In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff & Respondent,

v.

DAVID ALAN WESTERFIELD,

Defendant & Appellant.

CAPITAL CASE

Case No. S112691

San Diego County Superior Court Case No. SCD 165805
The Honorable WILLIAM D. MUDD, Judge

RESPONDENT'S SUPPLEMENTAL BRIEF

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THE TRIAL COURT WAS NOT REQUIRED TO GIVE INSTRUCTIONS ON SECOND DEGREE MURDER AND INVOLUNTARY MANSLAUGHTER BASED ON THE LANGUAGE OF THE ACCUSATORY PLEADING

On December 29, 2015, this Court granted Westerfield's request to file a supplemental opening brief ("Supp. AOB"), modifying Argument XIV of his opening brief. In Argument XIV, Westerfield claimed the trial court erred in failing to instruct *sua sponte* on second degree murder and involuntary manslaughter as lesser included offenses of first degree felony murder. (AOB 359-366.) "[A] lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*People v. Banks* (2014) 59 Cal.4th 1113, 1160, internal quotation marks omitted.) In his opening brief, Westerfield conceded the accusatory pleading test was not applicable in determining whether the trial court had a *sua sponte* duty to instruct on second degree murder and involuntary manslaughter. (AOB 365.) Westerfield relied instead on the statutory elements test, arguing that this Court's decision in *People v. Chun* (2009) 45 Cal.4th 1172, signified that felony murder was simply a different form of malice-aforethought murder and therefore, under the statutory elements test, one could not commit first degree felony murder without also committing second degree murder and involuntary manslaughter which would give rise to the need to instruct *sua sponte* on these additional crimes. (AOB 359-366; Supp AOB 2.) Relying on the Court of Appeal's decision in *People v. Anderson* (2006) 141 Cal.App.4th 430 (*Anderson*), which held that a defendant is entitled to such instructions under the accusatory pleading test if the accusatory pleading expressly alleges the defendant killed "with malice aforethought" (*id.* at pp. 444-445; accord, *People v. Campbell* (2015) 233 Cal.App.4th 148, 162), Westerfield

now contends the trial court was required to instruct *sua sponte* on lesser included offenses under the accusatory pleading test. But Westerfield's reliance on *Anderson* is misplaced since the accusatory pleading in this case did not specifically allege that Westerfield killed with malice aforethought. Contrary to appellant's contention, and consistent with respondent's argument at Respondent's Brief pages 217 through 225, the trial court was not required to give these lesser-included-offense instructions.

In his supplemental brief, Westerfield claims that, under the accusatory pleading test for lesser included offenses, the trial court was required to instruct on second degree malice murder and involuntary manslaughter because the information alleged that Westerfield violated Penal Code section 187, subdivision (a). (Supp. AOB 2-3.) The accusatory pleading test does not aid Westerfield's claim of trial court error because the information contained no language suggesting that he killed with malice aforethought.

Because an accusatory pleading puts a defendant on notice to be prepared to defend against all the elements of any lesser included offenses, even if not explicitly set forth in the pleading, the Penal Code expressly provides that a defendant can be found guilty of any necessarily included offense (*People v. Birks* (1998) 19 Cal.4th 108, 117, citing Pen. Code, § 1159). "Consistent with these principles, California decisions have held for decades that even absent a request, and even over the parties' objections, the trial court must instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser." (*Ibid.*) This instructional rule implementing the principles of necessary inclusion is "to the benefit of both defense and prosecution." (*Ibid.*) "Where the evidence warrants, the rule ensures that the jury will be exposed to the full range of verdict options which, by operation of law and with full notice to both parties, are

presented in the accusatory pleading itself and are thus closely and openly connected to the case. In this context, the rule prevents either party, whether by design or inadvertence, from forcing an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other." (*Ibid.*) The *sua sponte* duty to instruct regarding lesser included offenses arises "because neither the defendant nor the People have a right to incomplete instructions." (*Ibid.*, internal quotation marks and citations omitted.) Westerfield relies on the accusatory pleading test, which is satisfied where the charging allegations include language describing the offense in such a way that if committed as described, the lesser offense is necessarily included. (*People v. Lopez* (1998) 19 Cal.4th 282, 288.)

Here, the information alleged that Westerfield "did unlawfully murder Danielle Van Dam, a human being, in violation of PENAL CODE SECTION 187(a)." In connection with that count, it further alleged that Westerfield committed the murder during the course of a kidnapping (Pen. Code, § 190.2, subd. (a)(17)). The information additionally alleged a second, separate count of the substantive offense of kidnapping a child under the age of 14 (Pen. Code, §§ 207/208, subd. (b)). (1 CT 174-175.)

Relying on *Anderson*, *supra*, 141 Cal.App.4th 430, Westerfield claims that because he was charged in the accusatory pleading with "murder … in violation of Penal Code Section 187, subdivision (a)," he was entitled to lesser-included-offense instructions on second degree murder and involuntary manslaughter. In *Anderson*, the accusatory pleading alleged the defendant committed first degree murder in violation of Penal Code section 187, subdivision (a), and in contrast to the information in this case, the charging document in *Anderson* also specifically stated that the defendant "'did unlawfully, and with malice aforethought, murder….'" (*Id.* at p. 445.) Additionally, at the conclusion of the presentation of evidence

in *Anderson*, the trial court permitted the prosecutor to *add* a charge of felony murder. (*Ibid.*) And Anderson was not charged with any separate predicate felony offense. (*Ibid.*)

The Court of Appeal in *Anderson* held that the defendant was entitled to instructions on lesser included offenses of second degree murder and voluntary manslaughter based upon the theory that a trial court's *sua sponte* duty to instruct on lesser included offenses is dictated by the charges contained in the accusatory pleading because "the role of the accusatory pleading is to provide notice to the defendant of the charges that he or she can anticipate being proved at trial." (*Anderson, supra*, 141 Cal.App.4th at p. 445.) "'[T]he stated charge notifies the defendant, for due process purposes, that he must also be prepared to defend against any lesser offense necessarily included therein, even if the lesser offense is not expressly set forth in the indictment or information.'" (*Ibid.*, quoting *People v. Birks, supra*, 19 Cal.4th at p. 118.) The *Anderson* court observed that second degree murder and voluntary manslaughter were necessarily included offenses within the charge of first degree murder as alleged in the information— malice aforethought murder. (*Anderson, supra*, 141 Cal.App.4th at p. 445.) The fact that the prosecutor *added* a felony murder charge at the conclusion of evidence did not alter that fact, as the added charge did not supplant the original charge, or the notice to the defendant flowing from it, of malice murder. (*Ibid.*) Finally, substantial evidence was presented at Anderson's trial to indicate that the murder did not constitute a felony murder, as well as support for a finding of second degree murder or voluntary manslaughter. (*Id.* at pp. 446-447.)

Westerfield's case is readily distinguishable from *Anderson.* In Westerfield's case, while the information generically referred to Penal Code section 187, subdivision (a), it did not contain any language referencing "malice aforethought" as did the information in *Anderson.*

Westerfield argues this distinction is of no moment because if one looks behind the language in the accusatory pleading and looks instead to the language of the code section cited therein, Penal Code section 187, subdivision (a), provides that murder is a killing "with malice aforethought." (Supp. AOB 2-3.) According to Westerfield, "[t]here is no difference between a pleading that refers to the language of the statute and a pleading that simply tracks the language of the statute." (Supp. AOB 3.) This Court's precedents make plain that Westerfield's argument is incorrect, as the accusatory pleading test looks "not to official definitions, but to whether the accusatory pleading *describes* the offense in *language* such that the offender, if guilty, must necessarily have also committed the lesser crime. (*People v. Moon* (2005) 37 Cal.4th 1, 25, 25-26, emphasis added.) The focus is on facts alleged in the accusatory pleading, not what any particular statute referenced in the pleading states. (See *People v. Birks*, *supra*, 19 Cal.4th at p. 117.)

Moreover, unlike *Anderson*, the prosecutor clearly tried Westerfield's case solely on a felony-murder theory. Specifically, prior to the close of evidence, the prosecutor filed a written motion stating that he was solely proceeding on a felony-murder theory of first degree murder, and not on premeditation or any other theory of homicide, such that the trial court should not instruct on premeditation or any lesser included offenses. (9 CT 2217-2223.) Westerfield requested instructions on premeditation and deliberation, arguing there was evidence to support that theory, but did not request any lesser-included-offense instructions. (9 CT 2258-2262; 37 RT 8819.) But the trial court's observations during the jury instruction conferences echoed that Westerfield's was nothing other than a felony murder case. The trial court observed that "in this case there is only one theory that there is any evidence on, and that is that this homicide occurred during the course and scope of the kidnapping"; the court further observed

that "there is no other theory that the prosecution has proffered." (37 RT 8821.) Ultimately, the trial court declined to give any instruction on premeditated murder, finding that no evidence supported it, the evidence only supported felony murder, and instructing on lesser related homicide theories would only confuse the jury. (40 RT 9265-9266.)

Further, while the defendant in *Anderson* was not charged with any predicate felony offense, here, Westerfield was charged with a felony murder special circumstance based on a kidnapping theory as well as a separate charge of kidnapping. (1 CT 174-175.) Accordingly, Westerfield's accusatory pleading made plain that the prosecution would pursue a felony murder theory. Therefore, Westerfield did not have the reasonable expectation of lesser-included-offense instructions as did the defendant in *Anderson.*

In contrast, Westerfield's case is virtually identical to *People v. Huynh* (2012) 212 Cal.App.4th 285 (*Huynh*). In *Huynh*, the information charged the defendant with unlawfully murdering the victim in violation of Penal Code section 187, subdivision (a), but contained no additional language alleging he committed the murder with "malice aforethought." (*Id.* at pp. 312, 313.) Additionally, the information alleged two special circumstances that the defendant committed the murder during the commission or attempted commission of oral copulation and sodomy. (*Ibid.*) Finally, the information alleged the two predicate felonies of oral copulation and sodomy. (*Id.* at p. 313.) In addition to the accusatory pleading itself, the reviewing court observed that the defendant knew "well in advance of trial" that the prosecutor was proceeding solely on a felony murder theory. (*Ibid.*) In light of these circumstances, the reviewing court found *Anderson* distinguishable and concluded that the trial court had no obligation to instruct the jury on second degree murder as a lesser included offense. (*Ibid.*)

The only significant difference between Westerfield's and Huynh's case is the fact that, in *Hunyh*, the defendant "knew from the get-go that his case was being prosecuted only on a felony-murder theory because the prosecution made the theory of the case clear well in advance of trial." (*Huynh*, *supra*, 212 Cal.App.4th at p. 313.) While Westerfield's prosecutor did not make an express declaration that the sole theory of the case was felony murder until just prior to the close of evidence, as the comments of the trial court described above demonstrate, the evidence established no other theory of murder. (See 37 RT 8821.) This case is unlike *Anderson* where the accusatory pleading alleged malice murder, the felony murder theory did not become apparent until after trial commenced, and the evidence presented at trial could be reconciled with both theories. Moreover, as in *Huynh* and not in *Anderson*, Westerfield was charged with a predicate felony and a felony murder special circumstance.

Finally, as discussed in the Respondent's Brief at pages 224 through 225 and not repeated here, even if the statutory elements test or the accusatory pleading test suggested a potential need for the trial court to instruct on lesser included offenses, the court's decision not to instruct on second degree murder and involuntary manslaughter was nonetheless correct, as there was no evidence from which a reasonable jury could have concluded that Westerfield committed any crime other than first degree felony murder by kidnapping.

CONCLUSION

For the reasons stated herein and in the Respondent's Brief, respondent respectfully requests that the judgment be affirmed in its entirety.

Dated: January 27, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S SUPPLEMENTAL BRIEF uses a 13-point Times New Roman font and contains 2,118 words.

Dated: January 27, 2016

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Attorney General of California

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DECLARATION OF SERVICE

Case Name: ***People v. Westerfield*** Case Number: **S112691**

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On January 27, 2016, I served the attached **RESPONDENT'S SUPPLEMENTAL BRIEF**, by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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On January 27, 2016, I caused one electronic copy of the **RESPONDENT'S SUPPLEMENTAL BRIEF**, in this case to be served on the California Supreme Court by sending the copy to the Supreme Court's electronic service address pursuant to Rule 8.212(c).

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 27, 2016, at San Diego, California.

STEPHEN MCGEE
Declarant

Signature

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