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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JESUS MURIETA, Defendant and Appellant.	B229399 (Los Angeles County Super. Ct. No. GA072974)

APPEAL from a judgment of the Superior Court of Los Angeles County, Teri Schwartz, Judge. Affirmed.

Edward H. Schulman, 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, Scott A. Taryle and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant Jesus Murieta guilty of second degree murder with a personal use of a weapon. He contends on appeal that: (1) the trial court prejudicially erred by refusing to instruct the jury on voluntary manslaughter; and (2) an intoxication instruction denied him his federal due process and equal protection rights. We reject these contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

On April 7, 2008, at approximately 6:00 p.m., Leo Cervantes went to Zapopan Park, where a group of homeless people, including defendant (known as Chalino) and Leticia Sanchez, sometimes hung out. According to a confidential informant,[1] Cervantes asked defendant, who was drunk, if he had any weed. Offended, defendant said he didn't sell anything. Cervantes apologized and asked someone else for weed. Still angry, defendant asked Cervantes what his problem was and if he wanted "beef," to fight. Sanchez[2] told defendant to sit down, that Cervantes wasn't bothering him. Cervantes told defendant he didn't want to fight. Defendant, however, persisted, saying he was going to kick Cervantes's ass.

Removing a knife from a sheathe on his belt and saying he wanted a clean fight, defendant handed the knife to Sanchez and walked to Cervantes. Defendant swung at Cervantes. When he missed, Cervantes hit defendant, knocking him to the ground. Defendant tried to get up, but Cervantes knocked him back down and kicked him, repeating he didn't want to fight. Sanchez kicked Cervantes and yelled at defendant to get up, that he looked like he didn't know how to fight. Two men pulled Cervantes and defendant apart, and Cervantes left.

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[1] The confidential informant, a homeless woman, did not testify. Under the parties' stipulation, her recorded interview with detectives was played for the jury. It is unclear whether the confidential informant witnessed all of the events at Zapopan Park or was repeating what others told her.

[2] The confidential informant did not know Sanchez's name.

Defendant and Sanchez, knives in their hands, followed him. People told the confidential informant that defendant and Sanchez split up to look for Cervantes and that Sanchez bragged about "sticking" him.

That same day, sometime after 7:00 p.m., Kimberly Martinez was on Delta Avenue, near Zapopan Park.[3] While putting her baby into a car, she noticed Cervantes walk past her.[4] About a minute later, another man, whom Martinez identified as defendant at trial, walked quickly or ran by. Martinez thought that defendant might be intoxicated because he wasn't walking straight. Defendant caught up to Cervantes and pushed him off the sidewalk, saying something to Cervantes while doing so.[5] Defendant punched Cervantes, and they fought. Defendant pulled something out and made a flipping motion, and Cervantes grabbed defendant's hand. Although Martinez did not see a knife, defendant made a stabbing motion at Cervantes's side and chest. Defendant fell and hit his head, and Cervantes kicked him once. Cervantes looked like he was in pain.

Sanchez, carrying a black purse, walked quickly by Martinez, saying, " 'Stop fighting, stop fighting.' " When Sanchez couldn't get defendant up, she pulled on Cervantes as if trying to hold him, and she " 'started kind of hitting him.' " Martinez did not see Sanchez make a stabbing motion toward Cervantes. Hurt, Cervantes broke away and walked to a house across the street. He died from a single stab wound to the chest. Cervantes had only the one stab wound, and he did not have wounds or cuts or bruises on his hands.

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[3] The south end of Zapopan Park is not far from the intersection of Delta and Garvey.

[4] Although she didn't realize it at the time, Martinez knew Cervantes from high school.

[5] Martinez previously testified at the preliminary hearing that Cervantes and defendant pushed each other.

Los Angeles County Deputy Sheriff Ricky Gutierrez received an emergency call at 7:20 p.m. and he went to the intersection of Delta and Garvey. On the way to the location, he saw a Latino man kneeling on the sidewalk and a Latina woman with long, pulled back hair helping him up.

Two days later, on April 9, 2008, Sergeant Robert Chivas with the Los Angeles County Sheriff's Department found defendant and Sanchez near the 10 Freeway and San Gabriel Boulevard in Rosemead. Defendant wore a belt with two knife sheathes attached to it. Folding knives, one with a dark handle and dark blade and the other with a dark handle and silver blade, were in each of the sheathes. Defendant had a black eye, split lip, and a fresh gash to the back of his head. No knives were on Sanchez or in a nearby black purse.

A DNA sample from a blood stain found at the crime scene on Delta matched defendant's DNA profile. DNA from blood on one of the knives found on defendant when he was arrested matched Cervantes's DNA profile.

II. Procedural background.

On September 3, 2010, a jury found defendant guilty of second degree murder (Pen. Code, § 187, subd. (a))[6] and found true a personal weapon enhancement allegation (§ 12022, subd. (b)(1)).

On November 22, 2010, the trial court sentenced defendant to 15 years to life plus one year for the weapon enhancement, for a total of 16 years in prison.

DISCUSSION

III. There was insufficient evidence of voluntary manslaughter to warrant instructing the jury on that theory.

Defense counsel requested an instruction on voluntary manslaughter as a lesser included offense of murder. The trial court refused, finding that there was insufficient evidence to show provocation. Defendant contends that the trial court prejudicially erred by refusing to instruct the jury on voluntary manslaughter. We disagree.

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[6] All further undesignated statutory references are to the Penal Code.

A trial court must instruct the jury, sua sponte, on the general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case. (*People v. Moye* (2009) 47 Cal.4th 537, 548; *People v. Abilez* (2007) 41 Cal.4th 472, 517; *People v. Breverman* (1998) 19 Cal.4th 142, 154.) Instructions on a lesser included offense must be given when there is substantial evidence from which the jury could conclude the defendant is guilty of the lesser offense, but not the charged offense. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584; *People v. Cook* (2006) 39 Cal.4th 566, 596.) Substantial evidence is evidence that a reasonable jury could find persuasive. (*Manriquez*, at p. 584.) In deciding whether there is substantial evidence of a lesser included offense, we do not evaluate the credibility of the witnesses, a task for the jury. (*Id.* at p. 585.) We independently review the question of whether the trial court erred by failing to instruct on a lesser included offense. (*Id.* at p. 587; *People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.)

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a); *People v. Manriquez, supra*, 37 Cal.4th at p. 583.) Voluntary manslaughter is the intentional but nonmalicious killing of a human being (*People v. Moye, supra*, 47 Cal.4th at p. 549; § 192, subd. (a)), and it is a lesser included offense of murder (*People v. Lee* (1999) 20 Cal.4th 47, 59; *Manriquez,* at p. 583). A killing may be reduced from murder to voluntary manslaughter if there is evidence negating malice, for example, where the defendant kills upon a sudden quarrel or in the heat of passion on sufficient provocation. (*Manriquez*, at p. 583.) An unlawful killing in a sudden quarrel or heat of passion constitutes voluntary manslaughter whether the defendant acts with an intent to kill or in conscious disregard for human life. (*People v. Lasko* (2000) 23 Cal.4th 101, 108-110.)

"Heat of passion arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.' [Citations.]" (*People v. Barton* (1995) 12 Cal.4th 186, 201.) The provocation that incites the defendant to

homicidal conduct must be caused by the victim or be conduct reasonably believed by the defendant to have been engaged in by the victim. (*People v. Manriquez, supra*, 37 Cal.4th at p. 583.) It may be physical or verbal, but it must be sufficiently provocative to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. (*Ibid.*; *People v. Lee, supra,* 20 Cal.4th at p. 59.) Thus, the heat of passion requirement has both an objective and a subjective component: " 'The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively.' " (*Manriquez,* at p. 584; see also *Lee*, at p. 60 [the test of adequate provocation is an objective one].) A defendant may not set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable person. (*Manriquez,* at p. 584.) No specific type of provocation is required, and the passion aroused need not be anger or rage, but can be any violent, intense, high-wrought or enthusiastic emotion other than revenge. (*People v. Lasko, supra,* 23 Cal.4th at p. 108.)

The trial court here correctly refused to instruct the jury on voluntary manslaughter, because there was insufficient evidence of adequate provocation to cause defendant to attack Cervantes. The provocative conduct may be physical or verbal, and it may comprise a single incident or numerous incidents over a period of time. (*People v. Lee, supra,* 20 Cal.4th at p. 59; *People v. Wharton* (1991) 53 Cal.3d 522, 569.) But the type of verbal argument that might constitute adequate provocation must be severe. A voluntary manslaughter instruction, for example, was unwarranted where the defendant called his ex-girlfriend a " 'f[uck]ing bitch,' " and she " 'cuss[ed]' " back at him. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 826-827.) In *Manriquez,* the victim taunted the defendant to take out his gun and " ' "use it you mother fuck[er]." ' " (*People v. Manriquez, supra,* 37 Cal.4th at p. 564, fn. 8.) Those harsh words, however, were also insufficient provocation to cause an average person to become so inflamed as to lose reason and judgment. (*Id*. at p. 586.)

Here, defendant became enraged when Cervantes asked if he had any marijuana for sale. Asking someone if they sell drugs may be insulting, but it is simply not the type of provocation that would cause an ordinary person to act rashly or without due deliberation and reflection. Moreover, when defendant said he didn't sell drugs, Cervantes apologized and moved on. Defendant, however, refused to let Cervantes go; instead, he challenged Cervantes to a fight. Although Cervantes hit defendant, it was defendant—not Cervantes—who provoked and initiated the physical attack.

And whether Cervantes's and defendant's fatal, second encounter on Delta Avenue is viewed as a continuation of the events at Zapopan Park or a separate encounter, there is similarly insufficient evidence that Cervantes either provoked defendant or that defendant was in an uncontrollable rage. Instead, Cervantes left the park, unwilling to fight. Defendant followed him, knife in hand. When he caught up to Cervantes, defendant pushed him. They may or may not have had a brief discussion. The witness, Martinez, thought that words were exchanged, but she didn't hear them. There is, however, no evidence that any words were exchanged in those brief moments that could have obscured defendant's reason.

The facts therefore show that defendant—not the victim, Cervantes—provoked and initiated all of the encounters. Under these circumstances, an instruction on voluntary manslaughter was unwarranted.

IV. Intoxication instruction.

Defendant next contends that the intoxication instruction violated his constitutional rights to due process and equal protection. We disagree.

As we said above, murder is the unlawful killing of a person or fetus with malice aforethought. (§ 187, subd. (a).) Malice may be express or implied. (§ 188.) Malice is implied when the killing is proximately caused by 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' [citation]." (*People v. Lasko, supra,* 23 Cal.4th at p. 107.) But where a person commits the murder while voluntarily intoxicated, evidence of that intoxication

may be admitted "solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought." (§ 22, subd. (b).) Evidence of voluntary intoxication is therefore *not* admissible to negate implied malice. (See generally, *People v. Timms* (2007) 151 Cal.App.4th 1292, 1297-1298 [discussing section 22's legislative history].)

The trial court here, without objection from either party, instructed the jury according to section 22: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill or the defendant acted with deliberation and premeditation. [¶] . . . [¶] You may not consider evidence of voluntary intoxication for any other purpose [except as set forth in] these instructions." (CALCRIM No. 625.) Voluntary intoxication, therefore, could not negate the mental state for second degree murder, which is what this jury found defendant guilty of.

Although defendant concedes that the instruction comports with section 22, he argues that foreclosing consideration of voluntary intoxication to negate implied malice second degree murder violated his due process right to present a defense and the equal protection clauses of the United States and California Constitutions. This argument, however, has been rejected. (See, e.g., *People v. Martin* (2000) 78 Cal.App.4th 1107 ["It is clear that the effect of the 1995 amendment to section 22 was to preclude evidence of voluntary intoxication to negate implied malice aforethought" (*Martin*, at p. 1114) and "[w]e find nothing in the enactment that deprives a defendant of the ability to present a defense or relieves the People of their burden to prove every element of the crime charged beyond a reasonable doubt" (*id*. at p. 1117)]; *People v. Timms, supra,* 151 Cal.App.4th 1292 [rejecting argument that section 22 violates due process and equal protection rights]; accord, *People v. Carlson* (2011) 200 Cal.App.4th 695, 707-708.)

Defendant, however, argues that these authorities misunderstand applicable authority, including *Montana v. Eglehoff* (1996) 518 U.S. 37, 40. A Montana statute prohibited voluntary intoxication from being considered in determining the existence of a mental state. Four justices found that nothing in the federal due process clause precludes a state from disallowing consideration of voluntary intoxication when a defendant's state of mind is at issue. (*Id.* at p. 56.) Justice Ginsburg concurred, but drew a distinction between a rule designed to keep out relevant, exculpatory evidence and one that redefines the mental-state element of the offense. (*Id.* at p. 57.) The former rule would violate due process; the latter would not. (*Ibid.*) Interpreting the statute as one redefining the mens rea of the offense, Justice Ginsburg found "no constitutional shoal." (*Id.* at p. 58.)

Our California Supreme Court cited *Eglehoff* when rejecting a defendant's argument "that the withholding of voluntary intoxication evidence to negate the mental state of arson violates his due process rights by denying him the opportunity to prove he did not possess the required mental state." (*People v. Atkins* (2001) 25 Cal.4th 76, 93.) Under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, we are bound by the California Supreme Court's holdings.

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.