SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

PEOPLE OF THE STATE OF CALIFORNIA

DEPT. 10

ACTION NO. 161210

PFN: BHC116
CEN: 9313908

v.

JOHANNES MEHSERLE
Defendant

ORDER AND STATEMENT OF DECISION

On June 4, 2009, the Hon. C. Don Clay of this court, sitting as a magistrate, held defendant Johannes Mehserle to answer on a charge of murder in violation of Penal Code section 187(a), as well as allegations of use of a firearm and infliction of great bodily injury. (RT 1062) Thereafter, the District Attorney of this county filed a felony information, charging defendant with that offense and various enhancements reflecting use of a weapon and infliction of great bodily injury or death. Defendant moved this court to dismiss the felony information under Penal Code section 995, as well as on non-statutory grounds for a violation of his right to due process.

This court reviewed the moving and responsive papers of counsel, the transcript of the preliminary hearing and the exhibits admitted into evidence at the hearing.

The motions are hereby denied.

The Law of Homicide

Not all killings are unlawful. Indeed, some killings, such as the carrying out of a death sentence or those occurring during wartime, are sanctioned by the state and, therefore, are not unlawful. Additionally, a killing, even though not sanctioned by the state, may not be unlawful—in the case of an accidental death, for instance. Such killings are commonplace and do not result in criminal charges. In these instances, while a person may have indeed caused a death, he may have lacked the criminal state of mind, or mens rea, required by the legal definitions of various crimes. The law describes these killings as excusable homicides and defines them as those "committed by accident or misfortune, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent." (Pen. Code, section 195(1).) An example of such a killing is a traffic accident in which the driver's actions, though not a violation of any law, may have resulted, as a matter of cause and effect, in the death of a pedestrian. Accidental deaths may be the subject of civil liability, but usually do not result in criminal liability. It is important to note that for those who experience the loss of the victim these legal distinctions are often irrelevant. Their loss is the same--is just as great. However, the criminal law addresses the question of whether the perpetrator bears any criminal responsibility for the death. That is often an extremely nuanced question, which turns on specific facts and specific legal definitions.

Unlawful killings are those in which the perpetrator harbors the mens rea required by the definition of a crime. Murder is the unlawful killing of a human being with malice aforethought. Malice may be either express or implied. It is express when the defendant manifests the deliberate intention unlawfully to take away the life of a fellow creature. It is implied when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life. (People v. Blakeley (2000) 23 Cal.4th 82, 87.) Manslaughter is the unlawful killing of another without malice. In two specifically defined circumstances, the law calls the killing voluntary manslaughter: when the defendant acts in a sudden quarrel or heat of passion and when he acts with the actual but unreasonable belief in the need to act in self-defense. (Id., at pp. 87-88.) Involuntary manslaughter occurs "in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act

which might produce death, in an unlawful manner, or without due caution and circumspection." (Pen. Code, section 192(b).) "Without due caution or circumspection" refers to unintentional conduct which is gross or reckless, amounting to a disregard of human life or an indifference to the consequences. (People v. Evers (1992) 10 Cal.App.4th 588, 596.)

A killing is not unlawful when it is justifiable under the law. The most common form of justifiable homicide is that committed in self-defense, i.e., "[w]hen resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person . . . ." (Pen. Code, section 197(1).) As pointed out by the defense here, a killing by a peace officer is also justifiable, and not unlawful, "[w]hen necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty . . . ." (Pen. Code, section 196(1).)

The distinction between implied malice murder and involuntary manslaughter is described as follows: "If a defendant commits an act endangering human life, without realizing the risk involved, the defendant acted with criminal negligence [committed involuntary manslaughter]. By contrast where the defendant realizes and then acts in total disregard of the danger, the defendant is guilty of murder based on implied malice." (People v. Evers, supra, 10 Cal.App.4th at p. 596, brackets added.)

Finally, mistake of fact may be a defense to a crime where the alleged act or omission was committed under the ignorance or mistake of fact that disproves the requisite criminal intent. (Pen. Code, section 26(3).)

The Burden of Proof at a Preliminary Hearing

In any prosecution, the People bear the burden of proof. Before a holding order may issue following a preliminary hearing the magistrate "must be convinced of only such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused." (Guevara v. Superior Court (1998) 62 Cal.App.4th 864, 869.) There is no question that a defendant may, under certain circumstances, present evidence at a preliminary hearing that is "reasonably likely to establish an affirmative defense, negate an element of the crime charged, or impeach the testimony of a prosecution witness or the statement of a declarant testified to by a prosecution witness." (Pen. Code, section 866(a); Nienhouse v. Superior Court (1996) 42 Cal.App.4th 83, 91.)

The parties here dispute what standard the magistrate must employ when evidence of an affirmative defense is presented. Defendant contends, at page 4 of his reply brief, if "facts [which raise an affirmative defense] are not disproven by the prosecution, no probable cause exists in the first place." The People, relying upon People v. Mower (2002) 28 Cal.4th 457, argue that, in order for the defendant to prevail at the preliminary hearing, the evidence of an affirmative defense must negate the finding of probable cause. The parties cite little case law on this point.

However, the case law supporting the defendant's right to present evidence of an affirmative defense at the preliminary hearing supports the People's position as to the burden of proof: "The purpose of [the right of the defendant to present such evidence] is obvious: to permit the defendant to rebut the People's evidence of probable cause and persuade the magistrate not to make a probable cause finding." (Nienhouse, supra, 42 Cal.App.4th at p. 91.) Thus, the defendant's evidence will carry the day only if it eliminates probable cause in the mind of the magistrate. Some evidence of an affirmative defense is not enough. "'Reasonable and probable cause' may exist although there may be some room for doubt." (Mower, supra, 28 Cal.4th at p. 473.) Indeed, defendant's suggestion that the magistrate must accept any reasonable conclusion favorable to the defendant is incorrect. (See p. 20 of Defendant's Points and Authorities.) This proposition is drawn from jury instructions on circumstantial evidence and is not applicable to a preliminary hearing.

It is important to note that the magistrate is not asked to make a determination of guilt or innocence, nor to opine as to the likelihood of any particular verdict. The standard of proof, as set forth above, is a very limited one and is not an indication of the likely result of a trial.

Standard of Review on a Section 995 Motion

There is no controversy over the standard to be employed when reviewing the finding of the magistrate: "Neither the superior court ruling on a section 995 motion nor the appellate court reviewing the superior court's order may substitute its judgment for that of the committing magistrate concerning the weight of the evidence or the credibility of the witnesses. [Citations.] Thus, 'an information [must] not be set aside or a prosecution thereon prohibited if there is *some rational ground* for assuming the possibility that an offense has been committed and the accused is guilty of it. [Citation.] Conversely, an information *will* be set aside 'only when there is a total

absence of evidence to support a necessary element of the offense charged. [Citation.] The evidence supporting each element of the charged crime 'may be made by means of circumstantial evidence supportive of reasonable inferences on the part of the magistrate. [Citation.] 'Every legitimate inference that may be drawn from the evidence must be drawn in favor of the information.' [Citation.]" (People v. Plengsangtip (2007) 148 Cal.App.4th 825, 835, brackets and italics in original.)

Non-Statutory Motion to Dismiss

Defendant has also brought a non-statutory motion to dismiss the information based upon evidence outside the record of the preliminary hearing. (See People v. Sherwin (2000) 82 Cal.App.4th 1404, 1410.) The standard of review employed by the court considering such a motion is similar to that employed on a section 995 motion when the gravamen of that motion is not an insufficiency of evidence to support the holding order but a denial of a substantial right at the hearing. "[A] defendant is denied a substantial right affecting the legality of his commitment when he or she is subjected to prejudicial error, that is, error that reasonably might have affected the outcome." (People v. Konow (2004) 32 Cal.4th 995, 1024.) A similar analysis is employed when the motion is a non-statutory one. (See Merrill v. Superior Court (1994) 27 Cal.App.4th 1586, 1596-1597.)

Analysis

These charges arise from the killing by defendant, an on-duty peace officer, of the victim, Oscar Grant, in the early morning hours of January 1, 2009, at the Fruitvale BART station in Oakland. As to these points, there is no dispute between the parties. As is clear from the transcript of the preliminary hearing and the briefing here, the dispute between the parties lies in the question of the defendant's state of mind at the time of the killing.

The defense has never contended, nor does the evidence support, that defendant killed Mr. Grant accidentally in the sense understood by the law, i.e., that the weapon was *discharged* accidentally. The overwhelming evidence is that defendant intended to discharge a weapon that was in his hand. It is, of course, disputed whether he knew that weapon to be a firearm rather than a taser. But that question is not one of accident but rather mistake of fact. That is, if defendant acted on the belief that he was firing his taser at Mr. Grant and not his gun, he would

not be guilty of murder—but on a theory of mistake of fact, not on a theory of accident. Under either theory, defendant might still be guilty of involuntary manslaughter.

Early in the preliminary hearing, defense counsel announced that it was the defense position that this was not a murder case because there was no malice and that there was no malice because defendant fired his weapon believing it to be a taser. (RT 284) The one factual finding clearly made by the magistrate was that defendant fired the weapon knowing it to be a gun. (RT 1061) While there is some evidence to the contrary (for instance, defendant's statement shortly before the shooting that he was going to tase Mr. Grant), there is ample evidence to support the magistrate's finding of probable cause. The parties agreed, at oral argument, that the video shows defendant's taser housed on his left hip; his service weapon was housed on his right hip. Based upon the evidence presented, the court can presume that defendant is right-handed. The video shows defendant using his right hand to withdraw his service weapon at the right hip; it does not show him using his left hand to withdraw the taser at his left hip, nor does it show him using him right hand to cross his body to withdraw the taser. Also, the video shows the officer looking down at the weapon as he tries to remove it from its holster and shows the officer extending the weapon in front of him before firing. Defendant's taser was placed in evidence. It is bright yellow and looks nothing like his service weapon. Additionally, there was evidence of defendant's statement made shortly after the shooting that he thought Mr. Grant was reaching for a gun and no evidence of a contemporaneous statement by defendant that he thought he was firing his taser. Finally, the testimony of Officer Foreman was that, in the immediate aftermath of the shooting and for several weeks thereafter, defendant never claimed that he believed he was firing his taser.

As noted above, for purposes of the preliminary hearing, the question is whether a strong suspicion of guilt exists, not whether all doubt as to guilt is eliminated. Furthermore, on review, this court is required to draw all reasonable inferences in favor of the magistrate's ruling. The magistrate's factual finding that defendant knowingly fired his gun is supported by the evidence presented.

Additionally, after reviewing the entirety of the magistrate's remarks, this court has no doubt that the magistrate—contrary to defendant's argument—applied the correct standard of proof. The magistrate's comments regarding defendant's failure to testify (RT 1056, 1059) were not meant to suggest that defendant's testimony was required but only that in the absence of such

testimony there was not otherwise sufficient evidence in the record of defendant's state of mind at the time of the shooting to counter the evidence that he acted with malice and without excuse or justification.

Although defendant did not contend below that he was at most guilty of voluntary manslaughter, he contends now that the magistrate made a factual finding that the officers were in fear for their lives at the time of the shooting, thus precluding his being guilty of anything more than voluntary manslaughter. The court summarized the testimony of various officers as to their "elevated" state, state of "uncertainty" or "fear for their safety." (RT 1060) However, the court also recited various facts that would suggest that, at the time of the shooting, the officers' concern for their safety was not pronounced. The court noted that Officer Woffinden had his back to Mr. Grant and Officer Mehserle and did not press his emergency button. The court also noted that, while Mr. Grant and his companions were loud and uncooperative, they did nothing to warrant the use of deadly force. (RT 1059) As to Officer Pirone, the magistrate commented: "I'm not certain I can trust what Officer Pirone said, but I am certain when he said, and it was on Mr. Stein's cross-examination, that he believed that Mr. Grant posed an imminent threat of death to them." (RT 1060) Defendant characterizes the magistrate's comments in regard to Officer Pirone's state of mind as a finding of fact that Officer Pirone was in fear for his life. Even if we assume this statement was a finding of fact as to Officer Pirone's state of mind, it was not a finding of fact as to defendant's state of mind. Although Officer Pirone's state of mind may be circumstantial evidence of defendant's, it does not conclusively demonstrate defendant's state of mind, particularly in light of the video evidence and the magistrate's other comments about the circumstances surrounding the shooting.

Reviewing the record as a whole, this court cannot say that evidence that the killing was justifiable either as a matter of self-defense or as a matter of a peace officer acting as necessary to overcome actual resistance to the execution of some legal process or in the discharge of any other legal duty was so strong as to obviate a finding of probable cause of malice. The same is true of any evidence that the killing was partially justifiable on the basis of imperfect self-defense. The video evidence alone in this matter is sufficient to support a finding of malice for purposes of a preliminary hearing. The firing of a gun at close range into the upper back of a prone suspect is certainly demonstrative of implied, if not express, malice.

Defendant claims he was prejudiced by the magistrate's failure to allow him to present certain evidence. First, he contends the magistrate erred in rejecting his offer of proof that Mr. Grant had been arrested in October 2006 for resisting arrest and possession of a firearm. (See Defendant's Supplemental Offer of Proof, filed May 21, 2009.) Because there was no evidence and no offer of proof that defendant was aware of this arrest, the magistrate correctly concluded that the evidence was not probative of the defendant's state of mind at the time of the shooting. However, the magistrate incorrectly concluded that the evidence would not be probative of Mr. Grant's character for resisting arrest, as contemplated by Evidence Code section 1103(a)(1). That having been said, this court cannot conclude that the failure to admit that evidence was prejudicial. Whether Mr. Grant resisted the lawful orders of a peace officer and the extent to which he did was the subject of much testimony. For example, counsel stipulated that Mr. Grant's friend, Mr. Greer, stated that Mr. Grant "resisted a little" and that Lydia Kierstead stated that Mr. Grant was resisting. (RT 923-4) Most importantly, the videos were the best evidence of Mr. Grant's behavior. Evidence of his prior arrest was of very little significance in light of this record.

Defendant claims he was prejudiced by the magistrate's limitation on the testimony of his video analysis expert, Mr. Schott. Mr. Schott testified at great length. He testified about the deceptive nature of video evidence, particularly in regard to spatial relations: "In any two-dimensional image, you are getting a compromised copy of real three-dimensional space, and it's important to understand the limitations of any two-dimensional image . . . ." (RT 988) In order to give a third dimension to the video evidence, Mr. Schott prepared Defense Exhibit G1, a synchronized compilation of the various videos presented by the prosecution, simultaneously capturing events from different angles. Additionally, he testified about various exhibits designed to show the spatial relationship of the various people who were filming the events and, thus, the various subjects of the videos. The magistrate allowed this testimony but did not permit the witness to give his opinion as to what the video showed at particular points. This limitation was certainly within the magistrate's discretion. At several points, defense counsel asked the witness to look at the video as it was being played in court and give his opinion as to what the video showed. For example, counsel asked the witness whether, just before the shooting, the video showed Mr. Grant's left shoulder coming off the ground. The court sustained the prosecutor's objection, commenting, "I can see the video. I've seen this video, and he can't tell me what I'm

seeing." (RT 1023) The court correctly concluded that the testimony was moving beyond the area of expertise to simple lay opinion, something unnecessary in light of the court's ability to view the video.

Defendant also claims the magistrate erred by not allowing testimony from Jackie Bryson, one of Mr. Grant's friends who was detained with him on the BART platform. The offer of proof as to Mr. Bryson was that he would testify that defendant said, "I'm going to tase him," just before he shot Mr. Grant. The court correctly concluded that this evidence would be cumulative. (RT 920) Evidence to that effect had already been received by the magistrate. The magistrate never expressed any doubt that defendant had made such a statement. The absence of Mr. Bryson's testimony could not possibly have affected the holding order here.

Defendant next claims the magistrate prejudicially limited his examination of Officer Pirone in several particulars. First, he asserts that he was precluded from having Officer Pirone testify that, based on his training and in light of Mr. Grant's level of resistance, it would have been appropriate to tase him and not appropriate to have shot him. (RT 970-1) This testimony would arguably have been supportive of defendant's position that, having received the same training as Officer Pirone, he too knew what was appropriate in the situation and would have only meant to tase Mr. Grant. As the People point out, defense counsel was essentially able to elicit this same information a few moments later by way of a different question. (RT 975) Moreover, the information was only marginally relevant to the question before the court, i.e., the appropriateness of shooting Mr. Grant rather than tasing him was not before the court. Second, defendant asserts that Officer Pirone should have been permitted to testify that he was trained, when using his taser, to put some distance between himself and the target—an action defendant was observed to have taken before shooting Mr. Grant and, thus, supportive of the argument that defendant meant only to tase Mr. Grant. This court agrees that this line of questioning had some relevance. However, on balance, the exclusion of this information could not have prejudiced defendant; the inclusion of this information could not reasonably have affected the outcome. The defense argues that, unlike a taser, a firearm can be fired at close range. In truth, both weapons can be fired at close range. The contention is essentially that a taser can be fired more safely at a distance. However, the video evidence alone supports a reasonable inference that, in the circumstances presented here of a small group of closely positioned suspects and officers, an officer intending to use a firearm would wisely, if able to do so, step back to insure the direction

of fire and that he was not impeded. Consequently, the act of stepping back before firing was at best equivocal in light of the point in dispute.[1] Finally, defendant contends that Officer Pirone should have been permitted to opine as to the significance of defendant's hand position in a photograph showing defendant withdrawing his gun from its holster. Officer Pirone had already demonstrated the hand movement necessary to unholster the taser and that that movement differed from the movement necessary to unholster the firearm. (RT 972-4) Counsel had asked whether Officer Pirone saw the holster of defendant's weapon protruding from his gun belt in the photograph taken at the point defendant was attempting to unholster the weapon. Pirone acknowledged that he did. Counsel then asked what significance that observation had to Officer Pirone and whether he had any idea how long it took the defendant to remove his gun from his holster. The magistrate correctly sustained the objections to these two questions. The first sought only the officer's opinion about what the photograph showed, something determinable by the court; the second obviously asked the officer to speculate. What defendant failed to note in his moving papers is that Officer Pirone responded in the affirmative when he was asked by defense counsel, with regard to the photograph of defendant's hand: "You see the thumb up in the same motion that you described that one would have to draw a Taser?" (RT 974) Thus, the information the defense now claims it was precluded from presenting was, indeed, presented and before the magistrate.

Finally, defendant contends he was prejudiced by the magistrate's refusal to allow testimony from an expert on the training and deployment of tasers. The entirety of defense counsel's offer of proof on this point is as follows: "The relevance is that Mr. Mehserle had been trained with a Taser for a grand total of three weeks, before this event occurred. When I say training, I mean probably ill trained. Ill trained is probably the more correct word. And as the Court knows—I suspect the Court knows—officers, when they resort to drawing their weapon, resort to motor skills; motor skills that are instinctive; motor skills that are learned with repetitive training, that's what this fellow would testify to. He's going to testify that given the circumstances of this case, given what we see in the video of this case, which he's examined,

[1] Defense counsel contended, for the first time at oral argument on these motions, that Officer Pirone would also have testified that he was trained to warn his fellow officers if he was about to use his taser, so that they too could put some distance between themselves and the target, and that he was trained to fire a taser at the center mass of a suspect. This training would arguably have been consistent with defendant's actions and, thus, demonstrative of an intent to only tase. These points were never raised with the magistrate. More significantly, as pointed out above, the video evidence is supportive of a reasonable inference that such actions would also have been consistent with someone intending to fire a gun. Thus, this evidence also would have been, at best, equivocal.

given all of the factors he's examined in this case, Mr. Mehserle's drawing of his weapon was an accident. He, in fact, intended to use his Taser; he, in fact, intended to draw his Taser; the video shows us that; he'll explain that, and therefore there was no malice, because Mr. Mehserle had the right to use the Taser to take Mr. Grant into custody as he actively resisted arrest." (RT 921-2) In his moving papers here, defendant makes a broader argument as to what the expert would have testified. For instance, he asserts that the expert would have testified that the taser could properly be fired with a two-handed grip. However, this point was never presented to the magistrate. On review, this court is confined to the offer of proof made to the magistrate. First, the record is replete with evidence that the BART officers had been equipped with tasers for only a very short time. The expert would have added nothing on this point. He presumably could have opined on the quality and extent of the training provided; however, there was no offer of proof as to defendant's specific proficiency with the taser. Thus, the expert's opinion would have been only marginally relevant to the question before the court: what did defendant believe he was doing? Finally, the expert would have opined, based upon the video evidence, that defendant believed he was drawing his taser. "Otherwise admissible expert opinion testimony, which embraces the ultimate issue to be decided by the trier of fact is admissible. [Citation.] This rule, however, does not permit the expert to express any opinion he or she may have. [Citation.] '"Undoubtedly there is a kind of statement by the witness which amounts to no more than an expression of his general belief as to how the case should be decided . . . . There is no necessity for this kind of evidence; to receive it would tend to suggest that the judge and jury may shift responsibility for decision to the witnesses; and in any event it is wholly without value to the trier of fact in reaching a decision."' [Citation.] A bright line cannot be drawn to determine when opinions that encompass the ultimate fact in the case are or are not admissible. The issue has long been the subject of debate. [Citations.] . . . . '[A]dmissibility depends on the nature of the issue and the circumstances of the case, there being a large element of judicial discretion involved.'" (People v. Killebrew (2002) 103 Cal.App.4th 644, 651; see also People v. Gonzalez (2006) 38 Cal.4th 932, 944-947.) There was no abuse of discretion here in the magistrate's conclusion that the expert's opinion of defendant's state of mind, based upon the expert's knowledge of the amount and kind of training received by defendant and the video evidence, would not have assisted the magistrate.

Finally, the evidence extrinsic to the record of the preliminary hearing, namely counsel's declaration which included claims that the magistrate arbitrarily truncated the defense presentation based upon concerns about the length of the hearing,[2] does not persuade this court that defendant's right to due process was violated. Here, the magistrate presided over an extensive preliminary hearing, listening to and viewing evidence from almost twenty witnesses, nearly half of which were called by the defense. The evidence included several stipulations as to testimony, a half dozen videotapes, numerous photographs and diagrams, defendant's Taser, and assorted other documentary evidence. The magistrate struck an admirable balance between the preservation of defendant's right to a fair and thorough hearing and the husbanding of scarce judicial resources; no violation of defendant's right to due process occurred.

Dated: September 10, 2009

THOMAS M. REARDON
JUDGE OF THE SUPERIOR COURT

[2] The People did not object to counsel's declaration, nor did they file any responsive declaration. Therefore, the court admits the declaration into evidence and presumes the allegations therein to be true for purposes of the motion.