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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.

CARLOS F. PAREDES,

Defendant and Appellant.

B182323

(Los Angeles County
Super. Ct. No. KA065698)

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

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

Carlos Paredes was convicted of two counts of voluntary manslaughter (Pen. Code,¹ § 192, subd. (a)) for causing the deaths of Monique Almanza and Raymond Flores. On appeal, he challenges his conviction for the voluntary manslaughter of Almanza on the basis that the doctrine of transferred intent was inapplicable; claims that the trial court erred in providing additional instruction on transferred intent; and contends that the trial court violated *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) by basing his sentence on facts neither found by the jury nor admitted by Paredes. We conclude that Paredes was properly convicted of voluntary manslaughter; follow California Supreme Court guidance with respect to *Blakely*; and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On March 16, 2004, while riding in a sport utility vehicle, Paredes shot and killed Monique Almanza and Raymond Flores as they drove a car on the 71 freeway in Pomona. The shooting was preceded by conflict between Flores and Paredes and his companions, three male minors. Flores threatened at least one of the minors, Paredes's cousin. The clash culminated in Paredes's vehicle, which was being driven by one of the minors, pulling alongside Flores's car on the freeway. Paredes shot multiple rounds into Flores's car, killing both occupants.

Paredes was charged with first degree special circumstances murder. (§§ 187, 190.2, subds. (a)(3) & (a)(21).) Paredes did not contest that he shot into Flores's car, but his counsel argued self-defense, heat of passion, and provocation. The jury was instructed on first degree murder with special circumstances, second degree murder, voluntary manslaughter, and involuntary manslaughter. The trial court gave CALJIC No. 8.65, concerning transferred intent. The jury asked questions about transferred intent, leading the trial court to repeat and amplify CALJIC No. 8.65 over defense

¹ All further statutory references are to the Penal Code.

objection. Soon thereafter, the jury convicted Paredes of voluntary manslaughter of both victims. Paredes appeals.

DISCUSSION

I. Transferred Intent

Transferred intent is defined by CALJIC No. 8.65 as follows: “When one attempts to kill a certain person, but by mistake or inadvertence kills a different person, the crime, if any, so committed is the same as though the person originally intended to be killed, had been killed.” Here, the jury presumably convicted Paredes of voluntary manslaughter for the death of Almanza on the basis of transferred intent, having concluded that the shooting of Flores constituted voluntary manslaughter.

The criminal act of killing another human being constitutes either murder or manslaughter, depending on whether the element of malice is present: “The distinguishing feature is that murder includes, but manslaughter lacks, the element of malice.” (*People v. Rios* (2000) 23 Cal.4th 450, 460 (*Rios*)). Paredes argues that transferred intent is only applicable to homicides involving malice—that is, to murders. He begins with the principles that the doctrine of transferred intent requires the perpetrator to “attempt[] to kill” (CALJIC No. 8.65) and that to make a legal attempt one must have “a specific intent to commit the crime.” (CALJIC No. 6.00.) All of this is uncontroverted enough. Paredes then concludes that because “[g]enerally, the intent to unlawfully kill constitutes malice” (*Rios*, at p. 460), the “idea behind transferred intent is to apply the doctrine when the defendant, having both the specific intent and malice, intends to kill one person but instead kills another.” In other words, Paredes argues that the use of the term “attempt” serves to restrict the doctrine to malicious homicides—to murders, not manslaughters.

The doctrine, however, is transferred *intent*, not transferred *malice*. While generally, the intent to unlawfully kill constitutes malice and makes a homicide a murder,

intent and malice are not universally interchangeable. The absence of malice is not necessarily the same as the absence of intent. (See, e.g., *Rios, supra*, 23 Cal.4th at pp. 460-461.) The divergence between malice and intent arises in the context of exactly the crime here—voluntary manslaughter. “[A] defendant who intentionally and unlawfully kills lacks malice . . . in limited, explicitly defined circumstances: either when the defendant acts in a “sudden quarrel or heat of passion” (§ 192, subd. (a)), or when the defendant kills in “unreasonable self-defense”—the unreasonable but good faith belief in having to act in self-defense [citations].” (*People v.]Barton [(1995)] 12 Cal.4th [186,] 199.*) . . . [H]eat of passion and unreasonable self-defense reduce an intentional, unlawful killing from murder to voluntary manslaughter by *negating the element of malice that otherwise inheres* in such a homicide (*ibid.*) . . .” (*People v. Breverman* (1998) 19 Cal.4th 142, 153-154.) The result: an intentional killing that lacks malice, exactly the situation presented here with respect to victim Flores. The fact that intent and malice often go hand in hand in the homicide context does not mean that malice is required for the doctrine of transferred intent to apply.

While Paredes’s argument does not lead to the restriction of transferred intent to the context of murder, it does properly focus on the key component of intent. The intent to kill that is necessary for an attempt to kill is precisely the basis for the doctrine of transferred intent, which our Supreme Court has observed may more accurately be described as a doctrine of transferred mental state. (*People v. Bland* (2002) 28 Cal.4th 313, 319, fn. 1.) As the Supreme Court has recently commented, the transferred intent doctrine is a “theory of liability that long has been part of California law and one that ‘connotes a *policy*—that a defendant who shoots at an intended victim *with intent to kill* but misses and hits a bystander instead should be subject to the same criminal liability that would have been imposed had he hit his intended mark.’ [Citations.]” (*People v. Shabazz* (2006) 38 Cal.4th 55, 62 [second emphasis added].) While this doctrine is most often applied in the context of a murder charge, nothing in California decisional or statutory law limits it to murder or prevents it from being applied to a voluntary manslaughter charge. Indeed, the policy rationale and legal reasoning extend equally to

the voluntary manslaughter context. In either event, the doctrine reflects “the blameworthiness of someone who, acting with the intent to kill . . . actually has killed another individual” (*Shabazz*, at p. 64), and allows the perpetrator to be “punished for a crime of the same seriousness as the one he tried to commit against his intended victim.” (*People v. Scott* (1996) 14 Cal.4th 544, 546 (*Scott*)). We note that the California Supreme Court, while not deciding this issue, has observed that the doctrine serves to transfer intent to “an unintended homicide victim,” not an unintended murder victim. (*Bland*, at p. 326.)

Paredes also argues that transferred intent may not properly be applied in the context of voluntary manslaughter because voluntary manslaughter may be committed without any intent to kill at all, but may be committed when a perpetrator acts with conscious disregard for life. (CALJIC No. 8.40.) Because the transferred intent doctrine requires an intent to kill, Paredes argues, the doctrine of transferred intent cannot apply to a crime that can be committed without any specific intent to kill. We do not understand how the possibility that a crime can be accomplished without the intent necessary for transferred intent makes the doctrine inapplicable when the crime is accomplished with the requisite intent.² If a perpetrator is acting not with the intent to kill but with conscious disregard for life, the transferred intent doctrine would not apply; but it would not be needed, as the conscious disregard for life that accompanied the fatal conduct would exist absent any imputation of mental state. The act performed in conscious disregard for human life supports voluntary manslaughter convictions for all the lives lost by its commission. (See *People v. Taylor* (2004) 32 Cal.4th 863, 869 [“defendant acted with knowledge of the danger to and conscious disregard for life in general. That is all that is required for implied malice murder. He did not need to be specifically aware of how many potential victims his conscious disregard for life endangered”].) In other words, if

² The jury found true the allegations that Paredes inflicted great bodily injury upon his victims “*with the intent to do so*” as a “result of discharging a firearm from a motor vehicle.” Whether Paredes intended to kill Almanza was in dispute at trial, but his intent to kill Flores was undisputed.

the jury had believed that Paredes shot into the car in which Flores and Almanza were riding without any intent to kill but with conscious disregard for life (which it did not, based on its finding that Paredes intended to inflict great bodily injury), he would properly have been convicted of voluntary manslaughter of both victims without any transfer of intent.

Because we have identified no legal impediment to the application of the doctrine of transferred intent in the context of voluntary manslaughter and because the policy basis for the doctrine applies with equal force to this form of homicide as it does to murder, we conclude that the conviction for the voluntary manslaughter of Almanza may properly have been based on the doctrine of transferred intent.

II. Amplification of CALJIC No. 8.65

Paredes argues that even if the doctrine of transferred intent could properly have been invoked here, the trial court's additional instructions to the jury effectively directed a verdict against Paredes on the charges relating to the death of Almanza. The court gave the jury this advisement³ in response to their questions as to what transferred intent is and whether the mental state prompting the shooting of Flores had to be the same as the mental state causing the shooting of Almanza:

“Instruction number 8.65 provides that, quote, ‘When one attempts to kill a certain person [but] by mistake or inadvertence kills a different person, the crime, if any, so committed is the same as though the person originally intended to be killed had been killed.[’] This principle of law is referred to as the doctrine of transferred intent.

“If you find that a killing in this case was the result of mistake or inadvertence during the killing of another human being, the intent or mental state accompanying the

³ The written version of this instruction was not included in the record on appeal; the following was taken from the court's reading of the proposed instruction to counsel before the court sent it in to the jury room.

killing of the unintended victim is the same as that accompanying the killing of the intended victim. On the other hand, if you find the killing was not the result of mistake or inadvertence, the mistake [*sic*] or mental state accompanying the killing may be—may but not necessarily be [*sic*] the same as the intent or mental state accompanying the killing of any other victim.

“If you should find that a killing in this case was not the result of mistake and/or inadvertence, you must determine whether the defendant is guilty or not guilty of an unlawful killing, and, if so, find him—and if you find him guilty of an unlawful killing, you must then determine whether the killing of murder [*sic*], first degree murder, second degree murder, voluntary manslaughter, or involuntary manslaughter.”

Paredes argues that this amplification of CALJIC No. 8.65 left the jury with two options: if jurors found Paredes intended to kill Flores but killed Almanza through mistake or inadvertence, they had to find that Paredes harbored the same intent as to both victims; and if the jurors found that the victims were not killed as the result of mistake or inadvertence, only then would they independently determine his mental state with respect to each victim. Paredes complains that only under the second option would the jury determine whether the killing was first or second degree murder or involuntary or voluntary manslaughter—meaning that the jury could not conclude that Almanza’s death resulted from mistake or inadvertence and that it qualified as involuntary manslaughter because Paredes did not know she was in the car.

To the extent that Paredes complains about the first of the two options, he is not complaining about the trial court’s instruction as much as he is dissatisfied with the doctrine of transferred intent. The court’s instructions did not mandate that the intent transfer from Flores to Almanza. If the jury found that Paredes intended to kill Flores and that he killed Almanza by mistake, CALJIC No. 8.65, given again to the jury in response to its questions, offered the jury two options: either to conclude that there was no crime in the killing of Almanza or to transfer the intent over from the killing of Flores to that of Almanza. The remainder of the trial court’s amplification did not highlight the

option of finding that no crime occurred, but the language of CALJIC No. 8.65 gave the jury that choice.

Paredes's larger concern is that the instructions foreclosed the possibility of a conviction for involuntary manslaughter because the jury could not consider the possibility that Almanza's death resulted by mistake or inadvertence because Paredes, while intending to kill Flores, did not know that Almanza was in the car.⁴ This again is a quarrel with the transferred intent doctrine rather than with its amplification by the trial court. Paredes's alleged lack of knowledge of Almanza's presence in the car is irrelevant for the purposes of transferred intent—provided that he intended to kill Flores when he opened fire into the car, an unintentional killing committed in the act of attempting to kill Flores is subject to the application of the transferred intent doctrine. (*People v. Carlson* (1974) 37 Cal.App.3d 349, 356-357 [transferred intent doctrine applicable to killing of fetus unknown to defendant who intentionally killed a pregnant woman]. This is the policy choice that forms the basis of the transferred intent doctrine: “that a defendant who shoots with an intent to kill but . . . hits a bystander . . . should be punished for a crime of the same seriousness as the one he tried to commit against his intended victim.” (*Scott, supra*, 14 Cal.4th at p. 546.)

It is not true that the court's instructions precluded Paredes from being convicted of involuntary manslaughter in the death of Almanza. Paredes could have been convicted of involuntary manslaughter of both victims had the jury believed that Paredes acted without intent to kill or conscious disregard for life. (CALJIC No. 8.45 [defining involuntary manslaughter].) It is only once the jury concluded that the death of Flores was murder or manslaughter that the transferred intent doctrine could have limited the jury's options with respect to evaluating the death of Almanza and effectively ruled out

⁴ Paredes's argument assumes that the jury has already found that the shooting of Flores constituted voluntary manslaughter and is carrying the intent over to the shooting of Almanza.

an involuntary manslaughter conviction.⁵ Even if there could, under some circumstances, be merit to Paredes's contention that the transferred intent doctrine insufficiently permits the consideration of involuntary manslaughter as to one victim once the other victim's killing is determined to constitute murder or voluntary manslaughter, those circumstances are not the ones we are presented with in this case. In order to have convicted Paredes of involuntary manslaughter in the killing of Almanza, the jury would have to have concluded that the act of discharging a firearm repeatedly at an occupied, moving motor vehicle somehow did not evince a conscious disregard for human life, a conclusion that is impossible under the circumstances. Trial counsel conceded as much when he argued in opening statement that his client was guilty of voluntary manslaughter—"the defendant is not guilty of first degree murder, not guilty of second degree murder, but guilty of manslaughter based on an imperfect self-defense."⁶ To the extent that there was any error in the court's amplification of the doctrine in a manner that would rule out a conviction for involuntary manslaughter for Almanza, it is harmless because an involuntary manslaughter conviction is inconceivable under these facts. (*Chapman v. California* (1967) 386 U.S. 18.)

III. Jury Trial

Paredes was sentenced to the upper term for the voluntary manslaughter of Almanza because the court found: Almanza was particularly vulnerable; there were multiple victims; Paredes posed a serious danger to society; he used minors in the

⁵ Again, it is not certain that the jury relied upon transferred intent to convict Paredes of the voluntary manslaughter of Almanza, as there was evidence that Almanza had been known to be in the car and the jury could have concluded that Paredes committed voluntary manslaughter of Almanza without a transfer of intent.

⁶ Paredes's counsel appeared to advocate for a not guilty verdict or involuntary manslaughter verdict in closing argument despite this very clear statement in his opening argument.

commission of the crimes; and he was in a position of leadership. Paredes contends the trial court's imposition of an upper term on this count, based on facts neither found by a jury to be true beyond a reasonable doubt nor admitted by Paredes, violated his right to a jury trial under *Blakely, supra*, 542 U.S. 296. Paredes acknowledges that the fact of multiple victims was in fact found by the jury, as evidenced by the guilty verdicts with respect to the deaths of both Flores and Almanza, but, citing California Rule of Court 4.425, subdivision (b)(i), argues that this fact could not justify both the upper term and the imposition of consecutive sentences.

The contention that a defendant's constitutional right to a jury trial is violated by the trial court's identification of aggravating factors and imposition of upper terms was rejected in *People v. Black* (2005) 35 Cal.4th 1238, 1244, in which the California Supreme Court held "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." The court explained, "The jury's verdict of guilty on an offense authorizes the judge to sentence a defendant to any of the three terms specified by statute as the potential punishments for that offense, as long as the judge exercises his or her discretion in a reasonable manner that is consistent with the requirements and guidelines contained in statutes and court rules." (*Id.* at pp. 1257-1258.) Paredes does not contend that the trial court exercised its discretion in an unreasonable fashion or the sentence imposed on him was inconsistent with the requirements of the Penal Code or the California Rules of Court. *Blakely, supra*, 542 U.S. 296, as interpreted by the California Supreme Court in *Black*, therefore provides no basis to set aside or modify the sentence.⁷

We do, however, observe that the United States Supreme Court has granted certiorari in *Cunningham v. California* (Apr. 18, 2005, A103501 [nonpub. opn.], cert.

⁷ See also *Washington v. Recuenco* (2006) (June 26, 2006, No. 05-83) ___ U.S. ___ [2006 WL 1725561] (failure to submit a sentencing factor to the jury is not structural error; harmless error analysis is performed on review).

granted Feb. 21, 2006, ___ U.S. ___ [126 S.Ct. 1329, 164 L.Ed.2d 47]), a case involving the effect of *Blakely, supra*, 542 U.S. 296, on California law. We therefore reject Paredes's *Blakely* argument without prejudice to any relief to which he might be entitled based on the United States Supreme Court's decision in *Cunningham*.

DISPOSITION

The judgment is affirmed.

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ZELON, J.

We concur:

JOHNSON, Acting P. J.

WOODS, J.