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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DANNY JEROME HAYDEN, JR.,

Defendant and Appellant.

A131767

(Sonoma County  
Super. Ct. No. SCR580277)

**I. INTRODUCTION**

Appellant was tried before a Sonoma County jury in November 2010 and convicted of one count of assault with a deadly weapon; the jury also found true a great bodily injury enhancement. He appeals, claiming prejudicial error in the trial court’s omission, at the conclusion of the trial, of one sentence in an agreed-upon instruction, CALCRIM No. 226. We disagree with appellant’s contentions regarding the legal consequences of this omission and hence affirm his conviction.

**II. FACTUAL AND PROCEDURAL BACKGROUND**

On March 11, 2010, Harvey Davis was living on Hearn Avenue in Santa Rosa, Sonoma County. Since either 1998 or 2000 (his testimony was unclear on the timing), he had been taking, per a prescription, 40 milligram Oxycontin pills because of a procedure he had undergone to remove a “few vertebraes . . . from my spine.” On that day, Davis was planning on selling 35 of those pills to appellant, who he had met “about a month prior to that” through a friend. He planned on selling them for \$20 a pill, less a \$50 discount from the total price.

On the day in question, appellant arrived at Davis's home between 5:30 and 6:00 p.m. along with two other African-American men, one with lighter skin and the other with darker skin. The three men came into Davis's home and "kind of insisted" that he count out the pills he was going to sell them, so he did. At that point, the darker-skinned companion of appellant "grabbed possession" of the bag with the pills, and he and Davis struggled for control of it; Davis had not yet been paid for the pills. Davis held the darker-skinned African-American companion of appellant for several minutes; he did not know what appellant was doing at that time. The lighter-skinned African-American had, however, already left Davis's home.

Appellant then secured a hammer, apparently from a basket of tools Davis kept in his living room. He then threatened Davis with it, telling him to let go of his remaining companion, i.e., the darker-skinned African-American man. But Davis continued that fight, because he did not want the men to leave without paying him for the pills. Appellant then left the house through the front door, whereupon Davis, still holding on to the remaining companion of appellant, tried, apparently unsuccessfully, to close his front door with his foot. Appellant came back, this time holding a knife and looked around "to see if there was somebody watching." He then stabbed Davis in the left forearm, a stab which left a one-inch scar. Appellant's companion then got loose from Davis's grasp and ran out the door, as did appellant. Both Davis and the companion collapsed on Davis's driveway. Appellant's companion had apparently lost his T-shirt in his struggle inside the house with Davis. The three men then left in a white Monte Carlo, apparently driven by the lighter-skinned African-American companion of appellant.

Upon returning to his house, Davis discovered that he was bleeding severely. In addition to his arm wound, he had also been stabbed in the back by appellant; that part of him was "completely saturated" with blood.

A few minutes later, Davis called both a friend and 911. After that, he noted that some of his Oxycontin pills were missing, although he had not been paid for them.

Appellant was taken to Memorial Hospital in Santa Rosa, where he stayed for six days because of his wounds, which also included a wound in the area of his ribs.

When he returned home, Davis discovered a knife in his living room that had originally been in his kitchen. Davis testified that there might have been blood on the knife, but because appellant and his two colleagues had already been arrested, he threw away the broken knife blade and cleaned up the blood from his living room. He had not previously told the police about the knife—or any other weapon—being used in the fight. Also, Davis did not initially tell the police about the prospective drug transaction. And when the police searched his house after the 911 call, they found the Oxycontin pills, but no knife.

In the course of his testimony, Davis admitted that he regularly sold Oxycontin pills from his prescription and, also, pirated CD's and DVD's. Davis conceded that he had been granted immunity for prosecution on that subject, and also admitted that he had not initially told the police about his criminal activities regarding Oxycontin.

During his six-day stay at the hospital, Davis identified appellant and the darker-skinned African American as two of the three men who had come to his house on March 11. The latter was a man named Grinner.

Sonoma County Deputy Sheriff Gelhaus testified that, when he arrived at Davis's house following the latter's 911 call, he found a blue and black T-shirt on the driveway and the front door open; Davis had been stabbed, but apparently was in no immediate pain. There was a significant amount of blood throughout Davis's home.

Via a stipulation, it was established that, when admitted to the hospital, Davis had a two-inch knife wound in his back, a one-inch puncture wound to his arm, and a perforated lung.

By an amended information filed on October 12, 2010, appellant was charged with two counts: (1) robbery in concert of Davis (Pen. Code, §§ 211 and 213<sup>1</sup>) with enhancements for great bodily injury and use of a knife) (§§ 12022.7, subd. (a) and 12022, subd. (b)(1)) and (2) assault on Davis with a deadly weapon (§ 245, subd. (a)(1)) with the same great bodily injury enhancement.

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<sup>1</sup> All further undesignated statutory references are to the Penal Code.

After a three-day jury trial (and less than three hours of deliberation), on November 9, 2010, the jury found appellant guilty on the second charged count, assault with a deadly weapon, but was unable to reach a verdict on the first count (which was, thereafter, dismissed).

On April 11, 2011, appellant was sentenced to a total prison term of seven years, i.e., a four-year aggravated term for the assault charge plus a consecutive three-year term for the enhancement. Fines were imposed under sections 1202.4 and 1202.45 and credit for time served allowed; three trailing misdemeanor charges were also dismissed.

Appellant filed a timely notice of appeal on April 14, 2011.

### **III. DISCUSSION**

As noted above, the sole contention of appellant is that he was denied due process because, in charging the jury at the conclusion of the trial with CALCRIM No. 226, an instruction agreed upon by the parties, the court—apparently inadvertently—omitted the final sentence of that instruction, a sentence which read (regarding the factors the jury “may consider”): “Was the witness promised immunity or leniency in exchange for his or her testimony?”

For several reasons, we find this omission to be non-prejudicial and hence conclude we should affirm the judgment of conviction.

In the first place, as our Supreme Court has made clear many times, in considering a claim that there has been error in instructions given to the jury, especially a claim that an error was based on an omission from an instruction, the appellate court must consider “the entire charge” given to the jury. The court summed up the applicable law thusly in *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248: “As we said in *People v. Castillo* (1997) 16 Cal.4th 1009, 1016 ‘ “[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.’ ” ’ (Quoting *People v. Burgener* (1986) 41 Cal. 3d 505, 538[, disapproved on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743]; *id.* at p. 539 [ “The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole.” ’ ]; see also *People v.*

*Chavez* (1985) 39 Cal.3d 823, 830 [‘[W]e must look to the entire charge, rather than merely one part, to determine whether error occurred.’]; *People v. Noguera* (1992) 4 Cal.4th 599, 630-631.)” (See also, to the same effect: *People v. Williams* (1997) 16 Cal.4th 635, 675 [“We evaluate claims of instructional error ‘ “in the context of the overall charge” ’ to the jury.”].)

It is also clear that any omission or other error in an instruction given to the jury must be prejudicial. (See 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Trial, § 663(1).) And there is no prejudice concerning an omission in one instruction if another instruction remedies that. (See *id.*, § 663(2).) As our colleagues in Division Three of this court wrote: “There is no error in a trial court’s failing or refusing to instruct on one matter, unless the remaining instructions, considered as a whole, fail to cover the material issues raised at trial. As long as the trial court has correctly instructed the jury on all matters pertinent to the case, there is no error. The failure to give an instruction on an essential issue, or the giving of erroneous instructions, may be cured if the essential material is covered by other correct instructions properly given. [Citations.]” (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 277; see also the authority cited therein and *People v. Jeffries* (2000) 83 Cal.App.4th 15, 22.)

This law is relevant here because the sentence the trial court omitted from its final reading of CALCRIM No. 226 had been given by it just a few days earlier, i.e., on the first day of trial, after the jury had been selected and seated. Before the opening statements by either counsel, the court stated that it would “now explain some basic rules of law and procedure,” rules that would “insure that both sides receive a fair trial.” As part of those rules, it explicitly gave the jury *the entire* CALCRIM No. 226 instruction, including the sentence it omitted from the instruction it gave after the trial concluded several days later, i.e.: “Was the witness promised immunity or leniency in exchange for his or her testimony?”

As one of our sister courts wrote recently: “Section 1093, subdivision (f), permits the trial court to instruct ‘[a]t the beginning of the trial or from time to time during the trial . . . .’ It does not require a rereading of all instructions at the conclusion of trial.”

(*People v. Frederick* (2006) 142 Cal.App.4th 400, 415; see also, to the same effect: *People v. Smith* (2008) 168 Cal.App.4th 7, 14-16; *People v. Chung* (1997) 57 Cal.App.4th 755, 758-760; §§ 1093, subd. (f) and 1122, subd. (a); 5 Witkin & Epstein, *Cal. Criminal Law*, *supra*, § 619.)

Further, during the course of the three-day trial, the jury heard a fair amount concerning the immunity that had been granted Davis. Davis was the first of three witnesses presented by the prosecution. Toward the end of the prosecutor's direct examination, she adduced the following testimony from him:

“Q. [Ms. Kowler]: And you were given a grant of immunity for the events that occurred on that day; is that correct?

“A. [Mr. Davis]: Yes.

“Q. Now, part of that agreement is that you . . . would still be prosecuted for any false and misleading statements that you made today?

“A. Yes.

“Q. So you understand that perjury would not be covered?

“A. Right.”

This was not the only time the immunity agreement between the prosecution and Davis came up. In his extensive cross-examination of Davis—a cross-examination which repeatedly suggested Davis was not telling the whole truth about the events of the days in question—defense counsel specifically brought up the immunity agreement. He asked Davis if, when he was first interviewed by the police, “you hadn't yet . . . received immunity?” Davis responded, indeed twice, in the negative. And, just before resting, defense counsel introduced into evidence the immunity agreement Davis had negotiated with the prosecution.

Defense counsel also had something to say on the subject of the immunity agreement in the course of his closing argument to the jury. In the course of that argument—one focused almost entirely on the premise that Davis had been untruthful in his testimony—he stated: “Now, let's talk about that whole immunity thing. Immunity says, according to the immunity deal, we understand that you lied, that you dealt drugs,

and that you, and that you were engaged in other illegal activities. That's a given before we even give you immunity. So we have to think about that. The guy's already a liar and a criminal in order to get immunity. So the immunity, however that works, is already tainted by that. There's nothing in the immunity that indicates that's he's going to tell the truth, except a little statement down at the bottom, which I'll get to in a minute. . . . [¶] The question is, is his testimony reliable enough, on any basis, to convict anybody of anything or make any decision about anything: [¶] Now, that's not just because, because he lied a couple of times, because the stories that he's told contradict themselves so badly that they need to be addressed, and I will do that. But remember, I said that, in the statement, the exhibit that we have, which is the agreement for him to get immunity, it says that, in order for the immunity agreement to be valid and to be honored, he has to, he has to give truthful testimony. [¶] Think about what that means, I guess that's their way of saying, it has to be truthful this time, because we, we're giving you free pass on the times that you've lied in the past. But you have to understand that what he does now, his options are, he's pretty much stuck with the script. He pretty much has to tell the story that he told the most recent time to the District Attorney's office before he gets, before the immunity kicks in; because if he doesn't, if he goes back and tells another story, then of course they get to say that that's not truthful, 'cause the D.A.'s office gets to make that decision."

Finally, the trial court's instructions to the jury included many regarding its obligation to consider the "truthfulness," "believability," and "credibility" of the witnesses in the trial.

In view of all these facts, and especially that (1) the jury had, a few days earlier, been specifically instructed with the full version of CALCRIM No. 226, (2) defense counsel cross-examined Davis concerning his immunity agreement, introduced that agreement into evidence, and then specifically argued to the jury regarding it, the court's omission of one sentence in its second and final reading of the agreed-upon instruction could not reasonably have confused or misled the jury regarding whether Davis had been

“promised immunity or leniency in exchange for his . . . testimony.” (CALCRIM No. 226.)

One other factor reinforces our harmless-error conclusion: The only other witnesses to testify at the trial besides Davis were Deputy Sheriff Gelhaus, one other deputy who had responded to the scene of the March 11 melee, a Sergeant Naugle, and a deputy who had interviewed Davis at the hospital, Deputy Crean (the latter being the only witness called by the defense). Although the testimony of these three officers confirmed (as did Davis’s testimony on cross-examination) that his version of the events of the evening of March 11 had changed over the course of his interrogations, they did not significantly undermine Davis’s trial testimony concerning appellant’s assault of him during the evening in question.

For all these reasons, we conclude there was no prejudicial error in the trial court’s omission of the sentence regarding the “immunity” promised to Davis from the concluding instruction it gave to the jury.

#### **IV. DISPOSITION**

The judgment of conviction is affirmed.

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Haerle, J.

We concur:

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Kline, P.J.

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Richman, J.