

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON STEVEN HENRIQUEZ,

Defendant and Appellant.

E052987

(Super.Ct.No. RIF142897)

OPINION

APPEAL from the Superior Court of Riverside County. Daniel A. Ottolia, Judge.

Affirmed with directions.

John E. Edwards 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, Ronald Jakob, and Kristen Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION¹

Defendant Jason Steven Henriquez and his brother, Robert, became involved in a confrontation with a group of eight young people at a convenience store. Defendant supplied Robert with a gun, which Robert fired at the group and their vehicles. A jury convicted defendant on eight counts of assault with a firearm with an enhancement (§§ 245, subd. (a)(2); 12022, subd. (a)(1)) and one count of discharging a firearm at an occupied vehicle. (§ 246.) The court imposed and suspended a five-year prison sentence and granted defendant three years of formal probation.

On appeal, defendant argues there was instructional error and the prosecutor committed misconduct, supporting defendant's additional claim of ineffective assistance of counsel. We reject these contentions.

The Attorney General agrees the vicarious arming enhancements on counts 1 through 8 should be stricken. (*People v. Sinclair* (2008) 166 Cal.App.4th 848, 855-856.) Subject to the modification of defendant's sentence on counts 1 through 8, we affirm the judgment.

II

FACTUAL BACKGROUND

A. Prosecution Evidence

At 1:00 a.m. on March 22, 2008, eight young people in two cars, a red Honda and

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

a truck, encountered defendant at a Circle K in Riverside. The incident was recorded by an onsite video camera, which was played for the jury. Some of the witnesses testified reluctantly because they did not want to be regarded as a “snitch” or risk retaliation.

When defendant entered the store, he walked by the group, “mad-dogged” them, and asked, “What are you looking at?” Defendant bought some beer and left the store. He displayed a gun worn under his shirt, clipped to his belt. Defendant used a racial epithet. Defendant also said, “You don’t know who you’re fucking with. I’m calling my homies.” One of the group, Erendira Tapia, asked defendant and the others to calm down. Defendant responded, “I’m going to fuck you up. West Side Riva, bitch.”

After defendant made a call on his cell phone, Robert arrived at the Circle K. Robert was angry and ready to fight. He gestured with his hands and screamed. Robert kicked the car and slammed the truck door on the leg of one of the victims. Robert flashed some gang signs and used the gang name, “West Side Riva.” Robert grabbed defendant’s gun from his holster and fired into the hood of the red Honda in the direction of Tapia and the driver. Then the shooter fired three times at the three occupants of the truck, hitting a tire, the passenger side of the vehicle, the turn signal, and the engine compartment. All of the eight victims were in close proximity to the shooter but the shooter appeared to aim at the vehicles and not at the victims directly.

The driver of the truck pulled out and left the scene. Defendant and his brother also fled.

A gang expert testified that Robert was an active member of West Side Riva and defendant was an associate of the gang. He concluded their conduct was for the benefit

of the gang.

B. Defense Evidence

Defendant testified he had been a juvenile corrections officer and carried a gun for defense and protection. Defendant stopped at the Circle K with a coworker to buy beer. When the group members made provocative statements and threats, defendant responded. Defendant called Robert who, hearing the commotion in the background, came to the Circle K. Robert took the gun from defendant and began firing. Defendant had not mentioned West Side Riva. He was not affiliated with the gang and did not know his brother had been a member.

C. Closing Arguments

The prosecutor argued the jury could find defendant guilty either on a theory of aiding and abetting or under the natural and probable consequences doctrine. In supplying a gun to Robert, defendant aided and abetted Robert to commit the crime of disturbing the peace. The crimes of assault with a firearm and shooting at an occupied vehicle were natural and probable consequences of providing Robert with a gun.

Defendant argued he was not disturbing the peace because he claimed he did not know Robert would take his gun.

III

INSTRUCTIONAL ERROR

Defendant was charged with the nontarget offenses of assault with a firearm and shooting at an occupied vehicle. (§§ 245, subd. (a)(2), and 246.) Defendant was not charged with the target offense of disturbing the peace. (§ 415.) Defendant's primary

argument is that the court erred by instructing the jury on the natural and probable consequences doctrine, using CALCRIM No. 402, which applies when target and nontarget offenses are both charged, instead of CALCRIM No. 403, when only nontarget offenses are charged.² We consider this issue in order to foreclose defendant's related argument of ineffective assistance of counsel although the issue was waived by defendant's failure to object below. (*People v. Guiuan* (1998) 18 Cal.4th 558, 570; *People v. Mitchell* (2008) 164 Cal.App.4th 442, 465.)

The court instructed the jury based on CALCRIM No. 402.³ The court should have given an instruction based on CALCRIM No. 403, which applies because the target

² Respondent's argument that CALCRIM No. 402 is the correct instruction is not supported by the record which shows the target offense of disturbing the peace was not charged in the information.

³ "The defendant is charged in Count 1-8 with assault with a firearm and in Count 9 with shooting at occupied vehicle.

"You must first decide whether the defendant is guilty of disturbing the peace (PC section 415). If you find the defendant is guilty of this crime, you must then decide whether he is guilty of assault with a firearm or the lesser of simple assault and shooting at occupied vehicle.

"Under certain circumstances, a person who is guilty of one crime may also be guilty of other crimes that were committed at the same time.

"To prove that the defendant is guilty of assault with a firearm, the People must prove that:

"1. The defendant is guilty of disturbing the peace;

"2. During the commission of disturbing the peace a coparticipant in that disturbing the peace committed the crime of assault with a firearm and/or shooting at an occupied vehicle;

"AND

"3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of assault with a firearm and/or shooting at an occupied vehicle was a natural and probable consequence of the commission of disturbing the peace.

[footnote continued on next page]

offense of disturbing the peace was not charged.⁴ Defendant admits CALCRIM Nos. 402 and 403 are quite similar and using the former rather than the latter is not a “fatal” error.

[footnote continued from previous page]

“A coparticipant in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander.

“A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the assault with a firearm or shooting at an occupied vehicle were committed for a reason independent of the common plan to commit disturbing the peace, then the commission of assault with a firearm or shooting at occupied vehicle was not a natural and probable consequence of assault with a firearm or disturbing the peace.

“To decide whether the crime of assault with a firearm or shooting at occupied vehicle was committed, please refer to the separate instructions that I will give you on those crimes.

“The People allege that the defendant originally intended to aid and abet the commission of either disturbing the peace or assault with a firearm. The defendant is guilty of assault with a firearm and shooting at occupied vehicle if the People have proved that the defendant aided and abetted either disturbing the peace or assault with a firearm and that assault with a firearm and shooting at occupied vehicle was the natural and probable consequence of either disturbing the peace or assault with a firearm. However, you do not need to agree on which of these two crimes the defendant aided and abetted.”

⁴ “Before you may decide whether the defendant is guilty of assault with a firearm or shooting at an occupied vehicle, you must decide whether he is guilty of disturbing the peace.

“To prove that the defendant is guilty of assault with a firearm or shooting at an occupied vehicle, the People must prove that:

“1. The defendant is guilty of disturbing the peace;

“2. During the commission of disturbing the peace a coparticipant in disturbing the peace committed the crime of assault with a firearm or shooting at an occupied vehicle;

“AND

“3. Under all of the circumstances, a reasonable person in the defendant’s position would have known that the commission of assault with a firearm or shooting at an occupied vehicle was a natural and probable consequence of the commission of the disturbing the peace.

“A coparticipant in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander.

[footnote continued on next page]

But defendant also argues that there were prejudicial errors in CALCRIM No. 402 as given.

When considered as a whole, the jury instruction was generally correct.

CALCRIM No. 4.02 explains the doctrine of natural and probable consequences and aiding and abetting liability: “Under California law, a person who aids and abets a confederate in the commission of a criminal act is liable not only for that crime (the target crime), but also for any other offense (nontarget crime) committed by the confederate as a ‘natural and probable consequence’ of the crime originally aided and abetted.” (*People v. Prettyman* (1996) 14 Cal.4th 248, 254; *People v. Avila* (2006) 38 Cal.4th 491, 565.)

As applied here, if the jury found defendant aided and abetted Robert in disturbing the peace by giving him a gun, the crimes of assault with a firearm or shooting at an occupied

[footnote continued from previous page]

“A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the assault with a firearm or shooting at an occupied vehicle was committed for a reason independent of the common plan to commit disturbing the peace, then the commission of assault with a firearm or shooting at an occupied vehicle was not a natural and probable consequence of disturbing the peace.

“To decide whether crime of assault with a firearm or shooting at an occupied vehicle was committed, please refer to the separate instructions that I will give you on those crimes.

“The People are alleging that the defendant originally intended to aid and abet disturbing the peace.

“If you decide that the defendant aided and abetted disturbing the peace and that assault with a firearm or shooting at an occupied vehicle was a natural and probable consequence of that crime, the defendant is guilty of assault with a firearm or shooting at an occupied vehicle. You do not need to agree about which of these crimes, disturbing the peace and assault with a firearm or shooting at an occupied vehicle, the defendant aided and abetted.” (CALCRIM No. 403.)

vehicle were natural and probable consequences of the original target crime. The instruction based on CALCRIM No. 402 clearly expressed these principles, especially when the instructions were considered as a whole. (*People v. Milosavljevic* (2010) 183 Cal.App.4th 640, 649; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.)

We disagree there was an ambiguity caused by the instruction based on CALCRIM No. 402 to decide whether defendant “is guilty of assault with a firearm or the lesser of simple assault and shooting at occupied vehicle.” It is obvious from its language and from the context of the instruction that the phrase refers to two different crimes: 1) assault with a firearm or the lesser of simple assault with a firearm and 2) shooting at an occupied vehicle.

We agree that the phrase “[t]o prove that the defendant is guilty of assault with a firearm, the People must prove. . . .” should have included a reference to count 9 as follows: “[t]o prove that the defendant is guilty of assault with a firearm *or shooting at an occupied vehicle*, the People must prove. . . .” The entire instruction, however, makes eight separate references to “shooting at an occupied vehicle” in conjunction with “assault with a firearm.” In that context, the single omission of the reference to “shooting at an occupied vehicle” also was not a fatal error.

We reject defendant’s contention that the use of “and/or” was prejudicial. “And/or” was simply a way of expressing to the jury that it could find defendant guilty of either eight offenses of assault with a firearm or the offense of shooting at an occupied vehicle or all offenses. It certainly did not cause a conviction on count 9 to result in automatic convictions on counts 1 through 8, as argued by defendant.

We also disagree with defendant's assertion that the jury may not have separately decided the convictions on counts 1 through 8 as to each individual victim. The court expressly instructed the jury, based on CALCRIM No. 3515, to deliberate upon and decide each count separately, a task that was emphasized by the individual verdict forms.

Finally, we are not persuaded by defendant's reasoning that, because the jury instruction did not include a requirement that defendant knowingly provided a gun to Robert, the jury could find him guilty simply for disturbing the peace. The jury was instructed with CALCRIM Nos. 400 and 401, concerning the general principles of aiding and abetting intended crimes. CALCRIM No. 402 also explained liability for aiding and abetting. Taken altogether, these instructions adequately explained to the jury that defendant could be liable as an aider and abettor to the assault with a firearm or shooting at an occupied vehicle only if he knew of Robert's criminal intent and specifically intended to provide assistance for those crimes.

As to all defendant's arguments, we reiterate that the correctness of jury instructions is measured by a test of whether it is a reasonable likelihood the jury misconstrued or misapplied the law in consideration of all the instructions and the entire record at trial, including the arguments of counsel. (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 276.) Here the jury received adequate jury instructions as to the natural and probable consequences doctrine. Furthermore, the issue of whether defendant intended to give Robert a loaded gun was fully litigated and amply supported by witness testimony and a videotape of the incident. There is no doubt that the jury found defendant guilty of providing Robert with a firearm, making him guilty as an aider and

abettor, as well as guilty under the doctrine of natural and probable consequences. Any instructional error was harmless beyond a reasonable doubt. (*People v. Mayfield* (1997) 14 Cal.4th 668, 774.) Thus, defendant cannot establish ineffective assistance of counsel based on prejudicial deficient performance by trial counsel's failure to object. (*People v. Alexander* (2010) 49 Cal.4th 846, 888.)

IV

PROSECUTORIAL ERROR

In closing argument, the prosecutor asked the jurors to consider why three of the five victims who testified might have been reluctant to testify in a case involving purported gang conduct. Specifically, the prosecutor said, "I'm not saying put yourself in the place of the victim, because that's inappropriate. But it's your job to evaluate the evidence." Then the prosecutor suggested that, just as jurors might be nervous about serving on a gang-related case, the victims might have been uncomfortable about testifying, implying they could fear retaliation.

Defendant protests that the prosecutor improperly employed "The Golden Rule" argument, in which "a prosecutor invites the jury to put itself in the victim's position and imagine what the victim experienced. This is misconduct, because it is a blatant appeal to the jury's natural sympathy for the victim. [Citation.]" (*People v. Vance* (2010) 188 Cal.App.4th 1182, 1188; *People v. Leonard* (2007) 40 Cal.4th 1370, 1406.)

A prosecutor has wide latitude to argue his or her case vigorously. Only improper remarks, so egregious as to render the entire trial unfair, violate the federal Constitution. (*People v. Hill* (1998) 17 Cal.4th 800, 819; *People v. Navarette* (2003) 30 Cal.4th 458,

506.) Under state law, there must be deceptive or reprehensible methods used to persuade the jury. (*Navarette*, at p. 506.) The reviewing court considers the whole context, the entire argument and jury instructions, to decide whether it is reasonably likely the jury objectionably construed the prosecutor's remarks. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841; *People v. Frye* (1998) 18 Cal.4th 894, 977.)

Again, defendant waived this issue by failure to preserve it by an objection at trial. (*People v. Stanley* (2006) 39 Cal.4th 913, 959.) Notwithstanding, we conclude the prosecutor's comments were a fair assessment of the evidence and witness credibility. The prosecutor was not appealing to the jury's sympathy for the victims. Rather the prosecutor was trying to explain why the victims were not fully forthcoming in their testimony because of the gang factor. The prosecutor expressly warned the jurors not to "put yourself in the place of the victim." The prosecutor's argument cannot plausibly be characterized as so unfair as to violate due process. The argument was not intentionally misleading or made in pursuit of an unfair advantage.

In any event, it is not reasonably likely the prosecutor's comments affected the verdict. (*People v. Espinoza* (1992) 3 Cal.4th 806, 820-821.) The court instructed the jury to follow the law and not to be influenced by bias, sympathy, prejudice, or public opinion. (CALCRIM No. 200.) The court also instructed the jury about assessing credibility. (CALCRIM No. 226.) Jury instructions from the court outweigh argument by counsel. (*People v. Mendoza* (2007) 42 Cal.4th 686, 703.) The jury is presumed to follow the court's instructions. (*People v. Boyette* (2002) 29 Cal.4th 381, 436.)

Furthermore, as already discussed, the evidence was overwhelming in support of

the verdict. Defendant's confrontation with the victims was recorded on videotape. The victims testified that defendant was an aggressor who flashed his weapon and then enlisted his brother's aid, supplying him with a loaded gun. The jury obviously did not accept defendant's defense that he did not realize Robert was going to take the gun and fire it.

Any prosecutorial error was harmless beyond a reasonable doubt. Defendant cannot establish ineffective assistance of counsel. (*People v. Majors* (1998) 18 Cal.4th 385, 403.)

V

DISPOSITION

We hold there was no instructional or prosecutorial error or ineffective assistance of counsel.

We order the firearm enhancements on counts 1 through 8 stricken and the abstract of judgment corrected.⁵ Subject to the modification of defendant's sentence on counts 1 through 8, we affirm the judgment.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON

J.

We concur:

HOLLENHORST

Acting P.J.

MILLER

J.

⁵ The abstract of judgment is not part of the record on appeal.