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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent, **A124635**

v. **(Humboldt County Super. Ct. No. CR083238S)**

RODNEY JAY GROH,

Defendant and Appellant.

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A jury convicted appellant Rodney Jay Groh of murder (Pen. Code, § 187, subd. (a))[1] and the court sentenced him to state prison. Appellant's sole contention on appeal is the trial court erred by refusing to instruct the jury with CALJIC No. 3.40,[2] which pertains to causation in murder.

We affirm.

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

[2] CALJIC No. 3.40 provides in relevant part as follows: "To constitute the crime of [murder] there must be in addition to the [death] an unlawful [act][or] [omission] which was a cause of that [death]. [¶] The criminal law has its own particular way of defining cause. A cause of the [death] is an [act] [or] [omission] that sets in motion a chain of events that produces as a direct, natural and probable consequence of the [act][or] [omission] the [death] and without which the [death] would not occur."

FACTUAL AND PROCEDURAL BACKGROUND

The Incident

In 2008, Kathy Lynne Thibeault was living at the Budget Motel (motel) in Eureka. On the afternoon of May 22, 2008, she took a 40-ounce beer to the room appellant shared with George Giguere. She drank her beer and talked with the two men. Initially, things seemed "normal," but as the afternoon progressed, appellant's "mood changed" and he became "aggressive, angry [and] sarcastic." Appellant criticized Giguere, calling him "stupid." Thibeault left the room after appellant grabbed Giguere by "the front of his shirt and grabbed his face up real close to his and started talking in a really mean [voice], growling." Thibeault went back to her room, finished her beer, and took a nap. Later, appellant called and said, "I need you." Because of similar experiences in the past, Thibeault hung up the phone and took it off the hook.

In 2008, John Albertson lived at the motel with his family in a room above appellant and Giguere. Albertson talked to Giguere occasionally and thought he was a "real nice guy." Albertson's interactions with appellant, however, "weren't very pleasant." On the day of the incident, about 30 to 45 minutes before police and emergency personnel arrived at the motel, Albertson walked by appellant and Giguere's room on his way to buy groceries. He heard Giguere and appellant arguing; Giguere said, "'I'm tired of this. Knock it off. . . . Leave me the fuck alone.'" Appellant responded, "'Fuck you, you son of a bitch.'" Albertson continued walking to the store, but turned around and returned to the motel when he realized he had forgotten his debit card. Back in his apartment, Albertson heard what "sounded like someone knocking on the doors."[3]

In 2008, Joseph Grant lived at the motel in a room next door to Giguere and appellant. Throughout the day on May 22, 2008, he heard appellant yelling from his room. Grant heard appellant yell, "'Shut up. Shut up.'" In the late afternoon, appellant

[3] Other tenants heard "thumping" noises coming from appellant and Giguere's room at 9:30 or 10:00 p.m., like "somebody wrestling around[,]" and "a lot of screaming" coming from appellant and Giguere's room at 10 p.m.

walked into Grant's room uninvited and told Grant — whose children were jumping on the bed — that he should always take care of his children. Appellant was "acting really bizarre:" he "was drunk and . . . aggressive." Grant asked appellant to leave. Then he called his mother and asked her to come and pick up his children because appellant was being "really scary." Grant's mother retrieved his children at approximately 7:00 p.m. and a few minutes later, Grant went to a movie. When Grant returned to his room at approximately 11:00 p.m., appellant called. He said, "'He's not waking up. Usually, after our arguments, fights, he wakes up. He's not waking up. . . . I think I killed him.'" Grant told appellant to call the police.[4]

At 11:15 p.m. on May 22, 2008, appellant called the police and reported that he needed help. He said that he did not know whether his 61-year-old "buddy" was "dead or alive." A few minutes later, Eureka City Firefighters went to the motel and found Giguere unconscious on the floor. Appellant was bent over Giguere, taking his pulse. Giguere had "obvious bruises and discoloration on his face, arms and chest." He was unconscious, was not breathing, and had no pulse. Emergency personnel were unable to revive him.

One of the firefighters asked appellant what happened. Appellant, who was "shaky" and "nervous," said that he and Giguere had been in a fight a few hours earlier in the parking lot behind the motel. A little while later, appellant said "there were a bunch of people that had been in a fight." A firefighter observed appellant "running back and forth" along the breezeway outside of the room, screaming "'George'" and hitting and kicking a wall. Appellant had dried blood on his hands and blood on his shirt.

Eureka Police Officer Edward Wilson interviewed appellant, who was crying and "frantic," and who smelled and looked as though he had been drinking. Appellant told Wilson that he and Giguere were involved in a fight with two other men in the parking lot behind the motel and that both he and Giguere were injured. Appellant could not, however, say when the fight occurred or identify the men. Eureka Police Sergeant Steven

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[4] On the day of the incident, Grant was taking Oxycontin and morphine, which had been prescribed for back pain.

Watson went to appellant and Giguere's room and saw Giguere on the floor. His face was "severely battered and bloody" and his eyes were "swollen." Watson thought Giguere's injuries were consistent with someone who had been beaten. He did not see any injuries to appellant's face or hands. Appellant said that after the fight, he and Giguere helped each other back to their room, where appellant washed his own face and hands. At that point, according to appellant, Giguere became weak. Appellant told Wilson that Giguere "had fallen down on the floor near one of the double beds . . . [and] wasn't breathing very well" and became unconscious. Appellant then told Wilson that he felt Giguere's "weak pulse" and called 911. According to appellant, the blood on his hands was from holding Giguere while he waited for the fire department to arrive. Wilson and Watson looked in the parking lot behind the motel but were unable to find evidence of a fight such as scuff marks on the pavement, blood, disturbed landscaping, or personal belongings.

Eureka Police Detective Patrick O'Neill interviewed appellant at the Eureka Police station.[5] Appellant told O'Neill that he and Giguere had lived together for 11 years, and had spent the last three years living together at the motel. Appellant explained that he and Giguere had their "ups and down" but that they "always st[u]ck together." According to appellant, he and Giguere went to the parking lot behind the motel "because somebody was bullshitting out there." He and Giguere "got into it" with two young men who had long hair and who were wearing blue jeans and sweatshirts. After the fight, appellant and Giguere returned to their room; Giguere told appellant he was "really dizzy" and that he did not "want to live anymore." Appellant did not understand what was happening; he was confused because when he walked back into the motel room, he had blood on his hands. Appellant told Giguere to sit down and asked him if he wanted a "shot of booze."

Appellant got Giguere a shot of alcohol and went to the bathroom. When he came out, Giguere was lying on the floor. He told appellant he was "'just relaxing for a little

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[5] Appellant waived his *Miranda* rights. (*Miranda v. Arizona* (1966) 384 U.S. 436.)

while.'" Appellant drank another shot and lay down on the floor — where it was cooler — with Giguere and went to sleep.[6] Some time later, appellant woke up, saw blood on his hands, and shook Giguere. When Giguere did not respond, appellant administered CPR and then called 911. Appellant claimed he had three shots of brandy. According to appellant, Giguere had two shots of brandy and had taken prescription medication earlier that day.

When Detective O'Neill suggested that appellant may have killed Giguere, appellant explained that Giguere could have fallen and hit his head "on an edge or something." Later, however, appellant said that Giguere "might have been" injured during the parking lot fight, even though he claimed no one touched Giguere during the fight. Later, appellant claimed Giguere was hit, pushed down, and kicked during the fight. Appellant eventually admitted that he lied about the fight in the parking lot and claimed that he and Giguere had a few drinks and had gotten into an argument about what television show to watch. When appellant was in the bathroom, he heard "a thump" and thought Giguere had "probably run into the wall" or had fallen on the floor. When appellant came out of the bathroom, Giguere was on the floor. Appellant realized he was dead. He began performing CPR on Giguere and then called 911. Appellant said he did not know how Giguere sustained facial injuries.

Police officers searched appellant and Giguere's motel room and saw that the room was filthy. The officers observed blood on the carpet of the room and on a dresser. Among other things, officers found a bloody clump of hair and a flashlight.

Criminologist Kay Belschner determined Giguere's blood alcohol content was .41 and that appellant's blood alcohol content was .27. Various drugs, including Fluvoxamine, Olanzapine and Paroxetine — none of which should be taken with alcohol — were found in Giguere's blood. Belschner determined the wad of hair found with

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[6] At another point during the interview, appellant said that he brought Giguere into the motel room and laid him on Giguere's bed. Appellant claimed he took a nap in his bed and that when he woke up, Giguere was on the floor.

Giguere's body was forcibly removed from his scalp. She also determined that the blood all over the hotel room and on Giguere's body was from Giguere, not appellant.

Dr. Neil Kushner performed the autopsy on Giguere and observed numerous abrasions and contusions on Giguere's head. Giguere's nose was swollen and "possibly . . . fractured;" his lips were bruised, torn and "very remarkably swollen." According to Dr. Kushner, these injuries were recent, and were consistent with "blunt force trauma," or with being battered by an object such as a flashlight, fist or foot. Dr. Kushner found numerous injuries all over Giguere's body, including abrasions, bruises, and defensive wounds on Giguere's arms.[7] These injuries were not consistent with falling down, or with falling down multiple times. Dr. Kushner explained that it was unlikely that a "stuporous person under the influence of prescription medication and alcohol could conceivably have fallen and the falls would have resulted in" Giguere's injuries. Dr. Kushner also determined that neither alcohol nor heart disease caused Giguere's death. The cause of death was "blunt force trauma of the head."

The Jury Instructions and Verdict

Defense counsel asked the court to instruct the jury with CALJIC Nos. 3.40 and 3.41 because they "more accurately state [the] issues that the jury would have to consider in terms of proximate cause and causation." The prosecutor, however, argued the CALJIC instructions were "significantly more confusing than the language" in CALCRIM No. 620 and requested that instruction. The court ruled, "The Court will give [CALCRIM No.] 620 and will not be giving 3.40 and 3.41 from the CALJIC series. I do believe [CALCRIM No.] 620 sets forth the instruction clearly, in fact . . . better than [CALJIC Nos.] 3.40 and 3.41. . . . "

The court instructed the jury with CALCRIM No. 620 as follows: "There may be more than one cause of death. An act causes death only if it is the substantial factor in causing the death. A substantial factor is more than [a] trivial or remote factor. However, it does not need to be the only factor that causes the death. [¶] George Giguere

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[7] Dr. Kushner explained that some of the bruising on Giguere's chest could have come from "CPR activity" when emergency personnel tried to resuscitate Giguere.

may have suffered from an illness or physical conditions that made him more likely to die from the injury than the average person. The fact that George Giguere may have been more physically vulnerable is not a defense to murder or manslaughter. If the defendant's act was a substantial factor causing the death, then the defendant is legally responsible for the death. This is true even if George Giguere would have died in a short time of other causes or if another person of average health would not have died as a result of the defendant's actions. [¶] If you have a reasonable doubt whether the defendant's act caused the death, you must find him not guilty."

The court also instructed the jury with CALCRIM No. 251, the jury instruction on the union of act and intent, which informed the jury, "For you to find a person guilty of the crime of murder . . . that person must not only intentionally commit the prohibited act, but must do so with a specific intent or mental state. . . ." Further, the court defined malice in the context of murder with CALCRIM No. 520. After deliberating for three hours, the jury convicted appellant of murder and the court sentenced him to state prison.

DISCUSSION

Appellant's sole contention on appeal is the court erred by instructing the jury with CALCRIM No. 620 instead of with CALJIC No. 3.40 because the CALCRIM instruction did not inform the jury that he must have committed "'an unlawful act' which 'sets into motion a chain of events which produces' the death." Following appellant's logic, the jury could have found him guilty of murder "even if it simply found that [his] acts of providing alcohol and failing to call 911 — no matter how lawful — were substantial factors in causing Giguere's death."

Even if we assume for the sake of argument that the court erred by failing to instruct the jury with CALJIC No. 3.40, any error was harmless in light of the overwhelming evidence of appellant's guilt. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Prettyman* (1996) 14 Cal.4th 248, 274 [applying *Watson* harmless error standard of review to claimed error in failing to instruct on the natural and probable consequences theory of accomplice liability]; *Neder v. United States* (1999) 527 U.S. 1,

17-18 [alleged instructional error was harmless in light of overwhelming evidence of defendant's guilt].)

First, the evidence established appellant and Giguere had a violent physical confrontation just before Giguere died. On the afternoon of the incident, appellant was "aggressive, angry [and] sarcastic" toward Giguere: he criticized Giguere, yelled at him, and called him "stupid." At one point, appellant grabbed Giguere's shirt and was "growling" at him. Groh was "acting really bizarre" and "was drunk and . . . aggressive." Later that evening, Giguere told appellant, "'I'm tired of this. Knock it off. . . . Leave me the fuck alone." And shortly before the police and emergency personnel arrived, tenants heard "thumping" noises — like someone was "wrestling around" — and "a lot of screaming" coming from appellant and Giguere's room.

In addition, the evidence strongly suggested Giguere was beaten to death. His face and body were badly bruised and bloodied and Wilson testified that Giguere's injuries were consistent with someone who had been beaten to death. In addition, Dr. Kushner opined that Giguere's numerous injuries — including a broken nose, torn lips and swollen eyes — were consistent with being battered with an object such as a flashlight. Dr. Kushner opined that the cause of death was "blunt force trauma of the head." He explained that Giguere's injuries were not consistent with falling down and noted that it was unlikely that a "stuporous person under the influence of prescription medication and alcohol could conceivably have fallen and the falls resulted in" injuries like Giguere's. Giguere also had defensive wounds on his arms. His blood was all over the motel room and a criminologist Belschner determined that a wad of Giguere's hair had been forcibly removed. Finally, appellant called Grant and reported, "'He's not waking up. Usually, after our arguments, fights, he wakes up. He's not waking up. . . . I think I killed him.'"

In contrast, the defense evidence was weak. Appellant offered several different versions of what happened when he was interviewed by the police. First, he told Wilson that he and Giguere got into a fight in the motel parking lot, but he could not describe the assailants. Initially, he told Wilson that he and Giguere helped each other back to their

room after the fight and that Giguere fell down and became unconscious. Later, however, appellant told O'Neill that he and Giguere returned to the motel room after the fight and drank shots of alcohol and slept next to each other on the floor. Appellant explained that when he woke up, he realized Giguere was dead. Ultimately, appellant admitted that he lied about the fight in the parking lot and explained that Giguere got drunk, fell down, and hit his head in the motel room, as he had done in the past. Appellant's self-serving theory about the cause of Giguere's death was simply not believable.

This was not, as appellant suggests, a close case. We reject appellant's contention that the court's failure to instruct the jury with CALJIC No. 3.40 could have led the jury to conclude that appellant "intentionally committed lawful acts" such as "providing alcohol to a sick, elderly, and already intoxicated man and not immediately seeking medical care" and, on that basis, convicted appellant of murder. The evidence strongly supported the conclusion that appellant beat Giguere to death and the jury reasonably convicted appellant based on this evidence and not on any evidence that appellant provided alcohol to Giguere or waited too long to call 911. Therefore, any error in failing to instruct the jury with CALJIC No. 3.40 was "harmless because it was not 'reasonably probable' appellant would have obtained a more favorable outcome had the alleged instructional error not occurred." (*People v. Gonzales* (2010) 190 Cal.App.4th 968, 995, fn. 14, quoting *People v. Breverman*, (1998) 19 Cal.4th 142, 178.)

DISPOSITION

The judgment is affirmed.

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Jones, P.J.

We concur:

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Simons, J.

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Bruiniers, J.