Court of Appeal, First District, Division 3, California.

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Carol Ann OLIVER, Defendant and Appellant.

No. A040043.

May 5, 1989.
Rehearing Denied June 5, 1989.
Review Denied Aug. 17, 1989.

Defendant was convicted by jury in the Superior Court, Contra Costa County, Michael J. Phelan, J., of involuntary manslaughter and receiving stolen property, and she appealed. The Court of Appeal, Strankman, J., held that: (1) jury could find that defendant owed duty to seek medical attention for victim after he injected himself with heroin in her bathroom and was criminally negligent for failing to do so; (2) jury could also find that defendant intended to facilitate victim's use of drugs and aided and abetted in that use; (3) defendant's statements concerning her ex-husband's fatal drug overdose, flat rubber strap found in defendant's kitchen, and testimony of victim's family members indicating that defendant had helped inject victim with drugs were all admissible evidence; and (4) prosecutor's closing argument that defendant had injected or helped to inject victim did not violate trial court's previous ruling that case could not be presented to jury on theory that defendant had administered heroin to victim.

Affirmed.

Harvey R. Zall, State Public Defender, Irene Kiebert, Deputy State Public Defender, San Francisco, for defendant and appellant.

John K. Van de Kamp, Atty. Gen., Steve White, Chief Asst. Atty. Gen., John H. Sugiyama, Sr. Asst. Atty. Gen., David D. Salmon, Supervising Deputy Atty. Gen., Violet M. Lee, Deputy Atty. Gen., San Francisco, for plaintiff and respondent.

STRANKMAN, Associate Justice.

The victim, Carlos Cornejo, became acquainted with appellant Carol Ann Oliver at a bar. He accompanied her to her home and injected himself with heroin in her bathroom. He then collapsed to the floor unconscious. Appellant had her daughter drag him outside the house. The next morning he was discovered dead in the yard. The cause of death was heroin overdose.

Appellant was charged with and, following a jury trial, convicted of involuntary manslaughter (Pen.Code, § 192, subd. (b)) [FN1] and receiving stolen property (§ 496). A three-year, eight-month sentence was imposed. We affirm.

FN1. All further statutory references are to the Penal Code unless indicated otherwise.

I
Facts

Appellant met Cornejo on the afternoon of July 6, 1986, when she was with her boyfriend at a bar in the City of Pleasant Hill. She and her boyfriend purchased jewelry from Cornejo. In the late afternoon, when appellant was leaving the bar to return home, Cornejo got into the car with her, and she drove home with him. At the time, he appeared to be extremely drunk. At her house, he asked her for a spoon and went into the bathroom. She went to the kitchen, got a spoon and brought it to him. She knew he wanted the spoon to take drugs. She remained in the living room while Cornejo "shot up" in the bathroom. He then came out and collapsed onto the floor in the living room. She tried but was unable to rouse him.

Appellant then called the bartender at the bar where she had met Cornejo. The bartender advised her to leave him and to come back to the bar, which appellant did.

Appellant's daughter returned home at

about 5 p.m. that day with two girlfriends. They found Cornejo unconscious on the living room floor. When the girls were unable to wake him, they searched his pockets and found eight dollars. They did not find any wallet or identification. The daughter then called appellant on the telephone. Appellant told her to drag Cornejo outside in case he woke up and became violent. The girls dragged Cornejo outside and put him behind a shed so that he would not be in the view of the neighbors. He was snoring when the girls left him there.

About a half hour later, appellant returned home with her boyfriend. She, the boyfriend, and the girls went outside to look at Cornejo. Appellant told the girls that she had watched him "shoot up" with drugs and then pass out.

The girls went out to eat and then returned to check on Cornejo later that evening. He had a pulse and was snoring.

In the morning, one of the girls heard appellant tell her daughter that Cornejo might be dead. Cornejo was purple and had flies around him. Appellant called the bartender at about 6 a.m. and told her she thought Cornejo had died in her backyard. Appellant then told the girls to call the police and she left for work. The police were called.

Officer Mark Eggold arrived at appellant's house on July 7. After he found Cornejo's body outside, he searched the residence. In the bathroom, he found some tissue stained with blood. In the kitchen, he found a spoon with a blackish-gray residue on it, and a flat rubber strap in a kitchen drawer. He also found a travel case containing drug paraphernalia.

Later that day, appellant complied with a request to answer questions at the police station. After changing her version of events several times, she finally told the police that Cornejo was extremely drunk when she drove him to her home. He went into the bathroom and asked for a spoon,

> requirement fixing criminal responsibility is knowledge, actual or imputed, that the act of the accused tended to endanger life....
> "In determining whether the defendant's failure to summon medical assistance rose to the level of criminal negligence, you should consider whether an ordinarily prudent person, put in the place of the defendant, and confronted with the same circumstances as the defendant, including but not limited to the intoxicated state of Carlos Cornejo due to his voluntary ingestion of alcohol, and his apparent state of sleep, would have reasonably known at that time that Carlos Cornejo was helpless and in danger of death or great bodily harm."

III

The Evidence Supports the Trial Court's Denial of the Section 1118.1 Motion and the Conviction of Involuntary Manslaughter

As to the criminal negligence theory, the evidence supports the trial court's determination that appellant owed a duty to seek medical attention for Cornejo, and there was substantial evidence of criminal negligence. Criminal negligence is premised on conduct more reckless and culpable than that of "ordinary," or civil negligence. The conduct must be such a sharp departure from the conduct of an ordinarily prudent person that it evidences a disregard for human life, and raises a presumption of conscious indifference to the consequences. (See *People v. Watson* (1981) 30 Cal.3d 290, 296, 179 Cal.Rptr. 43, 637 P.2d 279; *People v. Penny* (1955) 44 Cal.2d 861, 879, 285 P.2d 926; *In re Michael B.* (1983) 149 Cal.App.3d 1073, 1088, 197 Cal.Rptr. 379.)

A necessary element of negligence, whether criminal or civil, is a duty owed to the person injured and a breach of that duty. Appellant claims that, regardless of whether her conduct evidenced a disregard for Cornejo's life, she did not cause his condition and therefore as a matter of law did not owe him any duty to seek medical care. She contends the question of whether her conduct amounted to criminal negligence therefore should never have gone to the jury.

Generally, one has no legal duty to rescue or render aid to another in peril, even if the other is in danger of losing his or her life, absent a special relationship which gives rise to such duty. (*Williams v. State of California* (1983) 34 Cal.3d 18, 23-24, 192 Cal.Rptr. 233, 664 P.2d 137; see 1 LaFave & Scott, Substantive Criminal Law (1986) Omission to Act, § 3.3, p. 282; 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 858, pp. 220- 221.) Further, "[t]he fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." (Rest.2d Torts, § 314.)

In California civil cases, courts have found a special relationship giving rise to an affirmative duty to act where some act or omission on the part of the defendant either created or increased the risk of injury to the plaintiff, or created a dependency relationship inducing reliance or preventing assistance from others. (See *Clemente v. State of California* (1985) 40 Cal.3d 202, 212-213, 219 Cal.Rptr. 445, 707 P.2d 818; *Johnson v. State of California* (1968) 69 Cal.2d 782, 73 Cal.Rptr. 240, 447 P.2d 352; *Carlisle v. Kanaywer* (1972) 24 Cal.App.3d 587, 592, 101 Cal.Rptr. 246.) Where, however, the defendant took no affirmative action which contributed to, increased, or changed the risk which would otherwise have existed, and did not voluntarily assume any responsibility to protect the person or induce a false sense of security, courts have refused to find a special relationship giving rise to a duty to act. (See *Williams v. State of California, supra*, 34 Cal.3d 18, 27-28, 192 Cal.Rptr. 233, 664 P.2d 137.)

The Restatement Second of Torts provides guidelines as to the specific kinds of conduct which will require one to take affirmative action to render aid. Section 321 provides: "(1) If the actor does an act, and

subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect. [¶] (2) The rule stated in Subsection (1) applies even though at the time of the act the actor has no reason to believe that it will involve such a risk."

Section 324 of the Restatement Second of Torts provides in part: "One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by [¶] (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge...."

Johnson v. County of Los Angeles (1983) 143 Cal.App.3d 298, 191 Cal.Rptr. 704, illustrates the application of section 321 of the Restatement cited above. There, the complaint alleged that sheriff's officers arrested the decedent for driving on the wrong side of a freeway in an attempt to commit suicide. Shortly thereafter, the wife of the decedent informed the officers that the decedent was a paranoid schizophrenic who required immediate medication to correct his suicidal tendencies. The decedent was subsequently released from custody without notice to his wife or daughter, and two days later he committed suicide. The wife and daughter brought an action against the county and the sheriff's officers, alleging that they violated their duties to confine, medicate and summon medical care for decedent, as well as their duty to warn them of the decedent's release from custody. The trial court sustained the defendants' demurrer on the grounds the complaint failed to state a cause of action.

On appeal, the court reversed. The court held the complaint alleged facts of a special relationship between the sheriff's officers and the decedent as well as the wife and daughter which gave rise to a duty to warn the wife and daughter before releasing the decedent. The court found that under the circumstances alleged, because the wife and daughter depended upon the sheriff's officers for protection against the very eventuality that occurred, and the sheriff's officers gave them assurances and instructions not to interfere, the sheriff's officers had increased the risk of suicide upon the unexpected and unsupervised release of the decedent. (*Johnson v. County of Los Angeles, supra*, 143 Cal.App.3d at p. 311, 191 Cal.Rptr. 704.) The creation of this unreasonable risk of harm imposed upon them a duty to warn.

Neither appellant nor respondent cite any California decision involving a charge of *criminal* negligence which is helpful to our determination of the nature, if any, of the duty owed here. The cases cited by them in which the defendant was charged with criminal negligence involved relationships which undisputably gave rise to a duty of care. (See, e.g., *Walker v. Superior Court* (1988) 47 Cal.3d 112, 253 Cal.Rptr. 1, 763 P.2d 852 [parents who provided only prayer treatment for their seriously ill child]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 8 Cal.Rptr. 863 [child killed by a fire after mother left children unattended in home].)

We find, however, that the rules governing the imposition of a duty to render aid or assistance as an element of civil negligence, are applicable to the imposition of a duty in the context of criminal negligence. As stated by one leading commentator on criminal law: "[T]he 'measuring stick' [of duty] is the same in a criminal case as in the law of torts. It is the exercise of due care and caution as represented by the conduct of a reasonable person under like circumstances, and this in itself is intended to represent the same requirement whatever the case may be." (Perkins & Boyce, Criminal Law (3d ed. 1982) ch. 7, § 2, p. 843.)

We conclude that the evidence of the combination of events which occurred between the time appellant left the bar with Cornejo through the time he fell to the floor unconscious, established as a matter of law a relationship which imposed upon appellant a duty to seek medical aid. At the time appellant left the bar with Cornejo, she observed that he was extremely drunk, and drove him to her home. In so doing, she

took him from a public place where others might have taken care to prevent him from injuring himself, to a private place--her home--where she alone could provide such care. To a certain, if limited, extent, therefore, she took charge of a person unable to prevent harm to himself. (Rest.2d Torts, *op. cit. supra,* § 324.) She then allowed Cornejo to use her bathroom, without any objection on her part, to inject himself with narcotics, an act involving the definite potential for fatal consequences. When Cornejo collapsed to the floor, appellant should have known that her conduct had contributed to creating an unreasonable risk of harm for Cornejo--death. At that point, she owed Cornejo a duty to prevent that risk from occurring by summoning aid, even if she had not previously realized that her actions would lead to such risk. (Rest.2d Torts, *op. cit. supra,* § 321.) Her failure to summon any medical assistance whatsoever and to leave him abandoned outside her house warranted the jury finding a breach of that duty.

Appellant next contends that even if the evidence supports the trial court's finding of a duty and breach thereof, there is no substantial evidence which supports a finding of *gross* negligence necessary to impose criminal liability. She points to the testimony of the prosecution's witness, Dr. Daugherty, that even he would not be able to tell, merely from the fact that Cornejo had injected himself with heroin and passed out, that he had overdosed on the drug. She also points to the evidence that Cornejo was snoring after he collapsed and continued to snore after he had been moved outside. She contends such evidence is inconsistent with a finding that her conduct had the "know[ing] and apparent potentialities for resulting in death." (*People v. Rodriguez, supra,* 186 Cal.App.2d at p. 440, 8 Cal.Rptr. 863.)

We disagree. "The fundamental requirement fixing criminal responsibility is knowledge, actual or imputed, that the act of the accused tended to endanger life." (*People v. Rodriguez, supra,* 186 Cal.App.2d at p. 440, 8 Cal.Rptr. 863.) Here, the evidence established that appellant knew that Cornejo wanted a spoon to administer drugs, that he then "shot up," i.e., injected himself with drugs, and then collapsed to the floor unconscious. There was also evidence that appellant believed that Cornejo had collapsed because he had "hot-shotted," from which the jury could infer that she believed he had injected a dangerous dose, if not a fatal dose, of drugs. Such evidence constitutes substantial evidence that appellant either knew or should have known that Cornejo's condition was critical, that immediate medical aid was necessary, and that the failure to summon aid tended to endanger Cornejo's life. Such finding is particularly warranted by the evidence that appellant's ex-husband had died of a drug overdose, and that appellant believed that the persons who were with him at the time had delayed too long in seeking medical help.

Substantial evidence also supports a finding that appellant's negligence was a legal cause of Cornejo's death. Dr. Daugherty testified that prompt medical attention, including the use of Narcan, an antidote to morphine which is normally given in cases of morphine overdose, might save a person who collapses from a heroin overdose if that person remains alive for some period after injecting the overdose. Such evidence reasonably supports the inference that appellant's inaction constituted a substantial factor leading to Cornejo's death, and therefore was a proximate cause of his death.

B. *Aiding and abetting.* Appellant contends there was insufficient evidence to support a finding that she aided and abetted Cornejo's use of heroin.

A person aids and abets the commission of a crime when he or she, with knowledge of the unlawful purpose of the perpetrator, and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, by act or advice aids, promotes, encourages or instigates the commission of the crime. (*People v. Beeman* (1984) 35 Cal.3d 547, 561, 199 Cal.Rptr. 60, 674 P.2d 1318); CALJIC No. 3.01 (1984 revision; see 4th ed. 1987 pocket pt.) Whether a person has aided and abetted

the commission of a crime is ordinarily and primarily a question for the trier of fact. (*In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094, 126 Cal.Rptr. 898.)

Here, the evidence establishes that appellant was aware of Cornejo's criminal purpose when he asked for a spoon. The evidence of appellant's act of giving Cornejo a spoon and allowing him to use her bathroom to inject drugs, with the evidence of the flat rubber strap and other drug paraphernalia found by the police at appellant's house, support the finding that appellant facilitated the commission of Cornejo's use of heroin.

The foregoing evidence, and all reasonable inferences drawn therefrom, also support the finding that appellant intended to facilitate Cornejo's use of drugs. The law presumes that an aider and abettor intends the natural and reasonable consequences of the acts he intentionally performs. (*People v. Beeman, supra*, 35 Cal.3d at p. 560, 199 Cal.Rptr. 60, 674 P.2d 1318.)

People v. Hopkins (1951) 101 Cal.App.2d 704, 226 P.2d 74, though predating *Beeman*, supports our conclusion. There the decedent purchased heroin with the defendant's money. They then prepared the narcotic for injection in the defendant's car and injected themselves, the defendant helping to manipulate a handkerchief-tourniquet around the decedent's arm while he did so. When the decedent fell unconscious, the defendant rushed him to the hospital where he died. The court held there was sufficient evidence to hold the defendant to answer a charge of manslaughter based upon aiding and abetting the decedent's use of heroin. The court further noted: "If [defendant] had not touched decedent's arm or otherwise physically aided him, but had merely stood by and kept a lookout for passers-by he could still be charged as a principal...." (*People v. Hopkins, supra*, 101 Cal.App.2d at p. 707, 226 P.2d 74; see also *People v. Edwards* (1985) 39 Cal.3d 107, 216 Cal.Rptr. 397, 702 P.2d 555.)

We conclude the record supports the trial court's denial of the section 1118.1 motion, and the conviction of involuntary manslaughter on both theories presented to the jury.

IV

Admission of Evidence of Appellant's Statements Concerning Ex-Husband's Overdose Did Not Constitute Error

As discussed *ante,* the prosecutor called as a witness Sergeant Jack Harper to testify as to statements made to him by appellant in 1978 concerning the investigation of the death of her ex-husband in 1978. Harper testified that appellant's ex-husband had been with friends, taken drugs, passed out, and then died of an overdose of morphine, amphetamine, and methamphetamine. Although appellant was not present when he died, she "was extremely upset that the people that he was with waited so long before asking for medical help and that if they had--they done this, he might have been saved."

Defense counsel objected on the grounds of irrelevancy and that the prejudicial effect outweighed the probative value, if any. The trial court admitted the evidence pursuant
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offense as administering a controlled substance, a felony.
However, aiding and abetting another's use of a controlled substance proscribed by Health and Safety Code section 11550 may also constitute administering a controlled substance proscribed by Health and Safety Code section 11352, even though the latter offense is not charged.

VI
There Was No Prosecutorial Misconduct

The record shows the prosecutor directly and unambiguously argued to the jury in closing arguments that the evidence supported a finding that appellant had injected Cornejo with heroin. At the conclusion of the prosecutor's closing argument, defense counsel moved for a mistrial on the ground of prosecutorial misconduct. He contended the prosecutor had improperly argued to the jury that the evidence showed that appellant had administered heroin to Cornejo. The trial court denied the motion, stating that the evidence to which the prosecutor had referred had been admitted without any limitations as to its purpose.

Appellant now argues: "Because the record shows unequivocally that the trial court repeatedly told the district attorney he could not try this case on an 'administering' theory, and that the evidence on which he relied to raise the inference that appellant had administered heroin to Cornejo *was* admitted on the condition that it not be used for that purpose, the trial court erred and appellant's motion should have been granted."

Regardless of any limitations imposed by the trial court on the use of the evidence in question, the prosecutor's argument to the jury that appellant had injected or helped to inject Cornejo did not violate the trial court's previous ruling that he could not present the case to the jury on an administering theory. (See discussion *ante,* in section V.) The denial of the motion for new trial did not constitute an abuse of the trial court's discretion.

VII
Disposition

The judgment is affirmed.

WHITE, P.J., and BARRY-DEAL, J., concur.

258 Cal.Rptr. 138, 210 Cal.App.3d 138