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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

LAMAR ROBERTS, JR.,

Defendant and Appellant.

E052152

(Super.Ct.No. RIF148439)

OPINION

APPEAL from the Superior Court of Riverside County. Craig G. Riemer, Judge.

Affirmed.

Mark Yanis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Peter Quon, Jr., and Lilia E. Garcia, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Lamar Roberts appeals from his conviction of six counts of acting in concert to commit first degree robbery in an occupied dwelling (Pen. Code,¹ §§ 211, 213, subd. (a)(1)(A); counts 1 through 6), assault with a deadly weapon (§ 245, subd. (a)(1); count 8), intimidating a witness (§ 136.1, subd. (b)(1); count 9), and violating the liberty of the six victims (§ 236; count 11) with associated enhancements. Defendant contends (1) the evidence was insufficient to support his conviction for intimidating a witness, and (2) the trial court erred in failing to instruct the jury that it must find that the prosecution proved each element of the offenses beyond a reasonable doubt. We find no error, and we affirm.

II. FACTS AND PROCEDURAL BACKGROUND

In January 2009, Juan and Antoinette Aguilera lived in a home in Norco with their son and daughter-in-law, Jaime and Marina Aguilera, their son and daughter-in-law, John and Veronica Aguilera, and several grandchildren. In the evening of January 26, 2009, Marina answered a knock at the door, and a man later identified as codefendant Clarence Edward Birdsong, Jr., asked if “Brittany” was home. Marina replied that no one by that name lived there and he had the wrong house. Birdsong said, “The fuck I got the wrong house.” He pulled out a gun and forced his way in, yelling for everybody to get on the floor. Moments later, three others intruders, all wearing masks and carrying guns, ran into the house.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

Birdsong² was about five feet five inches tall; he was wearing a white sweatshirt, and his face remained uncovered. A second intruder, later identified as codefendant Samisha Cache Tittle,³ was about five feet three inches tall. A third intruder, later identified as codefendant Jenary Nathan Leverette,⁴ was about six feet two inches tall with a thin build. Defendant is five feet 11 inches tall and weighs 250 pounds; witnesses described him as “stocky.” The three masked intruders all wore dark clothing.

Birdsong repeatedly asked, “Where’s the motherfucker that killed my brother?” But the people in the house did not know what he was talking about. Birdsong insisted the victims were hiding the man, and the intruders said, “If that motherfucker doesn’t come out, we’re going to start killing people here.” After Veronica and a family friend who was visiting the house ran into the back yard, Birdsong yelled, “Tell the ones that ran out to get back in here before I kill one of you.”

The intruders remained in the Aguilera house for 10 to 20 minutes. One of the intruders, identified as defendant, put a gun to Jaime’s head and stood there during the incident. Marina could see through the eyeholes of the man’s mask that he had crossed

² Birdsong entered a guilty plea to six counts of robbery (§ 211) and one count each of burglary (§ 459), assault (§ 245, subd. (a)(1)), intimidating a witness (§ 136.1, subd. (a)(1), and violation of personal liberty (§ 236) and admitted associated enhancements. The trial court sentenced him to 14 years in prison.

³ Tittle entered a guilty plea to six counts of robbery (§ 211) and one count each of burglary (§ 459), assault (§ 245, subd. (a)(1)), intimidating a witness (§ 136.1, subd. (a)(1), being a felon in possession of a handgun (§ 12021, subd. (a)), and violation of personal liberty (§ 236), and she admitted associated enhancement allegations. The trial court sentenced her to 21 years in prison.

⁴ The record does not indicate the disposition of the charges against Leverette.

eyes. Defendant has a lazy eye or crossed eyes; none of his codefendants has a similar condition.

All the children were placed on the floor face down. The intruders searched the victims' pockets, including the children's pockets, to see if they had any cell phones. Leverette hit Juan in the head with a gun and cut him in the leg and arm with a knife. When a child was crying, one of the intruders said something like, "Bitch, you better quiet her down, or I'm going to shoot her." Birdsong took about \$700 in currency from Veronica's purse. The intruders also took \$2 from one of the children and took Juan's wallet.

Some of the intruders kept saying, "Let's go now. We're taking too long." After Birdsong took a small safe from a closet, he said, "Let's go." Leverette, the last to leave, said something like, "Don't call the cops. Don't report this, or we'll come back and kill you guys."

Meanwhile, Veronica had called 911 from the back yard. She saw a white Chrysler 300 parked in front of the house and later saw it moved to a side street. She then saw people run to the car and drive away. Deputies pulled the car over within a mile of the Aguilera's house and arrested the four occupants; defendant was the driver. From the car, the deputies recovered a jacket with a folding knife in the pocket, ski masks, a pistol under the rear passenger seat, a bloody knife and a pistol under the driver's seat,

about \$1,000 in \$100 bills, wallets belonging to the occupants of the house, and a small safe containing two pistols and about \$25,000 in cash.⁵

Defendant testified in his own behalf. He said an acquaintance had asked him to drive Tittle, whom he had met only once before, to Norco. He picked her and the other codefendants up at a gas station; he had never met the other codefendants before that. He drove them to the victims' home and parked the car to wait for them. He did not know they were going to commit a crime; he never saw any masks or weapons; he never entered the house, and he had nothing to do with what had happened. He stayed in the car talking on his cell phone for 10 or 15 minutes while the others were inside.

The jury found defendant guilty of six counts of acting in concert to commit first degree robbery in an occupied dwelling (§§ 211, 213, subd. (a)(1)(A); counts 1 through 6), assault with a deadly weapon (§ 245, subd. (a)(1); count 8), intimidating a witness (§ 136.1, subd. (b)(1); count 9), and violating the liberty of the six victims (§ 236; count 11). The jury found true a great bodily injury enhancement as to count 8 and an allegation that defendant had acted in concert in committing the robberies in counts 1 through 6.

The trial court sentenced defendant to the middle term of six years for count 1; imposed and then stayed a term of six years for count 1, and imposed concurrent terms for the other counts.

⁵ It was stipulated at trial that Veronica and John had withdrawn approximately \$25,000 from bank accounts sometime in the two weeks before January 26, 2009. They had intended to use the money to help Juan and Antoinette, who were in arrears in their mortgage payments.

Additional facts are set forth in the discussion of the issues to which they pertain.

III. DISCUSSION

A. Sufficiency of the Evidence

Defendant contends the evidence was insufficient to support his conviction for intimidating a witness.

1. Additional Background

The evidence showed that the tall, skinny masked intruder, identified as Leverette, warned the victims, just before he left, that the intruders had the victims' identification cards and would return to kill the victims if the victims reported the crime. Defendant has a "stocky" build, and the prosecutor conceded he was not the one who uttered the threat.

The trial court instructed the jury on the charge of intimidating a witness as follows:

"The defendant is charged in Count 9 with intimidating a witness, in violation of Penal Code Section 136.1, Subdivision (a)(2) [*sic*]. [¶] The defendant is charged in Counts 1 through 6 with robbery and in Count 7 with burglary.⁶ Under certain circumstances, the person who is guilty of one crime may also be guilty of other crimes that were committed at the same time. [¶] To determine whether the defendant is guilty of intimidating a witness, you must first decide whether the defendant is guilty of robbery or burglary. If you decide the defendant is guilty of one of these crimes, you must then

⁶ The jury was hung on the burglary count, and it was later dismissed.

decide whether he's guilty of intimidating a witness. ¶ To prove that the defendant is guilty of intimidating a witness, the People must prove that: ¶ 1. The defendant is guilty of robbery or burglary; ¶ 2. During the commission of robbery or burglary, a coparticipant in that robbery or burglary committed the crime of intimidating a witness; and ¶ 3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of intimidating a witness was a natural and probable consequence of the commission of robbery or burglary. ¶ The terms coparticipant and natural and probable consequences have the same meanings as defined in Instruction Nos. 402m/875m, above. ¶ To prove that a coparticipant committed the crime of intimidating a witness, the People must prove that: ¶ 1. The coparticipant maliciously tried to prevent or discourage [one of the victims] from reporting to a peace officer or other law enforcement officer that he, she, or someone else was the victim of a crime; ¶ 2. [One of the victims] was a witness or crime victim; and ¶ 3. The coparticipant knew that he was trying to prevent or discourage [one of the victims] from reporting to a police officer or other law enforcement officer that he, she, or someone else was the victim of a crime, and intended to do so."

The trial court further instructed the jury: "The defendant is guilty of intimidating a witness if the People have proved that the defendant aided and abetted either robbery or burglary and that intimidating a witness was the natural and probable consequence of either robbery or burglary. However, you do not need to agree on which of these two crimes—robbery or burglary—the defendant aided and abetted."

The prosecutor argued to the jury, “[Defendant]’s responsible not only for the crimes that he committed, but the crimes that the other people committed while he was there. [¶] So, for instance, when the tall, skinny man took his knife and did this to Juan Aguilera, [defendant], under the law, is responsible for that. And when that same man said the phrase about, you know, ‘We have your IDS. If you call the cops, we’re going to come back and kill you,’ [defendant] is also responsible for that.”

2. *Standard of Review*

When a defendant challenges the sufficiency of the evidence to support his conviction, we determine whether, after viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found all the elements of the crime proved beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.)

3. *Analysis*

Defendant was found guilty of intimidating a witness as an aider and abettor. Conviction as an aider and abettor requires that the defendant have knowledge of the perpetrator’s unlawful purpose and the intent to commit, encourage, or facilitate the crime, and that he actually aids, promotes, encourages, or instigates the crime. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1116-1118.) As an aider and abettor, a defendant may be guilty not only of the target crime, but also of any other crime that is the natural and probable consequence of the target crime. (*People v. Prettyman* (1996) 14 Cal.4th 248, 267.) To be guilty under the natural and probable consequence theory, “The jury must decide whether the defendant (1) with knowledge of the confederate’s unlawful purpose, and (2) with the intent of committing, encouraging, or facilitating the commission of any

target crime(s), (3) aided, promoted, encouraged, or instigated the commission of the target crime(s); whether (4) the defendant's confederate committed an offense *other than* the target crime(s); and whether (5) the offense committed by the confederate was a natural and probable consequence of the target crime(s) that the defendant encouraged or facilitated. . . ." (*Ibid.*)

Whether a charged offense was the natural and probable consequence of the target offense requires a determination of whether, under all the circumstances, a reasonable person in the defendant's position should have known that the charged offense was a reasonably foreseeable consequence of the act the defendant aided and abetted. (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1587.) "“Nevertheless the act must be the ordinary and probable effect of the wrongful act specifically agreed on, so that the connection between them may be reasonably apparent, and not a fresh and independent product of the mind of one of the confederates outside of, or foreign to, the common design.” [Citations.]” (*People v. Prettyman, supra*, 14 Cal.4th at pp. 260-261.)

Here, defendant argues Leverette's decision to make the threat was improvised at the last moment and not planned in advance. The evidence showed Leverette was the last one out of the house, and defendant argues he made the threat as an afterthought. Defendant further argues there was no "evidence of any prior such threat," or conduct that would have put him "on notice that it was reasonably foreseeable that Leverette would make such a threat." For example, in *People v. Leon* (2008) 161 Cal.App.4th 149 (*Leon*), the court held that under the circumstances of the case, witness intimidation was not a natural and probable consequence of the target crimes of vehicle burglary,

possessing a concealed firearm by an active gang member, and carrying a loaded firearm by an active gang member. (*Id.* at p. 161.) In that case, while the defendant and his codefendant, both gang members, were committing the burglary of a car in a rival gang's territory, the victim arrived and shouted that he was going to call the police. The defendant "stared" at the victim, and his codefendant fired a gun into the air. (*Id.* at p. 159.)

The circumstances of the present case are significantly different from those in *Leon*, in which the victim's arrival was unforeseen—the victim surprised defendant and his cohort in the act of burglarizing a car. (*Leon, supra*, 161 Cal.App.4th at p. 161.) In contrast, in the present case, defendant and his three cohorts obviously knew they would encounter victims: they disguised themselves with masks and armed themselves with knives and guns before bursting into the home occupied by seven adults and several children. Moreover, throughout the 10- to 20-minute invasion, both Birdsong and Leverette made a variety of threats: they ordered the victims, including the children, to the floor; threatened to kill another victim after two of the victims ran outside; threatened to kill a child if she would not stop crying; and threatened to kill someone if they did not produce the person they were seeking. One of the intruders hit Juan in the head with a gun and cut him with a knife in the arm and leg. The intruders' intent to conceal their identities was apparent: three of them wore masks, and they searched the victims' pockets, even the children's pockets, to see if they had any cell phones.

In light of the abundant evidence that the entire incident was accomplished through threats and menace, the jury could reasonably infer that threatening the victims

not to report the crime was a natural and probable consequence of the home invasion plan. The fact that defendant was not the one who made the direct threats therefore does not exonerate him from the crime of intimidating a witness; ample evidence supports his conviction of that crime on an aiding and abetting theory.

B. Jury Instructions on Prosecution's Burden of Proof

Defendant contends the trial court erred in failing to instruct the jury that it must find that the prosecution proved each element of the offenses beyond a reasonable doubt.

1. Additional Background

Before the presentation of evidence began, the trial court instructed the jury, “A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove each element of the crime and each special allegation 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.” After trial, the trial court instructed the jury with CALCRIM No. 220 on reasonable doubt. The instruction stated, in part: “A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you that the People must prove something, I mean they must prove it beyond a reasonable doubt.” The trial court further instructed the jury on the elements of each of the charged crimes, the lesser included offenses of those crimes, and the special allegations. Each of those instructions began, “To prove that the defendant is guilty of this” crime, lesser crime, or allegation, “the People must prove that” The trial court then listed the separate elements of each offense and special allegation. After

instructing on the elements of robbery, the court instructed, “Remember you may not convict the defendant of any crime unless you are convinced that each fact essential to the conviction that the defendant is guilty of that crime has been proved beyond a reasonable doubt.”

2. *Standard of Review*

We determine de novo whether a jury instruction correctly states the law. In our review, we consider the instructions as a whole and assume the jurors are capable of understanding and correlating all the instructions given. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088 (*Ramos*).

3. *Analysis*

It is axiomatic that the People must prove each element of a charged offense beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 5; *People v. Osband* (1996) 13 Cal.4th 622, 678-679.) We determine whether the instructions adequately conveyed this standard to the jury in the context of the instructions as a whole. (*People v. Wyatt* (2008) 165 Cal.App.4th 1592, 1601.)

In a number of cases, California courts have held that instructing the jury in the language of CALCRIM No. 220 adequately informs the jury of the People’s burden. In *Ramos*, the court explained, “Construed in light of these principles [that guide appellate review of instructions], and in the context of the instructions as a whole, CALCRIM No. 220 adequately explains the applicable law. The instruction explicitly informed the jurors that ‘*Whenever* I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt.’ (Italics added.) In this case, the trial judge went on

to enumerate each of the elements of the charged crime and the special allegation, and stated that the People were obligated to prove each of those elements in order for the defendant to be found guilty. If we assume, as we must, that “the jurors [were] intelligent persons and capable of understanding *and correlating* all jury instructions . . . given,” [citation]’ [citation], then we can only conclude that the instructions, taken as a whole, adequately informed the jury that the prosecution was required to prove each element of the charged crime beyond a reasonable doubt.” (*Ramos, supra*, 163 Cal.App.4th at pp. 1088-1089, fn. omitted; accord, *People v. Henning* (2009) 178 Cal.App.4th 388, 406 [characterizing the defendant’s challenge to CALCRIM No. 220 as “frivolous”]; *People v. Wyatt, supra*, 165 Cal.App.4th at p. 1601; *People v. Riley* (2010) 185 Cal.App.4th 754, 768-770.) And, in *People v. Ochoa* (2001) 26 Cal.4th 398, disapproved on another point in *People v. Prieto* (2003) 30 Cal.4th 226, 263, footnote 14, our Supreme Court stated, albeit in dicta, “It would be correct to instruct that the People must prove every element of the offense beyond a reasonable doubt, but a defendant is not entitled to that instruction. [Citations.]” (*Ochoa, supra*, at p. 444, fn. 13.)

Defendant argues that the California cases were wrongly decided and urges us to instead adopt the reasoning of federal and other state cases that have reached an opposite conclusion. However, we agree with the *Ramos* court that “While we do not doubt that the use of such language is appropriate [citation], defendant has not cited any California or United States Supreme Court authority holding that it is constitutionally required.”

(*Ramos, supra*, 163 Cal.App.4th at p. 1090, fn. omitted.)⁷ We therefore find no instructional error.

IV. DISPOSITION

The judgment is affirmed.

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HOLLENHORST

Acting P. J.

We concur:

KING

J.

MILLER

J.

⁷ We further note that defendant fails to acknowledge that the trial court preinstructed the jury in the language for which he now advocates and further instructed the jury with additional language with the same import: “Remember you may not convict the defendant of any crime unless you are convinced that each fact essential to the conviction that the defendant is guilty of that crime has been proved beyond a reasonable doubt.” Thus, even if we were to accept defendant’s argument that such an instruction is required, defendant has failed to show error because the jury in fact received that instruction.