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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

DEMOND L. WALKER,

Defendant and Appellant.

B266902

(Los Angeles County  
Super. Ct. No. BA433782)

Appeal from a judgment of the Superior Court of the County of Los Angeles, Lisa B. Lench, Judge. Affirmed.

D. Inder Comar, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Stephanie A. Miyoshi, Supervising Deputy Attorney General, and Amanda V. Lopez, Deputy Attorney General, for Plaintiff and Respondent.

A jury found defendant and appellant Demond Walker guilty of, inter alia, making criminal threats and found true the allegation that he committed that crime for the benefit of a criminal street gang. On appeal, he contends the trial court's instructions concerning aider and abettor liability for the crime of making criminal threats were inadequate because they failed to inform the jury that both defendant (the aider and abettor) and the direct perpetrator must have the intent to threaten the victim.

We hold defendant forfeited his claim of instructional error and we decline to exercise our discretion to address the claim. We therefore affirm the judgment.

### **FACTUAL BACKGROUND**

On July 24, 2014, Miguel Camacho was washing clothes at a laundromat on Virginia and Western Avenues. Defendant<sup>1</sup> and two other hispanic males approached Camacho. Defendant and one of the other males said, "Here he is" and "Well, it doesn't go beyond this night, tonight won't pass." Defendant claimed that he was from the Mara Salvatrucha gang and told Camacho he was going to kill him. Defendant then appeared to take Camacho's photograph with a cell phone. Camacho was afraid and believed the men were going to kill him.

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<sup>1</sup> Camacho had been threatened by defendant before and knew him by the name "Negro." In his 911 call, Camacho explained that "El Negro" "always confront[ed him]" and told him he was in defendant's territory and had "to pay for walking in the street."

When defendant and the other men went outside in front of the laundromat, Camacho gathered his clothes and ran home. On his way home, he called the police who met him at his residence. Camacho later identified defendant in a photographic lineup.

On December 6, 2014, at around 2:00 a.m., Camacho was walking home from work on Virginia Avenue. A car driven by defendant stopped, and two hispanic males exited the vehicle and grabbed Camacho by the shirt. They threw Camacho into “a piece of cloth” or “some kind of - - something hanging.” At least one of the men pointed a handgun at Camacho’s temple and told him “they were M.S. and . . . in that area, they [were] the boss.” The men said they were “coming in the name of El Negro” and that they were going to kill Camacho. They forced Camacho to his knees, kicked and punched him, and took \$500 from his pocket. Camacho “thought they were going to keep hurting [him] more and [that he] wasn’t going to make it home.” One of the men said, “The Mara rules here” and that Camacho “needed to move out or they would kill [him].”

Camacho spoke with police that evening, and the next day he identified defendant in a photographic lineup. He had no doubt that defendant was the driver of the car involved in the December 6, 2014, incident.

Los Angeles Police Officer Howard Hwang was assigned to the Hollywood Division gang enforcement detail. He was familiar with all the gangs in Hollywood and assigned to the Mara Salvatrucha or MS-13 gang. The Hollywood MS-13 gang had two cliques, each with 20 to 30 gang members. The primary criminal activities of the Hollywood MS-13 gang were extortion, tagging, vandalism, criminal threats, and assaults with deadly weapons.

Both of the incidents involving Camacho occurred within the territory claimed by the Hollywood MS-13 gang. The gang used fear and intimidation to extort money from residents and local businesses and to prevent victims from contacting the police. As predicate offenses for the gang enhancement (Penal Code, § 186.22, subd. (b)<sup>2</sup>), the prosecution established (1) MS-13 gang members Palma and Pareda were convicted of crimes for threatening to kill the apartment manager of the complex in which Palma's girlfriend lived, and (2) MS-13 gang member Gomez was convicted of crimes for threatening and extorting a taco truck vendor in Lemon Grove Park.

Officer Hwang was familiar with defendant who was an admitted member of the Hollywood MS-13 gang. In response to a hypothetical question based on the facts of the July 24 and December 6, 2014, incidents involving Camacho, Officer Hwang opined that the crimes described in that question were committed for the benefit of and in association with the Hollywood MS-13 gang.

## **PROCEDURAL BACKGROUND**

A jury found defendant guilty on count 1 of the second degree robbery of Camacho on December 6, 2014, in violation of section 211; on count 2 of assault by force likely to produce great bodily injury on Camacho on December 6, 2014, in violation of section 245, subdivision (a)(4); on count 3 of making criminal threats to Camacho on July 24, 2014, in violation of section 422, subdivision (a); on count 4 of assault with a firearm on Camacho

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<sup>2</sup> All further statutory references are to the Penal Code unless otherwise indicated.

on December 6, 2014, in violation of section 245, subdivision (a)(2); and on count 5 of making criminal threats to Camacho on December 6, 2014, in violation of section 422, subdivision (a). The jury also found true as to count 1 the allegation that a principal personally used a firearm within the meaning of section 12022.53, subdivisions (a) and (e)(1). And, the jury found defendant committed all five offenses for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members. The trial court sentenced defendant to an aggregate term of 15 years and 4 months.

## **DISCUSSION**

### **A. Background**

On count 5, making criminal threats on December 6, 2014, the trial court instructed the jury on both direct and aider and abettor liability using the standard aiding and abetting instructions, CALCRIM Nos. 400 and 401 and a modified instruction on making criminal threats, CALCRIM No. 1300. CALCRIM No. 400 provided: “A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided or abetted a perpetrator, who directly committed the crime. A person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator. [¶] Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime.”

In pertinent part, CALCRIM No. 401 provided: “To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] 4. The defendant’s words or conduct did in fact aid and abet the perpetrator’s commission of the crime. [¶] Someone aids and abets a crime if he or she knows of the perpetrator’s unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator’s commission of that crime.” (Italics omitted.)

CALCRIM No. 1300, the standard criminal threats instruction, was modified based on the aiding and abetting theory to read as follows: “The defendant is charged in Counts Three and Five with having made a criminal threat in violation of Penal Code section 422. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant or a perpetrator who the defendant aided and abetted willfully threatened to unlawfully kill or unlawfully cause great bodily injury to Miguel Vasquez Camacho; [¶] 2. The defendant or the perpetrator who the defendant aided and abetted made the threat orally; [¶] 3. The defendant or the perpetrator who defendant aided and abetted intended that his statement be understood as a threat and intended that it be communicated to Miguel Vasquez Camacho; [¶] 4. The threat was so clear, immediate, unconditional, and specific that it communicated to Miguel Vasquez Camacho a serious intention and the immediate prospect that the threat would be carried out; [¶] 5. The threat

actually caused Miguel Vasquez Camacho to be in sustained fear for his own safety; [¶] AND [¶] 6. Miguel Vasquez Camacho's fear was reasonable under the circumstances. [¶] Someone commits an act willfully when he or she does it willingly or on purpose. [¶] In deciding whether a threat was sufficiently clear, immediate, unconditional, and specific, consider the words themselves, as well as the surrounding circumstances. [¶] Someone who intends that a statement be understood as a threat does not have to actually intend to carry out the threatened act or intend to have someone else do so. [¶] Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm. [¶] Sustained fear means fear for a period of time that is more than momentary, fleeting, or transitory." (Italics omitted.)

### **B. Instructional Error and Forfeiture**

Defendant challenges the instructions concerning the aiding and abetting theory of liability for count 5—making a criminal threat. According to defendant, the crime of making a criminal threat is a specific intent crime that requires both the perpetrator and the aider and abettor to have the specific intent to make the threat. Defendant contends the trial court's modification of CALCRIM No. 1300 to include the aiding and abetting theory misinformed the jury that defendant could be found guilty on count 5 if *either* he or a perpetrator had the intent to make the charged criminal threats.

The Attorney General argues defendant forfeited his challenge to the trial court's instructions by failing to object to them and request a modification or clarification. Defendant concedes that he failed to object or request a modification or

clarification, but contends his instructional error claim is not forfeited because the error affected his substantial rights, his claim raises a pure question of law that we have the discretion to address, certain fundamental constitutional rights cannot be forfeited, and justice requires that we reach and resolve the issue.

“A trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation], and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal. [Citations.] If [a] defendant believe[s an] instruction . . . require[s] elaboration or clarification, he [is] obliged to request such elaboration or clarification in the trial court. (*People v. Rundle* [(2008)] 43 Cal.4th [76,] 151; *People v. Hart* (1999) 20 Cal.4th 546, 622 [85 Cal.Rptr.2d 132, 976 P.2d 683].)” (*People v. Lee* (2011) 51 Cal.4th 620, 638 (*Lee*).)

### **C. Analysis**

We agree with the Attorney General that defendant’s claim of instructional error has been forfeited. Using the standard aiding and abetting instructions—CALCRIM Nos. 400 and 401—the trial court correctly instructed the jury on all the elements necessary to find aider and abettor liability for a specific intent crime, including that a defendant must not only know of a perpetrator’s intent to commit a crime, but must also personally intend “to aid, facilitate, promote, encourage, or instigate” the perpetrator’s commission of that crime. Thus, when the trial court instructed the jury in CALCRIM No. 1300 that defendant could be found guilty on count 5 if it found that a “perpetrator who defendant aided and abetted” intended to make a criminal threat to Camacho, the jury already understood from CALCRIM

Nos. 400 and 401 that, to find that defendant aided and abetted that threat, it was required to also find that defendant intended to aid, facilitate, and encourage the threat.

Thus, at best, defendant is claiming that the instructions were not clear enough concerning the requisite intent for aider and abettor liability in the context of a specific intent crime. But, as *Lee, supra*, 51 Cal.4th at page 638 explains, the trial court had no sua sponte duty to correct an instruction that was an accurate statement of the law. Rather, it was defendant's burden to raise the issue and to propose a modification or clarification to address any perceived ambiguity in the challenged instructions. His failure to do so in the trial court therefore forfeited his claim of instructional error on appeal.

It is true that, even if an instructional error was not raised in the trial court, an appellate court may review it when the error affects the "substantial rights" of the defendant. (§ 1259; *People v. Foster* (2010) 50 Cal.4th 1301, 1346, fn. 20.) However, because CALCRIM Nos. 400 and 401 clearly and properly defined the requirements for aider and abettor liability, and we presume the jury followed those instructions (*People v. Clark* (2016) 63 Cal.4th 522, 589), we decline to find defendant's substantial rights were affected by arguably less than clear modifications to CALCRIM No. 1300.

**DISPOSITION**

The judgment of conviction is affirmed.

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KUMAR, J.\*

We concur:

KRIEGLER, acting P. J.

BAKER, J.

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\* Judge of the Superior Court of the County of Los Angeles, assigned by the Chief Justice pursuant to Article VI, section 6 of the California Constitution.