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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,  
Plaintiff and Respondent,  
v.  
ALVA THOMAS REEVES et al.,  
Defendants and Appellants.

A128353  
(Mendocino County  
Super. Ct. Nos.  
SCUKCRCR088481402,  
SCUKCRCR088481403)

Alva Reeves and Brandon Pinola were convicted of the first degree murder of Gerald Knight. Pinola contends the court improperly admitted evidence that he committed a prior assault and misinstructed the jury on accomplice testimony and aider and abettor liability. Reeves asserts the court’s instructions to the jury on the effect of his mental defect or disorder impermissibly lessened the prosecution’s burden to prove he premeditated and deliberated Knight’s murder. We affirm.

**BACKGROUND**

Gerald Knight was known to be a “track person,” an alcoholic who lived in a small homeless community along the abandoned railroad tracks in Ukiah. Defendant Reeves and Knight were a couple. Reeves often hung out and drank with Knight and other “track people.”

On the afternoon of the murder, while Reeves was with him, Knight went to a nearby bank with his friends and they gave him \$80. He put the money in his left pocket.

Later Reeves and Knight returned to the tracks, where they were joined by defendant Pinola and offered him a beer. Pinola spent the day drinking. He eventually left to look for his girlfriend and shower, but he later returned to the tracks and drank another couple of beers with Reeves and Knight. When Reeves and Knight started arguing about a woman, Pinola left for a nearby bar because he “didn’t want to hear any drama.”

When Pinola was drinking beer at the bar, Reeves came in and invited him back to the tracks. Reeves promised Pinola free beer and claimed he was going to “kick Gerald Knight’s ass.” Expecting some free entertainment, Pinola returned to the tracks with Reeves. Knight and Reeves resumed arguing. At some point Knight began putting things in his backpack, as if he were going to leave. According to Pinola, that is when Reeves grabbed an object and hit Knight in the face with it. Knight stumbled and fell to the ground. Reeves viciously and repeatedly punched and kicked Knight while he was down.

Reeves and Pinola returned to the bar, and went directly to the men’s room to clean themselves up. Reeves was wearing Knight’s backpack. While Pinola was wiping blood off his shoe and Reeves was cleaning his hands and face with paper towels, customer David McCarty entered the restroom. Reeves looked “ruffled up” and seemed a little frantic about cleaning up and checking himself over. McCarty said that it looked like the two had been in a fight. Pinola responded, “yeah, we really messed him up,” or “we really fucked him up,” and made a kicking gesture as if he were stomping on someone who was down.

After they cleaned up, Reeves and Pinola ordered a pitcher of beer and sat at a back table. Pinola had \$60 or \$70 in his pocket, even though he later told police he was broke the night of the murder. After a while, Reeves walked up to Aaron Wear, a complete stranger, and told Wear that he had just killed someone by the railroad tracks. Reeves showed Wear his hands, which looked “beaten up,” and there was blood on his shirt.

Knight’s body was found on the tracks the next morning. His throat had been slit, most likely with a piece of broken glass. There were numerous contusions and

lacerations to his head and neck, multiple hemorrhages into and under his skull, and two broken ribs on each side of his body. The causes of death were blunt force trauma to his head and a laceration of his jugular vein and carotid artery. Knight's pockets had been pulled out and his cash was gone. A few days later Knight's backpack was found in the bar.

DNA from blood found on Reeves's and Pinola's shoes matched Knight's DNA profile. Bloody footprints on the back of Knight's pants were consistent with shoes seized from Pinola, but not Reeves.

### **Reeves's Defense**

Reeves argued that he was too drunk and psychologically impaired to form the requisite state of mind for murder. Moreover, it was Pinola who killed Knight and he was trying to pin it on Reeves. Neuropsychologist Eugene Couture, Ph.D. testified that Reeves suffered from dementia caused by a severe head injury in 1990, an ongoing seizure disorder, and a long history of substance abuse. Dr. Couture's testing also indicated antisocial personality disorder and a significant impairment of Reeves's ability to organize and plan his actions.

### **Pinola's Defense**

Pinola maintained that it was Reeves, not he, who murdered Knight. He testified that he tried to pull Reeves off of Knight during the fight, but gave up when Reeves elbowed him and forced him to let go. Pinola denied that he hit or kicked Knight. Pinola watched Reeves beat Knight for three or four minutes, then left and returned to the bar. As he was leaving he saw Reeves flip Knight onto his belly, pull back his hair and make a motion with something he was holding in his hand. Although Pinola told the police otherwise, he "had an idea" that Knight was dead when he left the tracks.

Reeves followed Pinola to the bar, where they cleaned themselves up in the bathroom. When McCarty came in and asked if the two had been in a fight, Pinola said that "he," meaning Reeves — not "we" — had "kicked the shit out of him." Then Reeves and Pinola shared a pitcher of beer.

## **Verdict**

The jury convicted both Reeves and Pinola of first degree murder. These appeals timely followed the denial of various posttrial motions.

## **DISCUSSION**

### **I. The Accomplice Testimony Instruction**

The prosecution theory was that each defendant was guilty as either a principal or an aider and abettor. Pinola's defense, as outlined above, was that it was Reeves, not he, who killed Knight. If the jury disbelieved Pinola's testimony to that effect, then he was an accomplice whose testimony was insufficient to convict Reeves without corroboration. Although Pinola did not object during trial, he now contends the court prejudicially erred when it instructed the jury more generally that his testimony required corroboration. There is no merit to his contention.

### **Background**

The court instructed the jury pursuant to CALCRIM No. 301 that "Except for the testimony of Brandon Pinola, which requires supporting evidence, the testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all of the evidence." The court went on to instruct the jury on conflicts in evidence, evidence admitted for a limited purpose, prior statements by defendants, impeachment evidence, and expert and lay testimony.

The court then turned to the accomplice instructions. It instructed the jury that: "[T]o the extent that Brandon Pinola gave testimony that tends to incriminate Alva Reeves it should be viewed with care and caution. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in light of all the evidence in the case. [¶] Before you may consider the testimony of Brandon Pinola as evidence against the defendant Alva Reeves regarding the crimes of murder and/or manslaughter, you must decide whether Brandon Pinola was an accomplice in those crimes. . . . [¶] If you decide that Brandon Pinola was not an accomplice, then supporting evidence is not required and you should evaluate his testimony as you would

that of any other witness. [¶] If you decide that Brandon Pinola was an accomplice, then you may not convict the defendant of murder or manslaughter based on his testimony alone. You may use the testimony of an accomplice to convict the defendant only if: [¶] 1) The accomplice's testimony is supported by other evidence that you believe; [¶] 2) That supporting evidence is independent of the accomplice's testimony; [¶] and 3) That supporting evidence tends to connect the defendant to the commission of the crime or crimes. [¶] Supporting evidence, however, may be slight. It does not need to be enough by itself to prove that the defendant is guilty of the charged crime and it does not need to support every fact about which the accomplice testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime."

### **Analysis**

Pinola argues that CALCRIM No. 301 erroneously informed the jury his testimony required corroboration in all circumstances, and that the error was not cured by the later instruction that corroboration was not required if the jury found he was *not* an accomplice because "this instruction does not apply until the jury first determines that a witness is not an accomplice, but pursuant to CALCRIM No. 301 the jury in this case would have required other evidence supporting Mr. Pinola's testimony before the jury could have decided he was not an accomplice." Therefore, he asserts the court should have modified CALCRIM No. 301 to say "the testimony of only one witness can prove any fact, except that any testimony of Brandon Pinola *which incriminates Alva Reeves* requires supporting evidence before you can consider that testimony against Mr. Reeves." (Italics added.)

The People contend, correctly, that Pinola forfeited this contention by failing to object to CALCRIM No. 301. "Generally, "[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." ' ' ( *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163 (*Samaniego*);

*People v. Tuggles* (2009) 179 Cal.App.4th 339, 364.) Pinola is not arguing that CALCRIM No. 301 is an incorrect statement of the law, but rather claims that it was misleading in the circumstances without additional language clarifying that it applied only to Pinola's testimony that incriminated Reeves. To preserve this claim for appeal, Pinola was required to request clarifying language at trial. (*Ibid.*; see also *People v. Spurlock* (2003) 114 Cal.App.4th 1122, 1130.) He did not.

Nonetheless, we are satisfied that any possible ambiguity introduced by the instruction did not implicate Pinola's due process rights. “ “[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.” [Citation.] If the charge as a whole is ambiguous, the question is whether there is a “ ‘reasonable likelihood that the jury has applied the challenged instruction in a way’ that violates the Constitution.” ’ [Citation.]” (*People v. Huggins* (2006) 38 Cal.4th 175, 192; *People v. Letner* (2010) 50 Cal.4th 99, 186.) Here, shortly after it gave CALCRIM No. 301, the court instructed jurors that they must decide whether Pinola was an accomplice before they considered his testimony as evidence against Reeves. It also explained that “If you decide that Brandon Pinola was not an accomplice, then supporting evidence is not required and you should evaluate his testimony as you would that of any other witness.” The instructions, as a whole, adequately clarified that the corroboration requirement applied only to testimony that was unfavorable to Reeves, and only if the jurors found he was an accomplice. No reasonable juror would have engaged in the mental gymnastics required to interpret CALCRIM No. 301 as meaning they could not accept Pinola's denial that he was an accomplice unless it was corroborated by some other evidence. Moreover, there was substantial evidence that corroborated Pinola's testimony that it was Reeves, not him, who killed Knight — e.g., Reeves's bloody clothes and injured hands, Knight's DNA on his shoes, his possession of Knight's backpack, and his statement to a stranger in the bar that he had just killed someone.

## II. The Aiding and Abetting Instruction

Pinola also contends the court erred when it instructed the jury pursuant to CALCRIM No. 400 that an aider and abettor is “equally guilty” as the direct perpetrator, and failed to sua sponte instruct that an aider and abettor can be found guilty of a lesser offense than the perpetrator. Specifically, Pinola argues the instructions failed to inform the jury that he could be guilty of a lesser crime than Reeves if he did not personally harbor the mental state of premeditation and deliberation. This contention, too, is unpersuasive.

Without objection, the trial court gave the following general instruction on aiding and abetting: “A person may be guilty of a crime in two ways: [¶] 1) He or she may have directly committed the crime. I will call that person the perpetrator. [¶] 2) He or she may have aided or abetted a perpetrator, who directly committed the crime. [¶] A person is equally guilty of the crime whether he or she committed it personally or aided or abetted the perpetrator who committed it.” (CALCRIM No. 400.)

The infirmity in this instruction was addressed in *Samaniego, supra*, 172 Cal.App.4th at pp. 1163–1164. Its discussion neatly encapsulates the legal issue. “*People v. McCoy* (2001) 25 Cal.4th 1111 . . . articulates the controlling principles in resolving the question of whether an aider and abettor of first degree murder is always equally as guilty as the direct perpetrator. In that case, McCoy and Lakey were convicted of first degree murder and two counts of attempted murder . . . . At trial, McCoy, but not Lakey, testified. McCoy admitted shooting but claimed to have done so because he believed he would be shot . . . . [¶] The Court of Appeal reversed McCoy’s conviction for misinstruction on unreasonable self-defense. (*McCoy, supra*, 25 Cal.4th at p. 1115.) The California Supreme Court concluded that it was possible on retrial that McCoy could be found guilty of manslaughter and attempted manslaughter on an unreasonable self-defense theory, rather than of murder and attempted murder. It characterized the issue before it as whether reversal of McCoy’s convictions also required reversal of Lakey’s because Lakey, found guilty as an aider and abettor, could not be guilty of a greater offense than the perpetrator. (*Id.* at p. 1116.) [¶] The Supreme Court reasoned that

‘when a person, with the mental state necessary for an aider and abettor, helps or induces another to kill, that person’s guilt is determined by the combined acts of all the participants as well as that person’s own *mens rea*. If that person’s *mens rea* is more culpable than another’s, that person’s guilt may be greater even if the other might be deemed the actual perpetrator.’ ”

While *McCoy* thus concluded that an aider and abettor could be guilty of an offense *greater* than the direct perpetrator (where, for example, the perpetrator’s mental state mitigated his intent), *Samaniego* observed that its reasoning “leads inexorably to the further conclusion that an aider and abettor’s guilt may also be *less* than the perpetrator’s, if the aider and abettor has a less culpable mental state.” (*Samaniego, supra*, 172 Cal.App.4th at p. 1164, italics added.) Consequently, instructing the jury (as here) that the aider and abettor is “equally guilty” of the crime of which the perpetrator is guilty “while generally correct in all but the most exceptional circumstances,” can be misleading where the aider and abettor claims a mitigating *mens rea*.<sup>1</sup> (*Id.* at p. 1165; see also *People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118–1120.)

We agree with *Samaniego*’s analysis, and we also conclude, as it did, that the error was both waived and harmless. Because the version of CALCRIM No. 400 given was generally an accurate statement of the law, even if arguably misleading in this case, Pinola was obligated to request a clarification or modification in the trial court and forfeited the contention by not doing so. (*Samaniego, supra*, 172 Cal.App.4th at p. 1163; *People v. Lopez, supra*, 198 Cal.App.4th at pp. 1118-1119; *People v. Tuggles, supra*, 179 Cal.App.4th at p. 364.)

Moreover, Pinola was not prejudiced. He contends the jury could have found he did not premeditate and deliberate the killing, “but rather just got in a couple of kicks on the spur of the moment,” and was therefore guilty of no more than second degree murder. But the jury was properly instructed that, to prove a defendant was an aider and abettor,

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<sup>1</sup> CALCRIM No. 400 has been amended and no longer contains the “equally guilty” language. (*People v. Lopez, supra*, 198 Cal.App.4th at p. 1119, fn. 5, citing Judicial Council of Cal., Crim. Jury Instns. (2011) p. 167.)

the People must prove the perpetrator intended to commit the crime and that the defendant intended to aid and abet the perpetrator in committing that crime. It was also instructed that each of the homicide instructions, including the instructions on intent, applied separately to Pinola and Reeves. Finally, the jury was instructed that “If you conclude that the defendant was intoxicated at the time of the alleged crime, you may consider this evidence in deciding whether the defendant: [¶] A. Knew that the perpetrator of the crime intended to commit a homicide; and [¶] B. The defendant intended to aid and abet the perpetrator in committing a homicide.” In light of the jury charge as a whole, any possible confusion created by giving CALCRIM No. 400 was harmless because other instructions correctly instructed the jury on the intent required to convict Pinola of murder under an aider and abettor theory.

### **III. Other Conduct Evidence**

Pinola contends the trial court also erred when it admitted evidence of an incident about two months before Knight’s murder in which Pinola repeatedly and viciously kicked an older man who was lying helpless on the street. Because the two incidents were sufficiently similar, the court did not abuse its discretion when it admitted Pinola’s earlier assault to support an inference of intent and identity.

“Evidence that a defendant has committed crimes other than those currently charged is not admissible to prove that the defendant is a person of bad character or has a criminal disposition; but evidence of uncharged crimes is admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes. [Citation.] Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent.” (*People v. Kipp* (1998) 18 Cal.4th 349, 369; *People v. Foster* (2010) 50 Cal.4th 1301, 1328; Evid. Code, § 1101.)<sup>2</sup>

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<sup>2</sup> Further statutory citations are to the Evidence Code.

The California Supreme Court has long recognized “ “that if a person acts similarly in similar situations, he probably harbors the same intent in each instance” [citations], and that such prior conduct may be relevant circumstantial evidence of the actor’s most recent intent. The inference to be drawn is not that the actor is *disposed* to commit such acts; instead, the inference to be drawn is that, in light of the first event, the actor, at the time of the second event, must have had the intent attributed to him by the prosecution.’ ” (*People v. Rowland* (1992) 4 Cal.4th 238, 261.) “ ‘The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] . . . In order to be admissible to prove intent, the uncharged conduct must be sufficiently similar to support the inference that the defendant “ ‘probably harbor[ed] the same intent in each instance.’ ” ’ ” (*People v. Foster, supra*, 50 Cal.4th at p.1328, quoting *People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) On the other hand, “ ‘[t]he greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity . . . . [T]he uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] “The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.” ’ ” (*Ibid.*)

If the prior conduct evidence is sufficiently similar to the charged crime that it is relevant to the defendant’s intent, common plan, or identity, the trial court must then consider whether its probative value is substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice under section 352. We review the trial court’s rulings under sections 1101 and 352 for abuse of discretion. (*People v. Foster, supra*, 50 Cal.4th at p. 1328.)

Here, in both incidents Pinola violently assaulted an older man, a stranger, as he lay helpless on the ground. Both assaults took place in the same vicinity, in public, and occurred only two months apart. On both occasions Pinola viciously and repeatedly kicked his prone victim in the midsection. Both victims suffered broken ribs.

Pinola admitted he had no motive to assault the first victim other than “just because,” and he did a victory dance during the attack. Similarly, according to his own testimony, Pinola went to the tracks with Reeves the night of Knight’s murder because he likes fights, was looking for some action and thought it would be a good show. In light of these parallels, the court did not abuse its discretion when it ruled that evidence of the prior incident was relevant to show both intent and identity.

The trial court’s finding that the evidence of the prior assault was not substantially more prejudicial than probative was also well within its discretion. The testimony about the earlier beating was no more inflammatory than the evidence about the attack on Knight. No photographs or other graphic evidence of the first victim were put in evidence, and, unlike Knight, the prior victim survived. The jurors were told Pinola was on bail awaiting sentencing for the earlier assault when Knight was killed, so there was no danger they might be inclined to punish him for the uncharged crime whether or not they believed him guilty of murdering Knight. (See *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405.) The prior act evidence was properly admitted.

#### **IV. The Instruction on Mental Defect and Disorder**

Reeves’s sole contention on appeal is that the trial court erred when it instructed the jury on how to weigh the evidence of his mental impairment. Here again, even if we assume the modified instruction was erroneous or misleading in isolation, and that the alleged error was neither invited nor forfeited, there is no doubt in light of the jury instructions as a whole that the jury was properly instructed.

#### **Background**

Before instruction and argument, Reeves asked the court to insert the terms premeditation and deliberation to CALCRIM 3428, the instruction that addresses how a mental defect or disorder may affect a defendant’s intent. After the court read the first paragraph of the pattern instruction, the following colloquy took place: “The Court: And you want to add ‘or with premeditation or deliberation’? [¶] [Counsel]: Yes, at whatever point the court thinks it’s appropriate in the wording. Maybe the way the court should word it is something like, you may consider the evidence only for the limited purpose of

deciding whether for the crime of first-degree murder there is the required intent or mental state and premeditation and deliberation. And then for second degree, murder and manslaughter, whether — [¶] The Court: I’m looking at 3428. The bench notes all talk about it going to specific intent or mental state. [¶] [Counsel]: They do. But premeditation and deliberation is part of it when you’re dealing with first-degree murder. I don’t think — [¶] The Court: One minute. Those are considered mental states. So you just want it pointed out — [¶] [Counsel]: yes. [¶] The Court: — that it is considered a mental state? [¶] [Counsel] I think you need — I’m requesting they be added wherever — [¶] The Court: I’ll add them like I indicated. ‘The mental state required for the crime, including premeditation and deliberation . . . .’ [¶] Is there specifically any other objections to any of the proposed jury instructions? [¶] [Counsel]: Not on behalf of Mr. Reeves.”

The court then read the following instruction as part of its charge to the jury, without a defense objection or request for amplification: “Now, you also have heard evidence that defendant Alva Reeves may have suffered from a mental defect or disorder. You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime, the defendant acted with the intent or mental state, including premeditation and deliberation, required for that crime. [¶] The People have the burden of proving beyond a reasonable doubt the defendant acted with the required intent or mental state, specifically, malice aforethought and/or intent to kill. If the People have not met this burden, you must find the defendant not guilty of murder and voluntary manslaughter.”

### **Analysis**

Reeves now argues the modification to CALCRIM No. 3428 incorrectly instructed the jurors on the People’s burden of proof because, although the first paragraph said the jury could consider his mental defect evidence as bearing on premeditation and deliberation, the *second* paragraph said the People had the burden of proof on malice aforethought and intent to kill and did not specify that they also had to prove premeditation and deliberation beyond a reasonable doubt. He argues that “the jurors

were reasonably likely to correlate the court’s specification of malice aforethought and intent to kill as mental states on which the prosecution had the burden of proof with the court’s exclusion of premeditation and deliberation [from the second paragraph] to conclude that this instruction was an instance of a specific exception to the general burden of proof rule . . . . In other words, it was reasonably likely the jurors would understand the second paragraph of CALCRIM No. 3428 as an instance of the court specifically saying the People did not have the burden of proof on premeditation and deliberation in the context of their evaluation of the defense evidence of [Reeves’s] mental deficits.”

We disagree. Assuming, *arguendo*, that Reeves did not forfeit this argument by suggesting and agreeing to the instruction, it fails because in context the jury was properly instructed on the burden of proof. The second paragraph of the instruction neither says nor reasonably can be read to imply what Reeves says it does — i.e., that the People do not have the burden of proving premeditation and deliberation in light of his mental defect defense. Even if such a suggestion could reasonably be gleaned from the instruction — which, to be clear, it cannot — other instructions made the People’s burden of proof clear. The jury was instructed that “A defendant is guilty of first-degree murder if the People have proved that the — that he acted willfully, deliberately, and with premeditation” and that “The People have the burden of proving beyond a reasonable doubt that the killing was a first-degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first-degree murder.” The jury was also instructed that the presumption of innocence “requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise.” Considered in context, there is no likelihood that the jurors would have misunderstood CALCRIM 3428 as carving out an exception to the People’s burden of proof specific to Reeves’s mental defect evidence.

#### **DISPOSITION**

The judgment is affirmed.

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Siggins, J.

We concur:

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McGuinness, P.J.

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Jenkins, J.