

CERTIFIED FOR PARTIAL PUBLICATION\*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(San Joaquin)

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THE PEOPLE,	C057216
Plaintiff and Respondent,	(Super. Ct. No. LF009380A)
v.	
TIMON JOEL POOL,	
Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of San Joaquin County, Cinda Fox, Judge. Affirmed.

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

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Catherine Chatman and John G. McLean, Deputy Attorneys General, for Plaintiff and Appellant.

A jury found defendant Timon Joel Pool guilty of the first degree murder of Lillian Best and the second degree murder of

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\* Pursuant to California Rules of Court, rule 8.110, this opinion is certified for publication with the exception of parts II and III of the Discussion.

Best's unborn fetus and found true a multiple-murder special-circumstances allegation. Defendant was sentenced to state prison for life without possibility of parole. On appeal, defendant argues the trial court committed reversible error by misinstructing the jury on murder of a fetus. Finding no error, we will affirm.

#### FACTUAL AND PROCEDURAL BACKGROUND

On July 23, 2006, defendant strangled his girlfriend, Lillian Best, to death. While performing an autopsy on July 24, the forensic pathologist noticed Best's uterus was noticeably larger than normal, and further investigation showed she had been pregnant. Because Best was in the early stages of pregnancy and was obese, her pregnancy was "not something obvious externally." The forensic pathologist, as well as a coroner's office pathologist who reviewed the forensic pathologist's report, both estimated the gestational age of the fetus to be about 12 weeks. Both pathologists also concluded that the fetus died as a result of the death of the mother.

Defendant claimed not to have known Best was pregnant until he was in the holding cell in court for his arraignment and received documents charging him with two murders. Defendant testified he was "[a]bsolutely devastated" to learn he had killed his unborn child.

Defendant was charged with two counts of willfully, unlawfully, and with malice aforethought murdering Lillian Best and her fetus, respectively, with a multiple-murder special-

circumstances allegation. (Pen. Code,<sup>1</sup> §§ 187, 190.2, subd. (a)(3).)

Prior to trial, the court agreed with the prosecutor's contention that knowledge of the existence of the fetus was not a prerequisite for finding defendant guilty of fetal murder. Later, during closing arguments, the prosecutor stressed to the jury that defendant could be found guilty of murdering the fetus on an implied malice basis even if he did not know Best was pregnant.

The court instructed the jury on murder with malice aforethought with CALCRIM No. 520.<sup>2</sup> The court did not include the optional "natural and probable consequences" paragraph from the standard instruction.<sup>3</sup>

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> The jury was instructed that in order to prove the crime of second degree murder as to the fetus, "the People must prove that: [¶] One, the defendant committed an act that caused the death of another person or a fetus; [¶] And, two, when the defendant acted, he had a state of mind called malice aforethought. [¶] There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder." (CALCRIM No. 520.)

<sup>3</sup> The omitted paragraph instructs as follows: "An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence." (CALCRIM No. 520.)

However, the trial court gave the following special instruction for murder of a fetus: "Malice is a separate element that must be proved for each of the two murders charged. [¶] When a defendant commits an act, the natural consequences of which are dangerous to human life, with a conscious disregard for life in general, he acts with implied malice towards those he ends up killing. There is no requirement that the defendant specifically know of the existence of each victim [i.e., the fetus]."

#### DISCUSSION

Defendant argues that the trial court committed reversible error by giving the prosecutor's special instruction that knowledge of the fetus's existence was not a prerequisite to a murder conviction and compounded that error by omitting from the jury instructions the "natural and probable consequences" paragraph. We find no error.

#### I

##### *Knowledge Of Existence Of The Fetus Is Not A Prerequisite To Fetal Murder*

Defendant first contends the special jury instruction "that knowledge of the existence of the fetus was not a prerequisite for finding [defendant] guilty of fetal murder" was erroneous. Defendant notes that "[a]lthough neither the court nor the prosecutor expressly referred to *People v. Taylor* (2004) 32 Cal.4th 863 (*Taylor*), that case was the unquestionable basis for the prosecutor's instruction." Defendant "submits, however, that the holding in *Taylor* should be narrowly construed and

should not have applied to the circumstances in [defendant's] case" in which the victim was strangled rather than shot. We see no reason to distinguish *Taylor*.

The facts in *Taylor* are remarkably similar to the facts here. In *Taylor*, the defendant engaged in a physical struggle with his ex-girlfriend, eventually shooting her in the head and killing her. (*Taylor, supra*, 32 Cal.4th at pp. 863, 866.) She died of a single gunshot wound to the head. (*Id.* at p. 866.) The autopsy revealed she was pregnant, and the fetus was between 11 and 13 weeks old. (*Ibid.*) The examining pathologist could not discern that the victim, who weighed approximately 200 pounds, was pregnant just by observing her on the examination table. (*Ibid.*) The prosecution proceeded on a theory of second degree implied malice murder as to the fetus, and the defendant was convicted of two counts of second degree murder. (*Id.* at pp. 866-867.) Noting that the "[defendant] did not know [the victim] was pregnant," Division Four of the First District Court of Appeal reversed the conviction for fetal murder. Specifically, the court asked, "[w]here is the evidence that [defendant] acted with knowledge of the danger to, and conscious disregard for, fetal life?" and answered "[t]here is none. This is dispositive.'" (*Id.* at p. 867.)

Our Supreme Court reversed the judgment of the Court of Appeal, holding that "[w]hen a defendant commits an act, the natural consequences of which are dangerous to human life, with a conscious disregard for life in general, he acts with implied malice towards those he ends up killing. There is no

requirement that the defendant specifically know of the existence of each victim." (*Taylor, supra*, 32 Cal.4th at p. 868.) "[B]y engaging in the conduct that he did, defendant demonstrated a conscious disregard for life, fetal or otherwise, and hence is liable for all deaths caused by his conduct." (*Id.* at p. 870.)

Defendant asks us to distinguish the holding in *Taylor*, arguing that "the differences between *Taylor* . . . and [defendant's] case should be obvious." Defendant argues that in *Taylor* "the Supreme Court arrived at its holding by focusing on the defendant's act of firing two bullets at the victim during the assault, specifically concluding that in shooting [his victim] the defendant acted with conscious disregard for life in general." Defendant then argues that "[a] reasonable person should know that when he fires a gun at an intended target he runs the risk of killing another person with a stray bullet [and] [i]t is undisputable that firing a weapon is an inherently reckless act dangerous to all those around . . . irrespective of whether he is aware of their presence."

"By contrast," in defendant's view, "a reasonable person with no knowledge, or even suspicion, that his victim is pregnant, should not be expected to know that strangling the victim might result in the death of another victim. Unlike discharging a weapon, or driving a car while drunk [as in *People v. Watson* (1981) 30 Cal.3d 290], both of which are potentially lethal to anyone who gets in the way, the act of strangling a person is not inherently dangerous to anyone other than the

person being strangled. . . . [S]trangling an intended victim indicates only a conscious disregard for that life *in particular*.”<sup>4</sup>

We are unpersuaded by defendant’s arguments. We find no basis in law or reason for distinguishing between murdering a pregnant woman by gunshot or by strangulation. Our Supreme Court in *Taylor* could hardly have been more clear: “In battering and shooting [the victim], 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 how many potential victims his conscious disregard for life endangered.” (*Taylor, supra*, 32 Cal.4th at p. 869.) Here, in strangling Best, defendant likewise acted with knowledge of the danger to and conscious disregard for life.

Finally, in trying to distinguish *Taylor*, defendant asks us to consider an earlier California Supreme Court case, *People v. Roberts* (1992) 2 Cal.4th 271, to further support his contentions. In *Roberts*, the defendant, a prison inmate, stabbed another inmate, Gardner, 11 times, after which Gardner grabbed the knife off the floor, staggered some distance up a flight of stairs, and stabbed a prison guard in the chest. (*Id.* at pp. 294-295.) Both Gardner and the guard eventually died

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<sup>4</sup> Defendant also asks us to consider Justice Kennard’s dissenting opinion in *Taylor* (*Taylor, supra*, 32 Cal.4th at p. 871, Kennard, J., dissenting) but concedes it lacks “precedential value.”

from their wounds. (*Id.* at p. 295.) The prosecution presented expert testimony that the sudden loss of blood to Gardner caused him to go into shock and unconsciously stab the guard. (*Id.* at p. 296.) The defendant was convicted of the first degree murders of Gardner and the guard. (*Id.* at p. 294.) In instructing the jury on the proximate cause of death, the trial court told the jury that it was "immaterial that the defendant could not reasonably have foreseen the harmful result" to the prison guard when he stabbed Gardner. (*Id.* at p. 315, italics omitted.) In reversing the defendant's conviction, the Supreme Court noted that "implied malice may be found when a defendant, knowing that his or her conduct endangers life and acting with conscious disregard of the danger, commits an act the natural consequences of which are dangerous to life." (*Id.* at pp. 271, 317.) The court then observed that "[a] result cannot be the natural and probable cause of an act if the act was unforeseeable." (*Id.* at pp. 321-322.) Defendant argues that because the death of a fetus whose existence is unknown is not the natural and probable consequence of a strangling, "[t]he effect of the prosecutor's special instruction in this case was analogous to the improper instruction given in *Roberts*" because "the court effectively told the jury that, as in *Roberts*, it was 'immaterial that the defendant could not reasonably have foreseen the harmful result' to the fetus."

We think the facts here are readily distinguishable from those in *Roberts*. Here, there was expert testimony that the defendant directly caused the fetus's death when he killed Best.



Defendant does not dispute this fact. In *Roberts*, however, the court noted there was an issue as to whether the defendant was an indirect, and likely unforeseeable, cause of the guard's death, which the jury never considered. (*People v. Roberts, supra*, 2 Cal.4th at pp. 321-322.) The *Roberts* court found that "[a]n instruction that told the jury to disregard foreseeability would inevitably lead it to ignore the nature of Gardner's response to defendant's attack, and hence would substantially distract the jury from considering the causation element of the offense--an element that was very much at issue in the case." (*Id.* at p. 322.) In other words, the *Roberts* court found that the trial court had incorrectly stated the law of proximate cause by expressly instructing the jury not to consider whether Gardner's unconscious response to being stabbed (i.e., stabbing the prison guard) was foreseeable. We are faced with no such "chain of causation" question here. On the facts before us, *Taylor*, decided 12 years after *Roberts* and with facts nearly identical to those here, is controlling. Accordingly, the trial court did not err in giving the special instruction.

## II

### *The Trial Court Did Not Err By Omitting The Jury Instruction On "Natural And Probable Consequences"*

Defendant next argues that the trial court erred by omitting from the jury instructions a "critical paragraph" of CALCRIM No. 520 instructing on "natural and probable consequences." Defendant argues that the court erred by omitting this paragraph because "in instructing that [defendant]

need not have known of the fetus's existence to be guilty of murder," the court "fail[ed] to instruct the jury that to convict [defendant] of murder, a reasonable person would have had to have known the death was the direct, natural, and probable consequence of the act." We find no error.

In his opening brief, defendant states that "[t]he Bench Notes to CALCRIM No. 520 state, in relevant part: 'The court has a **sua sponte** duty to instruct on the first two elements of the crime. . . . [¶] . . . . If the evidence indicates that there was only one cause of death, the court should give the 'direct, natural, and probable' language in the first bracketed paragraph of causation.' (Judicial Council of California Criminal Jury Instructions, CALCRIM, [(2006)] vol. 1, pp. 278-279.)" Defendant argues that because "there was no evidence that [he] knew Best was pregnant[, ] . . . a reasonable person would not know that strangling Best would result in the death of another." In other words, defendant contends that because the trial court did not include the paragraph of CALCRIM No. 520 instructing "that an act causes death [only] if the death was the 'direct, natural, and probable consequence' of the act," and "[b]ecause a reasonable person under these circumstances would not have known that strangling Best would 'likely' result in the death of another, [defendant] should not have been found legally culpable for the death of the fetus."

The logical implication of defendant's argument is that because there was "only one cause of death" of the fetus (i.e., the murder of the mother), the trial court was required to give

the instructions on "natural and probable consequences," and that because the instruction was not given, the court committed reversible error. A complete reading of the Bench Notes for CALCRIM No. 520 shows, however, that this is not the case. The Bench Notes read in relevant part as follows: "The court has a **sua sponte** duty to instruct on the first two elements of the crime. If there is sufficient evidence of excuse or justification, the court has a **sua sponte** duty to include the third, bracketed element in the instruction. [Citation.] The court also has a **sua sponte** duty to give any other appropriate defense instructions. [Citation.] [¶] *If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause.* [Citation.] If the evidence indicates that there was only one cause of death, the court should give the 'direct, natural, and probable' language in the first bracketed paragraph on causation." (Bench Notes to CALCRIM No. 520, italics added.)

We see, then, that the trial court need instruct on natural and probable consequences only "[i]f causation is at issue," and then only "[i]f the evidence indicates that there was only one cause of death." Thus, if causation is not at issue, the court need not include the "natural and probable consequences" paragraph in the instructions. Unfortunately, by failing to include this critical sentence in his citation of the Bench Notes, defendant misrepresents the trial court's duty regarding its jury instructions.

Causation was not at issue here because the uncontroverted evidence was that defendant's strangling of Best was the cause

of the fetus's death. Moreover, the *Taylor* court expressly stated that in similar circumstances, "[r]ecklessness need not be cognizant of the identity of a victim or even his existence. . . . When a defendant commits an act, the natural consequences of which are dangerous to human life, with a conscious disregard for life in general, he acts with implied malice towards those he ends up killing. There is no requirement that the defendant specifically know of the existence of each victim.'" (*Taylor, supra*, 32 Cal.4th at p. 868.) Accordingly, the trial court did not err in declining to include the "natural and probable consequences" paragraph from the jury instructions.

### III

#### *Defendant's Suggestion That The Trial Court Should Have Instructed On Involuntary Manslaughter Is Incorrect*

Finally, defendant suggests that in circumstances where, as here, there is no evidence the defendant was aware of the fetus's existence and acted in a manner unlikely to harm anyone other than the intended victim, a court should instruct on involuntary manslaughter pursuant to CALCRIM Nos. 580 or 581.

Defendant is wrong. The trial court could not have instructed the jury on involuntary manslaughter because in California there is no such crime as manslaughter of a fetus. (§ 192.) Section 192 defines manslaughter as "the unlawful killing of a human being without malice." (*Ibid.*) "[U]ntil [the year] 1970, section 187 defined murder as 'the unlawful killing of a human being with malice aforethought.' However, in

[1970] . . . the Legislature amended that section by adding in the disjunctive 'fetus.' [Citations.] The legislative history of that amendment reveals 'the omission of the word "fetus" from section 192 . . . was not due to legislative oversight; it was the exercise of legislative judgment.' [Citations.] Although the amendment originally proposed modification to the manslaughter statute as well, the legislative decision not to amend section 192 to include fetus was consistent with the Senate debate that the unlawful killing of a fetus should be governed solely by the murder statute due to a defendant's extreme culpability, rendering section 192 inapplicable to the crime of fetal homicide." (*People v. Brown* (1995) 35 Cal.App.4th 1585, 1592.) Thus, "'the unlawful killing of a human being or a fetus with malice aforethought is murder, but only the unlawful killing of a human being constitutes manslaughter.'" (*Ibid.*)

#### DISPOSITION

The judgment is affirmed.

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ROBIE, J.

We concur:

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DAVIS, Acting P.J.

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MORRISON, J.