

of law. (*People v. Albritton* (1998) 67 Cal.App.4th 647, 658; *People v. Williams* (2001) 26 Cal.4th 779, 788, 790.)

Defendant also focuses on his low IQ and intellectual disability. But Dr. Greenspan said that someone in defendant's situation could be helped to take care of children. And defendant obtained assistance from LWS on how to take care of Tatyana and J. Any intellectual disability did not preclude defendant from acting willfully in suffocating Tatyana.

IV. *Even if the trial court had erred (which it did not), any error was harmless*

Assuming arguendo that there was sufficient evidence to support an instruction on accident, the omission of the instruction was harmless under any standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18, 24.)

The accident instruction would have been duplicative of the other instructions given to the jury, including CALCRIM No. 220 (duty to prove defendant's guilt beyond a reasonable doubt), CALCRIM No. 252 (union of act and general intent for the purposes of count 2), CALCRIM No. 820 (elements of assault on a child causing death). The accident instruction would have reiterated the need to prove the intent elements in count 2 beyond a reasonable doubt. Since the CALCRIM No. 3404 would have done no more than affirm the People's burden as already set forth in other instructions, even though those instructions did not contain the word "accident," the trial court was not required to give this instruction. (*People v. Bolden* (2002) 29 Cal.4th 515, 558–559; *People v. Anderson*, *supra*, 51 Cal.4th at pp. 997–998.)

Moreover, the jury convicted defendant on both count 1 (murder) and count 2 (assault on a child causing death). Even

though defendant did not request an accident instruction as to count 1, his counsel argued that Tatyana's death was caused by accident. The jury could have acquitted defendant if it believed that defendant had acted accidentally; after all, if that is what the jury believed, then it could not have found the elements of counts 1 and 2 to have been proven beyond a reasonable doubt. But because the jury convicted defendant on both counts, after being instructed as to the elements of both counts, the appellate record shows that the jury would not have acquitted defendant had it been instructed on the theory of accident.

Finally, to the extent defendant argues that the prosecutor's closing argument regarding accident compounds the prejudice by the failure to instruct on accident, we are not convinced. The prosecutor did not give any incorrect instructions to the jury. The prosecutor was merely responding to defense counsel's argument that what defendant did was an accident and unintentional. Moreover, the trial court told the jury that it must follow the law as stated by the trial court. We presume the jury followed the trial court's admonitions, and treated the prosecutor's comments as those of an advocate who was attempting to persuade the jury. (*People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8; *People v. Bryden* (1998) 63 Cal.App.4th 159, 184.)

DISPOSITION

The judgment is affirmed.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT