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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JORGE ALBERTO MOLINA, Defendant and Appellant.	B239984 (Los Angeles County Super. Ct. No. BA379595)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen A. Marcus, Judge. Affirmed.

Landra E. Rosenthal, 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, Assistant Attorney General, James William Bilderback II and Mark E. Weber, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Jorge Alberto Molino appeals from the judgment entered after a jury found him guilty of two counts of second degree murder (Pen. Code,[1] § 187, subd. (a); counts 1 and 2), and one count of leaving the scene of an automobile accident (Veh. Code, § 20001, subd. (a); count 3). The trial court sentenced defendant to state prison for 30 years to life on counts 1 and 2 (15 years to life on each count, to be served consecutively), and a term of three years in prison on count 3, to be served consecutively to the two life sentences.

Defendant contends the trial court should have instructed the jury on involuntary manslaughter and vehicular manslaughter. We affirm.

FACTS

In April 2007, defendant pleaded guilty to driving while under the influence of alcohol. As part of the plea, defendant was warned that it is "extremely dangerous to human life to drive while under the influence of alcohol" and if he killed someone while driving under the influence of alcohol he could be charged with murder.

Los Angeles Police Officer William Brownell testified that on New Year's Eve, December 31, 2010, at about 11:30 p.m., he saw a white car, driven by defendant, traveling north on Van Ness Avenue. It ran a red light at the intersection of Van Ness and Florence Avenues. Defendant appeared to lose control of his car, locking up the brakes and "jerking side to side." After defendant's car came to a stop, he "screeched his tires" and made a left turn onto Florence Avenue, traveling at 75 miles per hour (in a 35 miles per hour zone), straddling two lanes.

As defendant proceeded down the street, Officer Brownell heard the sound of screeching tires and the sound of the engine "revving." He never saw any brake lights

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[1] Unless stated otherwise, all further statutory references are to the Penal Code.

come on. He turned on his lights and siren as he followed defendant down Florence Avenue.

As defendant approached the intersection of Florence Avenue and Crenshaw Boulevard, Demetria Dorsey and her husband, Kelvin, were in their SUV driving south on Crenshaw Boulevard. Mrs. Dorsey was driving and Mr. Dorsey was in the front passenger seat. As the Dorseys approached the intersection, the traffic light in their direction was green, so Mrs. Dorsey proceeded into the intersection. As the Dorseys entered the intersection, defendant ran the red light on Florence Avenue and crashed into the Dorsey's SUV. According to the evidence, defendant was traveling at least 55 miles per hour at the time. Kodeli Azoma, a bus driver, estimated that defendant was traveling 80 to 100 miles per hour. Los Angeles Police Officer Maurice Hallauer, a member of the Specialized Collision Investigation Detail, testified that defendant's car was traveling at least 55, most likely 65, miles per hour.

The force of the collision caused the Dorseys' SUV to roll over two or three times. Their vehicle slid about 100 feet until it came to rest on its roof, at a telephone or electric pole. The Dorseys were wearing their seat belts and they were suspended upside down in their SUV. They died from blunt force trauma received in the collision.

Kysha Holness testified that she was a passenger in a car, seated in the front passenger seat. The vehicle in which she was riding stopped at a red light at the intersection of Crenshaw Boulevard and Florence Avenue, waiting to make a left turn. She heard a sound, like an engine "revving" or accelerating, and saw two vehicles collide in the intersection. She saw a white car hit a black car, and the black car then flipped over two or three times. A person got out of the white car and ran up Crenshaw Boulevard. A police officer arrested the man who ran from the scene. She identified defendant as the man who got out of the white car and ran from the scene.

Officer Brownell and Officer Lopez apprehended defendant when he fled from the scene. He smelled of alcohol, had red watery eyes and his speech was slurred. His blood alcohol levels were .15 and .21. At the crime scene, defendant said he drank six beers.

Defendant told police officers that he drank more than a bottle of tequila before midnight. Defendant said multiple times, "I'm sorry, I'm very sorry, I'm drunk."

DISCUSSION

Jury Instructions

In general, the trial court has the duty to instruct the jury sua sponte as to the principles of law relevant to the issues raised by the evidence. (*People v. Wims* (1995) 10 Cal.4th 293, 303; *People v. Saddler* (1979) 24 Cal.3d 671, 681.) This duty extends to "instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense" have been established, but instructions on lesser included offenses are not required if "there is no evidence that the offense [is] less than that charged." (*People v. Breverman* (1998) 19 Cal.4th 142, 154; *People v. Barton* (1995) 12 Cal.4th 186, 200-201.) Instructions on lesser included offenses must be given whenever there is "'"evidence from which a jury composed of reasonable [persons] could have concluded"' that the particular facts underlying the instruction did exist." (*People v. Wickersham* (1982) 32 Cal.3d 307, 324, disapproved on other grounds in *Barton*, *supra*, at p. 201; *People v. Flannel* (1979) 25 Cal.3d 668, 684.) In the absence of such evidence, no instruction on the lesser included offense need be given. (*Wickersham*, *supra*, at pp. 324-325; *Flannel*, *supra*, at p. 684.)

1. Failure to Instruct on Involuntary Manslaughter

Defendant contends that the trial court erred in failing to sua sponte instruct the jury as to involuntary manslaughter, and that his convictions must be reversed for this failure. We disagree.

Section 192, subdivision (b), defines involuntary manslaughter as "the unlawful killing of a human being without malice" during "the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." Subdivision (b) also

provides in pertinent part: "This subdivision shall not apply to acts committed in the driving of a vehicle." (*Ibid*.)

While it is true that during the discussion about jury instructions, the trial court stated it was considering giving the involuntary manslaughter instruction, as defined in CALJIC No. 8.45, the court ultimately determined that an instruction on involuntary manslaughter was not appropriate. Section 192, subdivision (b), is very clear that the definition of involuntary manslaughter is inapplicable to acts committed in driving a vehicle.

In *People v. Ferguson* (2011) 194 Cal.App.4th 1070, the defendant drove his car into the rear of a vehicle stopped at a red light. One of the passengers in that vehicle was killed, and the other was severely injured. (*Id*. at p. 1074.) The defendant requested a "jury instruction on the defense of unconsciousness as a result of voluntary intoxication (CALCRIM No. 626). He [contended] that by rejecting the instruction, the court failed to instruct the jury it could find him guilty of the lesser included offense of involuntary manslaughter based on unconsciousness due to voluntary intoxication." (*Ferguson, supra,* at p. 1980.) The trial court did not give CALCRIM No. 626 "because although involuntary manslaughter is usually a lesser included offense of murder [citations], in the context of drunk driving it is not. The manslaughter statute, section 192, defines involuntary manslaughter as an unlawful killing without malice 'in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. This subdivision shall not apply to acts committed in the driving of a vehicle.'" (*Ferguson, supra,* at p. 1982, italics omitted.)

The court added that even if it were "to agree there [were] circumstances in second degree implied malice murder drunk driving cases in which a defense of unconsciousness from voluntary intoxication could be raised," the facts did not warrant it. (*People v. Ferguson, supra,* 194 Cal.App.4th at p. 1083.) That is true in the instant case. There was no evidence presented of unconsciousness.

As the trial court in the instant case noted, no reasonable jury could have concluded that defendant acted without implied malice. Defendant showed a complete disregard for human life. In 2007, when defendant pled guilty to driving under the influence of alcohol, he was warned that driving while under the influence was extremely dangerous to human life and if he killed someone while driving under the influence, he could be charged with murder.

Defendant's conduct on the night of the tragedy was clear evidence of his disregard for the warnings he received and the two innocent individuals he killed. His blood alcohol readings were .15 and .21, substantially higher than the legal limit of .08 (Veh. Code, § 23152, subd. (b)), and he admitted consuming a large quantity of alcohol. He drove for several blocks without concern for the safety of motorists or pedestrians. He ran red lights and reached speeds of 75 miles per hour or higher. He almost hit one motorist before he killed the Dorseys. He also attempted to flee the scene after the accident. As the trial court noted at the sentencing hearing, "And I believe that, when you look at this driving pattern, which is, in candor, the worst that I've ever seen as a judge, that [defendant] was making a statement. And the statement was 'I know what I'm doing is dangerous to human life, but I simply don't care. I am going to do it anyway.'" Even assuming there were a non-statutory involuntary manslaughter that could be committed by driving a vehicle, the trial court correctly rejected an involuntary manslaughter instruction.

The authority cited by defendant does not persuade us that the trial court erred in not giving the involuntary manslaughter instruction. *People v. Barton*, *supra*, 12 Cal.4th 186, in which the trial court properly instructed the jury on the lesser included offense of voluntary manslaughter (*id*. at p. 190), did not involve an act committed in the driving of a vehicle. It thus is inapposite.

2. Failure to Instruct on Vehicular Manslaughter

Defendant contends that the trial court should have instructed the jury on vehicular manslaughter. Initially, the People assert that defendant has forfeited any constitutional

claim based on the failure to instruct on vehicular manslaughter by failing to request the instruction. Regardless, we find that the jury was properly instructed.

In *People v. Sanchez* (2001) 24 Cal.4th 983, 992, the court held that gross vehicular manslaughter is not a lesser included offense of murder. Defendant concedes that based upon our Supreme Court's decision in *People v. Birks* (1998) 19 Cal.4th 108, he was not entitled to an instruction on vehicular manslaughter, which is a lesser offense related to, but not included in, murder. We decline to hold contrary to *Birks* that defendant was nonetheless entitled to an instruction on the lesser related offense of vehicular manslaughter notwithstanding his failure to request such an instruction. (*Auto Equity Sales, Inc v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Defendant contends that he was prejudiced and his due process rights were violated because the jury was not given the option to convict him of involuntary manslaughter or vehicular manslaughter. According to defendant, this prevented him from presenting his theory of defense and forced him into an "all-or-nothing" position. However, defendant had no due process right to instructions on a lesser related, but not included, offense. (*People v. Rundle* (2008) 43 Cal.4th 76, 147-148, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Birks, supra*, 19 Cal.4th at pp. 123-124, 136.)

Moreover, even if we were to find that the trial court should have instructed the jury on involuntary or vehicular manslaughter, any error would have been harmless. An examination of the record does not establish a reasonable probability of a more favorable result. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 165; accord, *People v. Thomas* (2012) 53 Cal.4th 771, 814.)

"At least since 1981, when our Supreme Court affirmed a conviction of second degree murder arising out of a high speed, head-on automobile collision by a drunken driver that left two dead, California has followed the rule in vehicular homicide cases that 'when the conduct in question can be characterized as a wanton disregard for life, and the facts demonstrate a subjective awareness of the risk created, malice may be implied . . . .' [Citation.] In such circumstances, 'a murder charge is appropriate.' [Citation.] So-

called implied malice second degree murder . . . is committed 'when a person does "'"an 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.] Phrased in a different way, malice may be implied when [a] defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with a wanton disregard for human life.' [Citation.] '[A] finding of implied malice' . . . 'depends upon a determination that the defendant actually appreciated the risk involved, i.e., a subjective standard.'" (*People v. Ortiz* (2003) 109 Cal.App.4th 104, 109-110, quoting *People v. Watson* (1981) 30 Cal.3d 290, 296-197, 298, 300, italics & fn. omitted.)

The evidence in the instant case overwhelmingly supports a finding of implied malice. Defendant had already been warned that he could be charged with murder if he killed someone while driving under the influence. Unfortunately, he drove again after drinking. He drove with a blood alcohol content greatly in excess of the legal limit. He was speeding at 75 miles per hour or faster down a city street, he ran multiple red lights, before tragically ending the lives of two innocent individuals. It is not reasonably probable a jury would have found that he did not appreciate the risk involved in his actions or act in wanton disregard for human life. (*People v. Ortiz, supra*, 109 Cal.App.4th at pp. 109-110.) Defendant's conviction for implied malice second degree murder will not be disturbed.

DISPOSITION

The judgment is affirmed.

JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.