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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JULIE WYNNE PARRISH,

Defendant and Appellant.

D048368

(Super. Ct. No. SCD187601)

APPEAL from a judgment of the Superior Court of San Diego County, Robert F. O'Neill, Judge. Affirmed in part, reversed in part and remanded.

Julie Wynne Parrish was convicted by a jury of voluntary manslaughter (Pen. Code,¹ § 192, subd. (a)) involving the personal use of a knife. (§ 12022, subd. (b)(1).) She was sentenced to an upper term of 11 years for the voluntary manslaughter plus one year for the knife use.

On appeal, Parrish contends her conviction must be reversed because the court failed to instruct the jury on involuntary manslaughter and unconsciousness and gave

¹ All statutory references are to the Penal Code unless otherwise specified.

misleading instructions on the prosecutor's burden of proof. She also contends her upper term sentence was unconstitutional because it was based on facts not found by a jury nor admitted by her. We agree with her last contention and remand to the trial court for resentencing. In all other respects, we affirm the judgment.

FACTS

Parrish became addicted to heroin while she was in her twenties and married to her first husband, who subsequently died from a heroin overdose. Although she stopped using drugs for some period, by the middle of September 2004 she had started using again after her second ex-husband took custody of their daughter. In addition to heroin, Parrish also used methamphetamine and cocaine on a daily basis. She also frequently used Rohypnol pills to help her forget, "kind of like a black-out, except you don't pass out." To support her drug habit, she worked as a prostitute in the Zona Norte area of Tijuana.

Among her repeat customers was Jerry Lautin. He hired her twice in late September and early October 2004. After the first time, he told her he thought there was something special between them, that they "clicked" and had "chemistry." She gave him her cell phone number. After the second time, he told her he was going to a convention in Las Vegas and would call her when he returned.

Lautin called Parrish on or about October 10, the morning he returned from the convention in Las Vegas. When she told him she did not feel like working that day because she had been beaten and robbed the night before, he suggested that they meet

anyway. He met her about 3:00 or 4:00 p.m. in Tijuana and they went to a restaurant to eat. Parrish described him as being "really understanding" about why she did not want to work that night and he seemed interested in getting to know her. He knew she used drugs, but Parrish believed he probably did not know she was using heroin because she told him only about using cocaine. He told her that she did not have to work, that she could live with him in San Diego and that he would take care of her. He suggested she come with him for five to seven days but she refused because she would run out of heroin. Eventually, she agreed to go to San Diego only for one night and he agreed to pay her \$100.

Parrish told Lautin that before they left, she needed to pay someone \$20 to watch her things. Lautin gave her money and she used it to buy more drugs (heroin, cocaine, methamphetamine and Rohypnol), used some of the drugs, packed a bag and then met Lautin. They walked across the border and then drove to his apartment in a rental car. While they were driving, he kept insisting they had "chemistry," they "clicked, they would be "perfect for each other," he could "make her happy," she needed to be off the streets and he would "take care of her."

She was surprised by his apartment; it was "tiny . . . like someone's dorm room." They opened some wine and went into the living room where he kept telling her over and over again they had a "connection" and they "were meant for each other." She thought "[i]t was a little weird." He started to kiss and "grope" her but he stopped when she told him she "didn't want to go there." He suggested they both take showers.

He took the first shower. When he finished with his shower, he brought her a pair of his sweat pants and a T-shirt to wear. She used some drugs both while Lautin was taking a shower and while she was in the bathroom for her shower. When she got out of the shower, she saw Lautin, clothed and stretched out on the bed on top of the covers. She told him she was tired and wanted to go to sleep. As she was starting to fall asleep, she felt Lautin trying to "cuddle" around her, something that she did not like because it was so intimate. She tried to move away, but he pulled closer and started kissing the nape of her neck and touching her breasts. She asked him to stop, but he told her he needed to have sex. He told her he would be quick. She finally agreed because it seemed "the easiest way" for her and then she would be able to sleep.

Lautin rolled on top of her, which made her "[r]eally uncomfortable." She tried to get on top of him but he would not let her. He bit her neck and would not stop when she said it hurt. He told her he was going to "fuck her" and "fuck her in the ass."² He was being very aggressive. She managed to free herself and stand up at the edge of the bed. When she asked him to take her home, he told her, "you are not going anywhere," stood up and pushed her back down on the bed. He started to penetrate her and put a finger in her anus. He ignored her when she told him he was hurting her. She was scared because she was aware that women disappeared from Tijuana all the time and were found beaten or killed. Also, she had been raped about a year earlier by one of the directors of a drug

² During her two earlier encounters with Lautin, he had asked for anal intercourse and she told him she did not do that.

rehabilitation center where she had been volunteering. The man had broken into her house, strangled her with a pair of pantyhose until she lost consciousness and raped her in front of her son.

Parrish came up with a plan. She convinced Lautin to allow her to tie him to the bed. With strips of fabric torn from a T-shirt, she tied his hands to the headboard and his ankles together and then to the bedpost. She had sex with him while she was binding him. Because the ties were "pretty flimsy" and "pretty loose," she tightened the knots, added masking tape as well as a belt and a chain.

When she got up off him, he told her if she tried to leave, he was going to start yelling and screaming until somebody came to the apartment and he would tell them Parrish was trying to rob and kill him. Parrish, who was afraid, held a pair of scissors to Lautin's chest and told him he needed to be quiet or she would harm him. She then decided to inject him with heroin to make him go to sleep. She was not intending to kill him. The heroin seemed to have no effect on him so Parrish put masking tape over his mouth and nose and taped a plastic bag over his face. Lautin continued to struggle to free himself. Parrish was sure he was going to get loose and that he would beat or kill her if he did.

She retrieved an exacto knife from a kitchen drawer with the intent to kill him. She was "really panicked." He was still moving. She put a pillow over his face so she would not have to look at him while she cut and stabbed him in the neck. At one point, the blade broke and she pressed a button for a new blade.

Before leaving the apartment, she wiped down some of the surfaces she had touched to eliminate fingerprints and took money from Lautin's wallet and other items, including a cell phone, and toy cars she later gave to her son. She loaded the items into Lautin's rental car and drove back to Tijuana where she abandoned the car.

She used Lautin's cell phone to call a friend and customer, Jimmy Davis. Davis vaguely remembered Parrish telephoning him and telling him about an altercation in the United States with a customer who had gotten violent, something about being tied up — either the customer wanted to be tied up or Parrish wanted to be tied up — that something went wrong, she hit him on the head and took his rental car. The police eventually located Davis through Lautin's cell phone records and he identified Parrish to the police on December 15, 2004.

Lautin's body was discovered about a week and a half later. The cause of death was asphyxiation and heroin toxicity with a contributing condition being the neck wounds. The neck wounds were probably inflicted about the time Lautin died and in themselves would have been fatal.

Parrish's fingerprints were found on the bed frame. Her DNA was found on a cap from the needle she had used to inject Lautin with heroin, a glass and a wine bottle.³ A swab taken from Lautin's penis contained a mixture of DNA from two people, most of it from Lautin. Parrish could not be excluded as contributing to the DNA mixture.

³ An expert testified the DNA found on the needle cap, glass and bottle occurs in 1 in 95 quintillion Caucasians, 1 in 5.1 sextillion African Americans, and in 1 in 160 quintillion Hispanics.

Parrish confessed to killing Lautin and described the evening in detail to the police but did not mention that she had used methamphetamine and Rohypnol in addition to heroin and cocaine nor did she mention using drugs while she and Lautin had been at the restaurant or while she was in Lautin's apartment.

She was charged with murder (§ 187, subd. (a)) involving the personal use of a knife (§ 12022, subd. (b)(1)) with special circumstances of committing murder during the course of a robbery (§§ 211, 212.5, 190, subd. (a)(17)) and by the administration of poison. The jury acquitted her of murder, instead finding her guilty of voluntary manslaughter involving the personal use of a deadly weapon, a knife.

DISCUSSION

I

Involuntary Manslaughter

Parrish contends the court erred in refusing her instructions on involuntary manslaughter and unconsciousness due to intoxication. She contends both instructions were supported by substantial evidence. We disagree.

A trial court has a duty to instruct the jury on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present. (*People v. Birks* (1998) 19 Cal.4th 108, 118.) "However, a trial judge need not instruct the jury as to all lesser included offenses, just those that find substantial support in the evidence." (*People v. Haley* (2004) 34 Cal.4th 283, 312. (*Haley*)). Substantial evidence in this context is evidence from which " " a jury composed of reasonable

[persons] could . . . conclude[]" ' that the lesser offense, but not the greater, was committed." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) In other words, if no rational jury could find the defendant guilty of the lesser included offense based on the evidence, then it is proper to refuse instructions on a lesser offense. (*Haley, supra*, at p. 313.)

"Involuntary manslaughter, when not misdemeanor manslaughter, is criminally negligent unlawful homicide. (§ 192, subd. (b).)" (*People v. Ochoa* (1998) 19 Cal.4th 353, 423; *People v. Heard* (2003) 31 Cal.4th 946, 981.) By its nature, involuntary manslaughter is an unintentional or "accidental" killing in the sense that the death is caused by reckless or criminally negligent, rather than intentional conduct by the defendant. (*People v. Broussard* (1977) 76 Cal.App.3d 193, 197; *People v. Velez* (1983) 144 Cal.App.3d 558, 566.)

" 'When a person renders himself or herself unconscious through voluntary intoxication and kills in that state, the killing is attributed to his or her negligence in self-intoxicating to that point, and is treated as involuntary manslaughter. [Citation.] Unconsciousness does not mean that the [person] lies still and unresponsive. Instead, a person is deemed "unconscious" if he or she committed the act without being conscious thereof.' " (*Haley, supra*, 34 Cal.4th at p. 313; *People v. Ochoa, supra*, 19 Cal.4th at pp. 423-424.)

Parrish's claim the instructions should have been given is based on evidence that she was under the influence of many drugs, including Rohypnol. Parrish testified she

used Rohypnol because it helped her to forget. Her expert testified Rohypnol, which is sometimes called the date-rape drug, causes "[a]nterograde amnesia" and "will put you to sleep and make you forget what happens after you take it." However, her expert also testified that he was unsure of the effect of Rohypnol when used in combination with the other drugs Parrish was using (heroin, methamphetamine and cocaine) and that he would expect a person under the influence of Rohypnol not to be able to report details of what he or she had been doing. Here, Parrish recounted in great detail all the events of October 10 both to the police and at trial.

In *Haley, supra*, 34 Cal.4th at page 313, the Supreme Court noted that a defendant's ability to recount an incident in great detail was inconsistent with a claim of unconsciousness. Additionally, the Supreme Court in *Haley* noted that the expert witness did not testify the intoxication rendered the defendant unconscious. Similarly here, Parrish's expert did not testify the drugs rendered Parrish unconscious. Instead, the expert merely testified the drugs and alcohol impaired Parrish's judgment, would have caused behavioral difficulties, and would have affected her ability to plan and understand the logical consequences of her actions. He also testified that since he did not have a toxicology report for Parrish from the night of the killing he could not have a confident opinion as to how the drugs would have affected her that night.

Most importantly, in this case Parrish specifically testified that she intended to kill Lautin when she retrieved the exacto knife and cut and stabbed Lautin's neck. In other words, Parrish admitted that, despite her intoxication, she was fully conscious of what she

was doing. This was not an accidental death caused by criminal negligence. Parrish's admission and her detailed recollection of the events precluded any rational jury from finding Parrish was "unconscious" and guilty only of involuntary manslaughter. The trial court correctly refused to give the requested instructions.

II

Instructions on Burden of Proof

Parrish contends the CALCRIM instructions on the lesser included offense of voluntary manslaughter improperly lessened the prosecutor's burden of proof.

In the instructions for completing the verdict forms, the court instructed the jury using CALCRIM No. 641, which, *inter alia*, stated:

"The People have the burden of proving that the defendant committed first degree murder *rather than a lesser offense*. If the People have not met this burden, you must find the defendant not guilty of first degree murder.

"A. Voluntary Manslaughter: Lesser Included

"If you all agree that the defendant is not guilty of first or second degree murder, but you all agree the People have proved she is guilty of voluntary manslaughter, then complete the verdict form stating that she is guilty of voluntary manslaughter. Do not complete a verdict form stating the defendant is guilty of voluntary manslaughter unless you all agree that the defendant is not guilty of murder.

"The People have the burden of proving that the defendant committed murder *rather than a lesser offense*. If the People have not met this burden, you must find the defendant not guilty of murder.

"The People have the burden of proving that the defendant committed murder or voluntary manslaughter rather than a lesser

offense. If the People have not met this burden, you must find the defendant not guilty of murder and not guilty of voluntary manslaughter." (Italics added.)

Parrish argues a reasonable jury could "easily interpret" the italicized portions of the instruction "as permitting a conviction on the lesser offense simply because the jurors did not find [her] guilty of the greater offense beyond a reasonable doubt." She argues: "The prosecutor does not have the burden of proving that appellant committed one offense 'rather than' another offense. The prosecutor instead has the burden of proving every element of a crime beyond a reasonable doubt. [Citation.] That burden of proof applies both to greater and to lesser offenses."

Parrish's argument is based on isolating a phrase out of its context. However, when we review the propriety of the jury instructions, we view the instructions in context and as a whole. (*People v. Barajas* (2004) 120 Cal.App.4th 787, 791; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) An instruction is not erroneous if no reasonable juror would have misinterpreted the instruction as the appellant suggests. (See *People v. Fonseca* (2003) 105 Cal.App.4th 543, 549.)

Here, CALCRIM No. 641 itself made it clear that the jury could not convict on a lesser offense that is voluntary manslaughter, simply because the prosecutor did not prove a greater offense beyond a reasonable doubt. CALCRIM No. 641 specifically instructed the jury: "If the People have not met this burden [of proving the defendant committed murder or voluntary manslaughter], *you must find defendant* not guilty of murder and *not guilty of voluntary manslaughter*." (Italics added.) Further, the jury was

fully instructed on the elements of voluntary manslaughter (CALCRIM No. 572) and on the reasonable doubt standard (CALCRIM No. 220).

The jury was not misinstructed on the prosecutor's burden of proof.

III

Imposition of an Upper Term

Parrish contends the court erred in imposing an upper term based on facts not found by the jury.

In sentencing Parrish to the upper term, the court noted there were some factors in mitigation but found the following aggravating factors present: the crime involved great violence, threats, and bodily harm showing a high degree of cruelty, viciousness and callousness; the victim was particularly vulnerable since he was in his own home and had been bound; Parrish had a prior conviction involving a physical altercation with a police officer when she learned she would be arrested for possession of a controlled substance; Parrish's prior convictions as an adult were of increasing seriousness; Parrish was on probation when the crime was committed; Parrish had violated probation by never reporting to a probation officer; and when Parrish's attempts to kill Lautin by heroin and suffocation were unsuccessful, she proceeded to cut his throat.

In *Cunningham v. California* (2007) 549 U.S. ____ [166 L.Ed.2d 856], the United States Supreme Court held California's sentencing scheme was unconstitutional to the extent it mandated a court impose an upper term sentence based on a determination that the aggravating factors outweighed the mitigating factors if the aggravating factors —

other than the fact of a prior conviction — had not been previously found true by a jury or admitted by the defendant. The Court held California's sentencing scheme violated a defendant's Sixth Amendment right to a jury trial. The Court suggested that California's sentencing scheme could be remedied by modifying it to one where imposition of the upper term would be discretionary, rather than mandatory.

Here, the imposition of the upper term was not imposed based solely on the fact of a prior conviction but based on numerous other factors that had neither been found true by a jury nor admitted by Parrish. Therefore, the sentence violated *People v. Cunningham*, must be set aside and the case must be remanded for resentencing.

DISPOSITION

The sentence is set aside and the case is remanded for resentencing. In all other respects, the judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

HUFFMAN, J.

MCINTYRE, J.