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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.

SANCHENGLER MISOUK,

Defendant and Appellant.

E054253

(Super.Ct.No. FSB054653)

OPINION

APPEAL from the Superior Court of San Bernardino County. Kyle S. Brodie,
Judge. Affirmed.

Sharon M. Jones, 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 Collette C. Cavalier and Steve
Oetting, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Sanchenglee Misouk appeals from his conviction of second degree murder (Pen. Code,¹ § 187, subd. (a); count 1) and attempted murder (§§ 664, 187, subd. (a); count 2) with associated firearm enhancements (§ 12022.53, subds. (b), (c), & (d).) Defendant contends the trial court erred in instructing the jury with CALCRIM No. 361 and in refusing to instruct the jury on assault with a deadly weapon as a lesser related offense to attempted murder. We find no prejudicial error, and we affirm.

II. FACTS AND PROCEDURAL BACKGROUND

A. Prosecution Evidence

On February 19, 2006, Marcello Valdez, his brother Martin Valdez, Jr., his father Martin Valdez, Sr., and two friends, Charles Rister and Jerred Rister,² were standing outside a liquor store in Muscoy. A man identified at trial as Randy Misouk³ walked by them into the liquor store. Marcello testified that no words were spoken, and Marcello, Martin, Jr., and the Risters walked away down the street. Marcello saw a man sitting in the driver's seat of a car parked outside the liquor store; it appeared that Randy had arrived in the same car. After the group walked past the car, it drove by them so closely that it almost hit Marcello. Martin raised his hands and yelled at the car to slow down

¹ All further statutory references are to the Penal Code.

² We will refer to witnesses who share a common last name by their first names for clarity and convenience, and not intending any disrespect.

³ Randy was arrested and charged with murder. He entered into a plea agreement under which he pled guilty to involuntary manslaughter in exchange for his truthful testimony at defendant's trial.

and that the car had almost hit his little brother. Randy had his head out the open window of the passenger side of the car and looked at Martin. After Martin yelled, Randy put his head back inside and said something to defendant. The car stopped, backed up about 10 feet, and stopped again. The driver and Randy got out and approached the group, and the driver asked, "What, you got a problem?" The driver pulled a gun from his waist area, pointed it toward Martin, Jr., and started firing. The first shot hit Martin, Jr., in the chest. The driver fired three more shots toward Charles; two of the shots struck him in the legs. The driver and Randy returned to their car and drove away.

Martin, Jr., died from the gunshot wound to his chest. Marcello did not identify defendant as the driver at trial. Marcello and Charles testified that no one in their group had had any type of weapon.

Christina Pedroza was driving in the area with her husband. She saw four young men walking down the street and saw a driver get out of his car, exchange words with the other men, reach back into the car, pull out a gun, and start shooting.. None of the group of men charged the driver, and she did not see any of them with weapons. The driver and his passenger got back into their car and sped away. Pedroza and her husband followed the car to a nearby house, where they saw two men get out of the car smiling and laughing and "acting like nothing happened." Pedroza's husband flagged down a sheriff's deputy and pointed out where defendant's car was parked.

Randy was arrested, but the deputy did not find defendant. Defendant was arrested in Long Beach about 18 months later.

Randy testified that defendant, his cousin, had driven him to the liquor store. When Randy got out of the car, “four guys approached [him], bump[ed him], called [him] Chinese, stuff like that,” but he “didn’t bother with them.” After Randy bought cigarettes, he got back in the car and defendant drove off. They passed the four men in the road, who raised their hands as if they wanted to fight and called out something. Defendant stopped the car, and both he and Randy got out. The men approached the car. Randy did not see any weapons. Defendant always carried a gun, and he reached under the car seat, pulled out a revolver, and started shooting. Defendant and Randy got back into the car and drove to defendant’s mother’s house. Randy initially told the police the shooting had been in self-defense, although he never said any of the men had a weapon.

B. Defense Evidence

Defendant testified in his own behalf. He waited in the car while Randy went into the liquor store, and when they were driving away, Randy yelled for him to stop. Defendant did so, and he heard someone yelling outside the car, “You F’ing hit my brother.” Four men ran toward the car. Randy threw a handgun onto defendant’s lap and got out of the car. Defendant got out to see if the car had hit someone, and the handgun slid to the floorboard.

One of the men who were yelling ran toward him with a handgun in his extended hand. Defendant became frightened, went back to the car, retrieved the gun from the floorboard, and started to fire. He knew he had hit someone but he did not render aid

because he was afraid he might be shot. He did not know he had hit a second man. He denied he had intended to kill anyone and denied he had aimed at Charles.

Defendant fled and avoided arrest for 18 months, although his father was disabled and dependent on him. He did not contact the police because he was scared and confused. He knew the police were looking for him because the victim had died. He denied laughing when he and Randy returned home. He denied that he always left the house with a gun.

Kevin Perry, an emergency medical technician who responded to the scene of the shooting, testified that he had seen a man in his 40s standing near Martin, Jr. The man was very emotional, and Perry saw him covertly pass a handgun to another person standing nearby.

Three gunshot residue particles were found on Martin, Jr.'s hands. Two gunshot residue particles were found on Randy's right hand, and one was found on Charles's hand. The particles indicated those persons had either fired a gun, handled a gun, been near a gun, or touched a surface that had residue on it.

Two persons who had known defendant for years testified that he was not violent and that he usually, but not always, stuttered. One witness testified that Randy did not have a reputation for honesty.

C. Verdict and Sentence

The jury found defendant guilty of second degree murder (§ 187, subd. (a), count 1) and attempted murder (§§ 664, 187, subd. (a), count 2) and found true firearm enhancements under section 12022.53, subdivisions (b), (c), and (d).

The trial court sentenced defendant to an indeterminate term of 15 years to life for count 1 and to a consecutive term of seven years for count 2. In addition, the trial court imposed a consecutive indeterminate term of 25 years to life for the firearm enhancement under section 12022.53, subdivision (d) as to each count. The trial court suspended the additional enhancements.

III. DISCUSSION

A. CALCRIM No. 361

Defendant contends the trial court erred in instructing the jury with CALCRIM No. 361.

1. Additional Background

The trial court instructed the jury with CALCRIM No. 361 as follows: “If the defendant failed in his testimony to explain or deny evidence against him, and if he could reasonably be expected to have done so based on what he knew, you may consider his failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove the defendant guilty beyond a reasonable doubt. [¶] If the defendant failed to explain or deny, it is up to you to decide

the meaning and importance of that failure.” Defense counsel did not object to the instruction.

2. *Forfeiture*

The People contend that defense counsel’s failure to object to CALCRIM No. 361 at trial means defendant’s challenge has been forfeited. (See *People v. Rundle* (2008) 43 Cal.4th 76, 151, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) However, section 1259 provides that even in the absence of an objection, we must review any instruction that affected the substantial rights of a defendant, and we cannot determine whether the instruction affected defendant’s substantial rights without addressing the merits of defendant’s claim. Moreover, the People have fully briefed the merits of the issue. We will therefore address the issue on the merits.

3. *Analysis*

The People argue that instructing the jury with CALCRIM No. 361 was proper because defendant failed to explain certain evidence, including “why, if he acted in self-defense, he did not contact the police”; what he was afraid of; why he was scared and confused; why he believed speaking with the police would bring more shame on him; and why he would feel shame if he acted in self-defense. The People further argue that defendant failed to explain why Pedroza testified she saw defendant and Randy laughing and smiling when they exited the car and why he was the only person who saw the victim point a gun.

For the most part, the People’s argument amounts to a rejection of the explanations defendant did give. For example, although the People contend defendant failed to explain “why, if he acted in self-defense, he did not contact the police,” defendant *did* explain he did not do so because he was fearful, confused, and ashamed. He further explained that in his culture he had brought shame on himself and his family. “[T]he test for giving the instruction is not whether the defendant’s testimony is believable. [The instruction] is unwarranted when a defendant explains or denies matters within his or her knowledge, no matter how improbable that explanation may appear.” (*People v. Kondor* (1988) 200 Cal.App.3d 52, 57.)

The People also argue defendant failed to explain why Pedroza testified that she had seen defendant and Randy laughing when they got out of their car; however, defendant did *deny* that he had been laughing. A contradiction between the defendant’s testimony and that of another witness is not a contradiction that supports giving an instruction on failure to explain. (*People v. Saddler* (1979) 24 Cal.3d 671, 682 (*Saddler*) [“a contradiction is not a failure to explain or deny”].)

The People further argue defendant failed to explain why he was the only person who saw the victim point a gun. However, CALCRIM No. 361 is appropriately given only when the facts a defendant fails to explain or deny are within his knowledge. (*People v. Kondor, supra*, 200 Cal.App.3d at p. 56.) What other witnesses saw or failed to see, and why they saw or failed to see something, are not such facts within a defendant’s knowledge. Moreover, defendant’s testimony was not a failure to explain but

a contradiction, which again did not support an instruction on failure to explain or deny. (*Saddler, supra*, 24 Cal.3d at p. 682.)

If we assume for purposes of argument the trial court erred in instructing the jury on failure to explain or deny, we review such error under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*Saddler, supra*, 24 Cal.3d at p. 683.) In *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1472, the court noted it had “not found a single case in which an appellate court found the error to be reversible under the *Watson* standard.” (*Id.* at p. 1472.) The court in that case found harmless the trial court’s error in failing to give CALJIC No. 2.62, which is generally similar to CALCRIM No. 361. (*Lamer*, at p. 1472.)

Here, the jury was instructed under CALCRIM No. 200 that some instructions given might not apply to the facts of the case. An instruction to the jury to disregard any instruction that is found not to apply to the facts “may be considered in assessing the prejudicial effect of an improper instruction.” (*Saddler, supra*, 24 Cal.3d at p. 684.) As discussed above, CALCRIM No. 361 addresses a defendant’s failure to explain or deny. As we have noted, defendant did deny certain evidence, and we presume the jury therefore found the instruction inapplicable to that evidence. “Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court’s instructions.” (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) As we have further noted, defendant would not reasonably have been expected to be able to explain what other witnesses saw or failed to see, and again, we presume the jury found the

instruction inapplicable in those instances as well. We therefore conclude any error in giving CALCRIM No. 361 was harmless. (*Watson, supra*, 46 Cal.2d at p. 836.)

B. Instruction on Assault with a Deadly Weapon

Defendant contends the trial court erred by refusing to instruct the jury on assault with a deadly weapon as a lesser-related offense to attempted murder.

1. Additional Background

The trial court noted that assault with a deadly weapon is a lesser related rather than a lesser included offense to attempted murder; the People objected to instructing the jury on assault with a deadly weapon as a lesser-related offense; and the law precluded the trial court from doing so over the People's objection.

2. Analysis

Our Supreme Court has held that the trial court may not instruct concerning an uncharged lesser related crime unless agreed to by both parties. (*People v. Birks* (1998) 19 Cal.4th 108, 136.) Assault with a deadly weapon is a lesser related offense to attempted murder. (*People v. Nelson* (2011) 51 Cal.4th 198, 215.) The People objected to the instruction at trial. Thus, the trial court did not err in refusing to instruct the jury on assault with a deadly weapon.

Defendant further contends the failure to instruct on a lesser related offense is federal constitutional error. However, our Supreme Court has rejected that argument. (*People v. Rundle, supra*, 43 Cal.4th at pp. 147-148.)

We are bound by the holdings in *People v. Birks* and *People v. Rundle*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Thus, we conclude the trial court did not err in refusing to instruct the jury on a lesser related offense.

IV. DISPOSITION

The judgment is affirmed.

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HOLLENHORST

Acting P. J.

We concur:

KING

J.

MILLER

J.