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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.

EDWARD LOUIS ABBENHAUS,

Defendant and Appellant.

E054111

(Super.Ct.No. BAF1100014)

OPINION

APPEAL from the Superior Court of Riverside County. Michael B. Donner,
Judge. Affirmed.

David P. Lampkin, 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 Steven T. Oetting and Tami
Falkenstein Hennick, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Edward Lewis Abbenhaus appeals from his conviction of first degree murder (Pen. Code, § 187, subd. (a)). He contends (1) his conviction should be reduced to second degree murder because (a) the evidence of premeditation was insufficient and (b) instructional error permitted the jury to convict him of first degree murder without agreeing on premeditation; and (2) the true finding on a prior strike allegation must be reversed because the trial court took his admission of the prior without advising him of his rights to remain silent and to confront witnesses. We find no prejudicial error, and we affirm.

II. FACTS AND PROCEDURAL BACKGROUND

On January 4, 2011, defendant was at an encampment in Beaumont where other homeless men, including Mike Finney, Mark Burley, John Larkin, Ron Bauer, and Ben Shipman, frequently panhandled at a freeway offramp. Defendant had been seen in Burley's company and there was no sign of animosity between them. Defendant invited Burley, Finney, and Larkin to drink with him, but he cautioned them that he became violent when he drank.

Defendant claimed to have military training in covert operations and hand-to-hand combat and that he was a boxer. He also claimed he knew all the pressure points in the human body. Around January 4, 2011, or the day before, defendant told Larkin that "a homeless guy with a beard" had stolen his cell phone and that "it really made him mad." Defendant said he was planning on getting his cell phone back; to Larkin, it "sounded like revenge."

On January 4, Burley and defendant went to a nearby liquor store several times. That afternoon, Burley and Larkin got into an argument over a woman, and at one point, Burley kept yelling at Larkin to leave the offramp. Burley told Shipman he should get Larkin to leave “before he gets hurt.” Defendant told Burley, “Don’t worry about it. I’ll take care of [Larkin].” He told Burley he should “lure” Larkin to some bushes, where defendant would “shank” him, and defendant took out a knife. However, Larkin and Burley made up their disagreement and parted with a shake of hands and a hug. Defendant praised Larkin for settling the situation with just words.

That afternoon, defendant and Burley were drinking heavily, and both were drunk. Finney, Larkin, Bauer, and Shipman left the offramp around 5:00 or 6:00 p.m. Defendant and Burley were there when the other men left; Burley had passed out near some bushes.

At 7:48 p.m., defendant went into the liquor store alone. He had red spots on his white jacket; the cashier thought the spots were paint, and he asked if defendant had been working. Defendant told the cashier he had been in a fight with Burley, and he demonstrated by throwing several punches in the air. A surveillance videotape of the incident was played for the jury.

About 4:00 p.m. on January 5, Bauer was collecting trash between the offramp and the freeway when he saw Burley’s body. Bauer called the police, who arrived shortly after 4:00 p.m. Burley’s body was face down in a pool of blood. His pants were partially pulled down, and his buttocks were exposed. Defendant was arrested the next day hitchhiking in Cabazon. His right hand was swollen and abraded, and he had scratches on his shoulder. He was not wearing the jacket shown in the liquor store videotape.

Detectives interviewed defendant on January 6. Defendant said he had been thinking he should go to the police because he heard someone had been killed in a fight “last night,” but “two nights ago I got in a fight.” He said he had been drinking on January 4, but he could “remember everything explicitly.” Larkin told Burley that Burley’s girlfriend had moved on, and Burley got mad; Burley thought defendant had something to do with it. When the other men left, defendant and Burley sat and drank, and suddenly Burley hit defendant. Defendant hit back once and “got him in a good one in the nose.” Defendant then left. Defendant threw away the baseball cap he was wearing, and the jacket he was wearing in the liquor store videotape had been lost or stolen; they were never recovered. Defendant described Burley as “kind of slender and I think he had a beard.” A tape of the interview was played for the jury, and the jury was provided with a transcript of the interview.

The pathologist who performed the autopsy testified that Burley had been severely beaten. He had multiple contusions, abrasions, and lacerations all over his face, on the side of his head, on his arms, and inside his mouth. Such injuries to the inside of the mouth “usually occur[] in the case of a beating from fists impacting the outer lip and pushing them up against the teeth,” and may also occur from a fall flat on the face. His hands were not injured. His eyes were bloody, severely swollen, and black and blue, and two bones in his nose had been fractured. He had “sub-scalp hemorrhages,” each of which signified an impact. He also had hemorrhages to the neck muscles on the left side which could have come from blunt force injury or strangling, or could have come from an “arm bar” with the left arm while the assailant’s right hand pummeled his face. The

pathologist testified the cause of death was “homicidal violence, including blunt force head injuries.” There was no evidence indicating Burley had been sexually assaulted. The pathologist could not pinpoint the time of death—it could have occurred around 7:00 p.m. on January 4, but it had been at least eight hours before 4:00 p.m. on January 5. Burley’s blood-alcohol level was 0.34 percent, and a “relatively low value of methamphetamine” was measured in his blood.

A law enforcement representative from South Dakota testified that Edward Abbenhaus, with a birth date of April 27, 1957, had pleaded guilty to manslaughter based on strangling a woman named Sybil.¹ Defendant told the agent he killed the woman by strangling her after a day of drinking heavily, but he could not remember why he had done so. He had entered a plea of guilty to manslaughter in that case.

A. Defense

A defense investigator testified the freeway offramp was heavily traveled, and the place where Burley’s body was found was visible from the ramp during the day. When defendant was detained, he had been hitchhiking near a sheriff’s station.

B. Verdict and Sentence

The jury found defendant guilty of first degree murder.

The trial court sentenced defendant to an indeterminate term of 50 years to life.

¹ The jury was not told that Sybil was defendant’s mother.

III. DISCUSSION

A. Sufficiency of Evidence of Premeditation

Defendant contends his conviction should be reduced to second degree murder because the evidence of premeditation was insufficient.

1. *Standard of Review*

When a criminal defendant challenges the sufficiency of the evidence to support his conviction, this court “review[s] the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) “‘The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence’ [Citation.]” (*People v. Houston* (2012) 54 Cal.4th 1186, 1215.)

2. *Evidence of Premeditation*

To convict defendant of first degree murder, the jury was required to find beyond a reasonable doubt that the defendant premeditated and deliberated the crime. (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.) In *People v. Anderson* (1968) 70 Cal.2d 15, the court set forth a nonexclusive list of categories of evidence for a reviewing court to consider with respect to premeditation and deliberation: (1) prior planning activity; (2) motive; and (3) the manner of the killing. (*Id.* at pp. 26-27.) Defendant argues that the evidence did not establish any of those categories sufficiently to sustain the jury’s verdict.

Defendant argues there was no evidence of motive. However, Larkin testified that in a conversation, probably on January 3, defendant said a man with a beard at the homeless encampment had stolen his cell phone, and he planned to get it back. Defendant described Burley as having a beard.

Defendant also argues the manner of killing did not support an inference the killing was premeditated. However, the fact that defendant had killed before by strangling his victim with his bare hands was clear evidence of premeditation and deliberation. (*People v. Steele* (2002) 27 Cal.4th 1230, 1244 [“the more often one kills, especially under similar circumstances, the more reasonable the inference the killing was intended and premeditated”].) Here, the evidence was consistent with defendant brutally battering Burley’s face with his bare hands while strangling him with an arm bar to the neck. Burley was extremely intoxicated, with a blood-alcohol level of 0.34 percent, which likely rendered him incapable of defending himself. Finally, the jury could take into consideration defendant’s statements that he was trained in hand-to-hand combat and was a boxer in determining his awareness of the consequences of his conduct.

Defendant further argues there was no evidence of planning. However, not long before the murder, defendant told three people he became violent when he drank, and he had been drinking throughout the day on January 4. When Larkin and Burley were arguing, defendant told Burley to lure Larkin into the bushes, where defendant would stab him. The jury could infer from such evidence that defendant planned and intended to kill someone that day.

Viewing the evidence in the light most favorable to the verdict—as we must—we conclude sufficient evidence supports the jury’s verdict of first degree murder.

B. Unanimity of Jury Verdict

Defendant contends his conviction should be reduced to second degree murder because instructional error permitted the jury to convict him of first degree murder without agreeing on premeditation.

1. Additional Background

The trial court instructed the jury that if it decided defendant had committed murder, it was then required to decide the degree of the murder. The court instructed the jury with CALCRIM No. 521, as follows: “The defendant has been prosecuted for first degree murder under the theory that the murder was willful, deliberate and premeditated. [¶] You may not find the defendant guilty of first degree murder unless all of you agree that the People have proved that the defendant committed murder. But all of you do not need to agree on the same theory. [¶] The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted willfully if he intended to kill. The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with premeditation if he decided to kill before completing the acts that caused death. [¶] The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A

decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time. [¶] The requirements for second degree murder based on express or implied malice are explained in CALCRIM No. 520, First or Second Degree Murder With Malice Aforethought. [¶] The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find that defendant not guilty of first degree murder.”

During deliberations, the jury submitted a question to the trial court: “Differen[c]e between murder 1 and murder 2.” The trial court responded, “Please refer to CALCRIM 520 & 521.”

2. *Standard of Review*

“‘We review de novo a claim that the trial court failed to properly instruct the jury on the applicable principles of law.’ [Citation.]” (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 850.)

3. *Forfeiture*

Defense counsel failed to object to the instruction in the trial court, and the People argue error has therefore been forfeited. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1260.) The People have nonetheless addressed the issue on the merits, and to forestall any future claim of ineffective assistance of counsel, we will do the same. (See *People v. Riazati* (2011) 195 Cal.App.4th 514, 530.)

4. Adequacy of Instructions

In determining whether instructions created a reasonable likelihood of jury misunderstanding, we consider “the specific language challenged, the instructions as a whole and the jury’s findings. [Citations.]” (*People v. Cain* (1995) 10 Cal.4th 1, 36.) We assume the jurors were intelligent persons capable of understanding and correlating all the instructions given. (*People v. Mills* (1991) 1 Cal.App.4th 898, 918.)

Defendant argues that the sentence, ““But all of you do not need to agree on the same theory,”” created a reasonable likelihood the jury found him guilty of first degree murder without agreeing that the murder was willful, deliberate, and premeditated. We disagree. The jury instructions as a whole made clear that to convict defendant of first degree murder, the jury had to find, unanimously, that the murder was willful, deliberate, and premeditated. The trial court specifically instructed the jury that defendant “is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation,” and that “[i]f the People have not met this burden, you must find the defendant not guilty of first degree murder.”

Although the challenged language could conceivably have been ambiguous as to the “theory” of what *evidence* constituted premeditation and deliberation, an issue upon which the jury was not required to agree (see, e.g., *People v. Russo* (2001) 25 Cal.4th 1124, 1132), it was *not* ambiguous as to the elements of first degree murder that must be proven beyond a reasonable doubt. We conclude the trial court did not err in its instructions to the jury.

C. Adequacy of Advisements Before Admission of Strike Prior

Defendant contends the true finding on a prior strike allegation must be reversed because the trial court took his admission of the prior without advising him of his rights to remain silent and to confront witnesses.

1. Additional Background

Before sentencing, defense counsel stated that defendant was going to waive jury trial on the prior. The trial court confirmed that defendant had discussed waiver with his attorney, who had answered all his questions, and that defendant did not have any further questions about waiver. Defendant confirmed that he understood he had the right to have a court trial in determining whether or not he had suffered the prior conviction in South Dakota. Defense counsel joined in the waiver. Defendant then admitted he had killed his mother in South Dakota in 1982 and had been sentenced to a 40-year prison term for the crime of first degree manslaughter and had been released “on October 3, 2011 [*sic*, 2003].”

2. Analysis

In *Boykin v. Alabama* (1969) 395 U.S. 238, the court held that before entering a plea of guilty, a defendant must knowingly and voluntarily waive his privilege against self-incrimination and his rights to a jury trial and to confront witnesses. (*Id.* at p. 243 & fn. 5.) Because the record was truly silent as to whether the defendant was informed of those rights, the court did not presume a knowing and voluntary waiver of those rights. (*Id.* at p. 239-240.) In *In re Tahl* (1969) 1 Cal.3d 122, the court held that “each of the three rights mentioned—self-incrimination, confrontation, and jury trial—must be

specifically and expressly enumerated for the benefit of and waived by the accused *prior* to acceptance of his guilty plea.” (*Id.* at p. 132, italics added.) In *People v. Howard* (1992) 1 Cal.4th 1132, the court rejected the rule that “the absence of express admonitions and waivers requires reversal regardless of prejudice.” (*Id.* at p. 1178.) Rather, “if the transcript does not reveal complete advisements and waivers, the reviewing court must examine the record of ‘the entire proceeding’ to assess whether the defendant’s admission of the prior conviction was intelligent and voluntary in light of the totality of circumstances. [Citation.]” (*People v. Mosby* (2004) 33 Cal.4th 353, 361 (*Mosby*).

In *Mosby*, the trial court informed the defendant he had a right to a jury trial on a prior conviction allegation, but did not inform him of his rights to remain silent and to confront witnesses. (*Mosby, supra*, 33 Cal.4th at p. 364.) The Court of Appeal found no prejudicial error, explaining, “‘It would exalt a formula (*Boykin-Tahl*) over the very standard that the formula is supposed to serve (that the plea is intelligent and voluntary) to suggest that a defendant, who has just finished a contested jury trial, is nonetheless unaware that he is surrendering the protections of such a trial’ when after being advised of the right to trial on an alleged prior conviction the defendant waives trial and admits the prior.” (*Mosby, supra*, at p. 364.) The Supreme Court agreed. (*Ibid.*) In *Mosby*, the “defendant, who was represented by counsel, had *just* undergone a jury trial at which he did not testify Thus, he not only would have known of, but had just exercised, his right to remain silent at trial, forcing the prosecution to prove [the charge against him]. And, because he had, through counsel, confronted witnesses at that immediately

concluded trial, he would have understood that at a trial he had the right of confrontation.” (*Ibid.*) Here, similarly, defendant had recently² undergone a jury trial and was represented by counsel, who had confronted witnesses on defendant’s behalf, and defendant had exercised his right to remain silent.

The *Mosby* court also considered the defendant’s prior experience with the criminal justice system “because previous experience in the criminal justice system is relevant to a recidivist’s “knowledge and sophistication regarding his [legal] rights.” [Citations.]” (*Mosby, supra*, 33 Cal.4th at p. 365.) Just like the defendant in *Mosby*, defendant’s prior conviction was based on a plea of guilty. (*Ibid.*) In this case, the reporter’s transcript of the plea hearing in defendant’s South Dakota case was admitted into evidence, and at that hearing, the trial court provided an extraordinarily thorough discussion of the right to confront witnesses and the privilege against self-incrimination.³

² Defendant attempts to distinguish *Mosby* on the basis that the defendant in that case waived his right to a jury trial on the prior conviction allegation immediately after the jury found him guilty of the charged offense, whereas here, two months elapsed between the jury verdict and the waiver of jury trial on the strike allegation. In considering the totality of circumstances, we find that distinction immaterial.

³ The trial court stated: “If a jury trial were held, you would have the right to meet and to hear and to see and to cross examine, that is ask questions of any of the witnesses that might be called by the state in order to prove the elements of the offense with which you are charged. [¶] In other words, you would have the right to be present when they testified and you would have the right either by yourself or through your attorney, to ask some questions. [¶] You would have the right to see them and to hear them personally. You would have the right to have subpoe[na]s issued from the court so that you might have present in court your witnesses so that they might testify in your behalf and in your defense.”

As to the right to remain silent, the court stated: “You also have what the law refers to as the privilege against self-incrimination. [T]his is your right to remain silent. Anything that you say in the form of a statement either orally or in writing can be used

[footnote continued on next page]

Moreover, although defendant argues that the South Dakota conviction took place 28 years earlier, the probation report, which the trial court reviewed before it took defendant's admission of the prior, lists four additional convictions between 2005 and 2010, as well as convictions in 1977 and 1979. We conclude the totality of the circumstances establishes that defendant knowingly and voluntarily admitted his prior conviction.

IV. DISPOSITION

The judgment is affirmed.

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HOLLENHORST

Acting P. J.

We concur:

MCKINSTER

J.

RICHLI

J.

[footnote continued from previous page]

against you. So in a trial in connection with this privilege against self incrimination you could not be forced or required to be witness yourself. [¶] In other words, the State could not call you as a witness to give testimony. However, if you yourself wanted to be a witness and testify in your own behalf and in your own defense, you could do so, but that would be a voluntary thing on your part and not something that you could be forced or required to do.” Defendant confirmed that he understood his rights and that he understood that the consequence of entering a guilty plea included waiving those rights. Defendant further confirmed that his attorney had previously explained those rights.