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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.

ATRAYBION HARMON,

Defendant and Appellant.

E054358

(Super.Ct.No. FVI1000503)

OPINION

APPEAL from the Superior Court of San Bernardino County. Eric M. Nakata, Judge. Affirmed.

Cara DeVito, 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, Eric Swenson and Garrett Beaumont, Deputy Attorneys General, for Plaintiff and Respondent.

On March 4, 2010, defendant Atraybion Harmon came running from his residence drenched in blood and yelling for help. Inside his home, his mother was found dead, a

result of multiple stab wounds to her face, head, chest, and arms. The police found a large knife that had broken in half in the trash.

Defendant claims on appeal that the trial court erred when it failed to correct the standard first degree murder instruction (CALCRIM No. 521), which he claims incorrectly omitted the language that, if the jury found the defendant not guilty of first degree murder, all other kinds of murders are of the second degree.

I

PROCEDURAL BACKGROUND

Defendant was found guilty by a San Bernardino County jury of willful, premeditated, and deliberate first degree murder. (Pen. Code, § 187, subd. (a).)¹ In addition, the jury found true the allegation that defendant personally used a deadly and dangerous weapon, a knife, in the commission of the offense. (§ 12022, subd. (b)(1).) Defendant was sentenced to state prison for 25 years to life for first degree murder and an additional one-year determinate sentence for personal use of a knife.

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

II

FACTUAL BACKGROUND

A. *People's Case-in-Chief*

1. *Defendant growing up with victim*

Defendant and Mauricio Silva were the sons of Barbette Harmon,² although they had different fathers. (RT 294-296.) In March 2010, defendant, Silva, and another brother all lived with their mother in Adelanto.

Growing up, Barbette would occasionally discipline them by “whooping” them with a belt. However, the last time that Barbette had hit defendant with the belt was when he was in middle school. Barbette and defendant frequently argued when defendant was a teenager but never had physical confrontations, nor was defendant violent with her.

In 2007, Barbette and defendant had argued over a \$14,000 phone bill defendant had run up. Defendant went away to a Job Corps program for two years. He returned to the home in 2009.

Around September 2009, Barbette caught defendant watching pornography on the television and computer in the house. Barbette forced defendant to live in the garage. Defendant was only allowed in the house when Silva or Barbette was home. Defendant seemed to adjust to the arrangement and did not seem to be upset by it.

² Barbette was also referred to as Barbara.

2. *Stabbing of Barbette*

In the morning on March 4, 2010, Silva awoke and let defendant into the house. Defendant seemed fine to Silva. Defendant was in the garage when Silva left the house. Barbette was in her bedroom.

At 1:00 p.m., Brian Rhodes, a realtor and home inspector, was inspecting a nearby property. Rhodes spent about a half hour inspecting the property and did not hear anything from any other residences or on the street outside.

As Rhodes walked back to his car to leave, defendant came running from a house across the street saying that his mother was dead and that he needed help. Defendant was covered in blood and sweat. He was hysterical and was talking to someone on the phone. Rhodes told defendant that he knew cardiopulmonary resuscitation and could help. Rhodes assumed defendant's mother had had a heart attack or had fallen.

At 1:22 p.m., a 911 call was made by defendant to the San Bernardino County Sheriff's Department. Defendant told the dispatcher that he had come home to find Barbette on the floor and that she had been stabbed. Defendant was crying.³ He told the dispatcher that he had no idea who had done it. The dispatcher asked defendant if there was a knife there, and he said that there was a knife on the floor that was broken. He then said it was in the trash.

³ A transcript of the 911 call was given to the jury.

When Rhodes entered the Harmon house, he realized that he had entered a crime scene. He walked back outside and called the police. Defendant had disappeared somewhere in the house.

San Bernardino County Sheriff's Sergeant Lon Jacobs responded to the scene. He turned on his belt recorder as he entered the house. Sergeant Jacobs announced his presence. He heard someone moaning and crying inside the house. Sergeant Jacobs entered the living room and found Barbette covered in blood. Defendant was sitting in a nearby chair. Barbette was lying on the floor on her right side. Her left arm was covering her face, neck, and shoulder. There was a blood stain near Barbette's body.

Sergeant Jacobs checked Barbette for a pulse, but she had none. Defendant was "drenched" in blood. He had blood dripping from his hands and clothes. Sergeant Jacobs checked the residence but found no one else at the house.

Sergeant Jacobs had defendant sit in a chair in another room. He asked defendant where the knife was, and defendant told him it was in the trash. On the belt recording, defendant told Sergeant Jacobs that he had been at the nearby park. When he returned home, he found a window open and the screen off.⁴ Barbette had been stabbed, but she was still alive. She kept saying, "God, help me." A "bowed" knife blade that had separated from the handle was found in the kitchen trash can.

During this time, Deputy Travis James arrived at the house. Deputy James checked Barbette for a pulse but found none. Defendant began screaming and yelling.

⁴ The jury was given a transcript of the belt recording from Sergeant Jacobs's recorder.

Deputy James had to assist defendant to his patrol car as he could barely walk or stand. Paramedics arrived and announced that Barbette was dead after unsuccessfully trying to revive her. Sergeant Jacobs told defendant that Barbette was dead. Defendant was upset and was muttering, "Can't be."

Detective Anthony Valencia arrived at the scene while defendant was being escorted to Deputy James's patrol car. Detective Valencia observed that defendant was shaking and crying. He had so much blood on him that it was still dripping off of him. He had cuts on his right palm and left index finger. Defendant spontaneously stated that he was a "good kid" and that he had blood on him from trying to help Barbette. Defendant was taken to the sheriff's station and said on the way that no one else was in the house when he arrived home.

The home was investigated. There was no sign of forced entry. There was a bloody shoeprint near the front door. There were bloody footprints throughout the house that were left by someone who appeared to have been wearing socks. Barbette was not wearing socks. There was blood on several knife handles and on a pair of kitchen scissors still left in the kitchen knife block. One of the blades on a knife in the block had blood on it. The pair of scissors had blood on the blades.

One of the kitchen chairs had been broken at the base and had blood on the seat. There was blood on the chair and on the floor under the chair. There were eyeglasses with blood on both lenses on the floor underneath the chair. There was a plate of watermelon and an open magazine on the table.

Barbette had been seated in the kitchen chair for some time bleeding. Blood spatter evidence indicated that Barbette had moved from the kitchen to the living room and was stabbed again in the living room.

There were blood stains throughout the house, including blood on the kitchen ceiling, around the kitchen table, and in the living room. Some of Barbette's hair was on the living room floor near her body. There was blood on a doorknob leading from the house to the garage and bloody sock prints in the garage.

An autopsy was performed. Some of the stab wounds were superficial and others were deep. There were numerous cuts on Barbette's face and head and on her arms. At some places she had been stabbed with such force that bone had been chipped. There were also cuts to her back and shoulder, her lungs were cut, and her jugular vein was cut. She had numerous defensive wounds. The cause of death was blood loss due to multiple stab wounds. Barbette would have bled to death in a matter of minutes.

The knife wounds were consistent with both the knife found in the trash and the bloody knife blade pulled from the kitchen block. It was probable that the knife broke when the bone was chipped when Barbette was stabbed in the head.

3. *Defendant's interviews*

Defendant was taken to the Adelanto Sheriff's Station and interviewed. He continued to cry and ask if Barbette was still alive. He said, "Get up, Mom" over and over and was not answering questions.⁵ He was instructed by Detective Valencia to lie

⁵ The transcript of the recorded interview was given to the jury.

down. While lying down, he continued to repeat, "Get up, Mom" and also repeatedly said, "Somebody help my mom."

Detective Valencia again tried to interview defendant. Defendant asked if he had been in shock and where he was. He was reminded that he was at the sheriff's station. Defendant reported that a couple of days prior to the stabbing, the front gate had been inexplicably open and that a window screen had been popped off. Defendant was living in the garage because he "got in trouble." He admitted he owed Barbette \$14,000 for the telephone bill. Barbette would remind him that he owed her for the bill but was not mad at him.

On that day, defendant went to the park for an hour. He returned home around 1:00 p.m. and found Barbette face down, and he flipped her over. She told him to call 911. He ran outside to get help. Defendant claimed his hands were injured when he fell on some rocks returning from the park. He spontaneously stated that he did not kill his mother.

Defendant found the knife in the trash and touched it even though he realized that was stupid because it would look like he had stabbed Barbette. When Detective Valencia left the interview room, defendant was either talking to himself or praying.

Defendant's interview then continued with Detective Steven Pennington and another detective who had just finished interviewing Silva. Barbette did not tell defendant who had stabbed her when he found her; she never talked about anyone

threatening her or being after her.⁶ Defendant admitted he and Barbette had disagreements but never got “super” mad at each other.

Defendant again claimed that he cut his hand because he fell on some rocks while hopping over the fence that was between his house and the park. He stated that officers searching the area would not find his blood because he did not start bleeding until he got in the house.⁷ Defendant also said that he may have cut himself when he touched the knife in the trash. He admitted touching the handle on one of the knives in the kitchen block at the direction of the 911 operator to determine if another knife was missing. He did not touch the blade.

Detective Pennington suspected that defendant might have stabbed Barbette because the wounds on defendant’s hands were straight, rather than jagged, as they would have been if he had fallen on a rock. The wounds were consistent with struggling with someone over a sharp instrument, not with falling on a rock. The wound was consistent with the handle of the knife coming off and the blade slipping down and cutting defendant.

Defendant was driven to the sheriff’s headquarters in San Bernardino and interviewed again. Detective Pennington observed that the collar on defendant’s shirt appeared to be stretched out. Defendant denied that it was stretched. Detective

⁶ The jury was given a transcript of the recorded interview. A majority of the transcript contains long dissertations by defendant that have no relevance to the facts of the crime.

⁷ The area was inspected and no blood was found on the ground.

Pennington asked defendant why he would do this to Barbette. He responded, “Well, I’m not saying me, but a person who would do something like this, their mother would have had to push them to that point or they would have to be hearing voices.” Defendant insisted he did not kill Barbette or argue with her that day. He would not have called 911 if he had wanted to kill her.

Detective Pennington noticed that defendant had what appeared to be scratches on his arms. Defendant explained they were stretch marks from working out. Detective Pennington did not believe him. During breaks in the interview, defendant was again observed talking to himself. Defendant denied that he had any mental health problems.

Defendant stated that he and Barbette had gone on a television show called Judge Mathis regarding the dispute over the telephone bill a few months prior to the stabbing. Barbette won and got \$5,000 from the show. She had called him “sex-crazed” on the show.

Defendant was then confronted by Detective Pennington’s supervisor that his story was a lie. All of his crying on the 911 call was clearly faked. Defendant was encouraged to start with the new story. Defendant then said he heard voices. Defendant explained that he had heard voices and saw “dark shadows” his whole life, which told him things to do. At 10:45 a.m. that day, the voices told him to kill Barbette, and he went into a trance.

Defendant went into the kitchen, where he found Barbette sitting at the kitchen table eating watermelon. There were demons surrounding her telling him to kill her. Something took over his body, and he saw his hand reaching for a knife in the butcher block. The “something” that took control of him repeatedly stabbed Barbette, and she

ended up on the floor by the couch. Defendant continued to stab her because he felt that he was defending himself. Defendant stopped stabbing Barbette when the knife handle broke, and he threw the broken knife in the trash.

The demons left his body, but he claimed they were coming back to him in the interview room. Defendant then acted like he had been taken over by someone and referred to “Tre” or “Tray,” presumably himself, as a child and a victim. “Tre” was weak and cut himself as a child. Defendant said the knife bent when he stabbed Barbette in the arm. Detective Pennington told defendant to stop playing games and “bullshittin[g] us.”

Defendant then said that “Tray” killed Barbette with the help of “me,” presumably the demon who had taken over his body, because the demon felt that defendant was worthless for being exiled to the garage.

B. *Defense*

Friends of defendant and his family, who had known defendant since he was a young child, had never seen defendant be violent with Barbette.

Defendant testified on his own behalf that Barbette had beaten him when he was a child. Barbette hit him in the face with her rings on and used a belt buckle when she beat him. She had used a ping pong paddle on one occasion. Barbette falsely accused him of drug dealing and punished him for talking to a girl. She told him he was a failure. She failed to do anything after he allegedly told her he was sexually assaulted by four boys.

On the day of the stabbing, defendant claimed he went into the kitchen, and Barbette told him that he was a failure and that she wished he was not her child. He had no ability to control his anger or what he was doing when he picked up the kitchen knife

and stabbed her. Barbette's back was to him when he picked up the knife. He stabbed her in the neck from behind. He repeatedly swung the knife at her body. Defendant did not mean to kill Barbette but acted out of frustration for all the things she had done to him.

Defendant claimed the knife did not break until he threw it in the trash, and he could not explain the blood on any of the knives in the knife block; he did not get a second knife. Defendant admitted that claiming another personality took over his body was a lie and the trance he claimed to be in during the interview was an act.

III

SECOND DEGREE MURDER INSTRUCTIONS

Defendant contends that the trial court failed to correct an error that it noticed in the revised CALCRIM No. 521 standard instruction on first degree murder. As a result, the jury was not properly instructed on *second degree murder*. He thus argues his right to due process and a fair trial were violated, and his first degree murder conviction should be reversed.

A. *Additional Factual Background*

Discussion of the jury instructions was held off the record. The trial court asked on the record if defendant was objecting to any of the instructions. There was no objection.

The trial court instructed the jury with CALCRIM No. 520 as follows: “The defendant is charged in Count 1 with murder in violation of Penal Code 187. The People must prove that: [¶] The defendant committed an act that caused the death of another

person; and two, when the defendant acted, he had a state of mind called malice aforethought. [¶] There are two kinds of malice aforethought, expressed malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder. The defendant acted with expressed malice if he unlawfully intended to kill. The defendant acted with implied malice if, one, he intentionally committed an act. Two, the natural and probable consequences of that act were dangerous to human life. Three, at the time he acted he knew his act was dangerous to human life. And four, he deliberately acted with conscious disregard for human life. [¶] Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time. [¶] An act causes death if the death is the direct, natural and probable consequence of the act and death would not have happened without the act. [¶] 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 you decide the defendant committed murder, you must then decide whether it is murder of the first or second degree.”

The trial court then began to instruct the jury on first degree murder, but stopped. It took a recess, advising the jurors there was a problem. It noted out of the presence of the jury that there was no second degree murder instruction. It noted that language from prior instructions, prior to the modification of CALCRIM No. 521 in 2010, had additional language that all other murders were second degree murder if the jury did not find first

degree murder. Defendant noted that he was not asking for the jury to be instructed with CALCRIM No. 522.⁸

The trial court felt the instruction was “terrible,” and the jury would not know what second degree murder was. It stated it was going to find the language and read it to the jury.

The trial court then advised the jury it was going to reread CALCRIM No. 521. The trial court read the instruction as follows: “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 consequence decided to kill. The defendant acted with premeditation if he decided to kill before completing the acts that caused that death. [¶] The length of time a person spends considering whether to kill does not alone determine whether the killing is deliberate or premeditated. The amount of time required for deliberation or 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 or premeditated. On the other end, a cold, calculated decision to kill can be reached quickly. The test is

⁸ CALCRIM No. 522, as revised in April 2011, provides as follows: “Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.] [¶] [Provocation does not apply to a prosecution under a theory of felony murder.]”

the extent of reflection not the length of time. [¶] The requirements for second-degree murder based on expressed or implied malice are explained in CALCRIM 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 the defendant not guilty of first-degree murder.” The trial court did not add anything regarding all other murders being second degree, and defendant did not object.

The jury was then instructed on voluntary manslaughter. They were advised that if defendant was provoked and killed because of a sudden quarrel or in the heat of passion, he was guilty of voluntary manslaughter.

B. *Analysis*

“The trial court has a sua sponte duty to instruct the jury on the general principles of law relevant to the issues raised by the evidence.” (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1331.) “Review of the adequacy of instructions is based on whether the trial court ‘fully and fairly instructed on the applicable law.’ [Citation.]” (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) In determining whether error has been committed in giving jury instructions, we consider the instructions as a whole and assume jurors are intelligent persons, capable of understanding and correlating all jury instructions which are given. (*Ibid.*) “‘Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.’ [Citation.]” (*Ibid.*)

“Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.’ [Citation.]” (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012.) Here, the People argue that defendant invited any error in the given instructions. However, as we discuss, *post*, we do not find the instructions given by the trial court to be erroneous despite the trial court’s displeasure with the modified CALCRIM instructions. As such, we need not address whether any error was invited by defendant.

Section 187 provides that “[m]urder is the unlawful killing of a human being . . . with malice aforethought.” Section 189 provides that all willful, premeditated and deliberate murder is first degree murder and “[a]ll other kinds of murders are of the second degree.” “First degree murder is an unlawful killing with malice aforethought, premeditation, and deliberation. [Citation.] Malice may be express (intent to kill) or implied (intentional commission of life-threatening act with conscious disregard for life). [Citation.] Second degree murder is an unlawful killing with malice, but without the elements of premeditation and deliberation which elevate the killing to first degree murder. [Citation.]” (*People v. Hernandez, supra*, 183 Cal.App.4th at p. 1332.)

The trial court instructed the jury pursuant to CALCRIM No. 520 that if it decided that defendant had committed murder, it then had to decide whether he committed a first or second degree murder. The trial court specifically advised the jury through CALCRIM No. 521 that the People had to prove beyond a reasonable doubt that the murder was first degree murder and that, if the People failed to sustain this burden, the

jury had to find the defendant not guilty of that offense. The jury was referred to CALCRIM No. 520 for the definition of second degree murder. The jury was also instructed that it would receive verdict forms. They were instructed, “[I]f all of you agree the defendant is not guilty of first-degree murder but also agree that the defendant is guilty of second-degree murder complete and sign the form for guilty of second degree murder.”

Defendant specifically rejected that the jury be instructed with CALCRIM No. 522. Such instruction would have allowed the jury to reduce a murder to second degree murder if it found that the premeditation and deliberation was negated by heat of passion arising from provocation. (CALCRIM No. 522.) A trial court does not have a sua sponte duty to provide the jury with an instruction concerning how it is to consider evidence of provocation in determining whether a defendant committed first or second degree murder. (*People v. Rogers* (2006) 39 Cal.4th 826, 878-879 [referring to CALJIC No. 8.73].)

There was only one theory upon which the jury could have based a second degree murder conviction: if it failed to find beyond a reasonable doubt that defendant committed the murder willfully, with deliberation and premeditation, but still possessed actual malice. CALCRIM Nos. 520 and 521 properly instructed the jury regarding the mental states required for these crimes. The language that all other murders are second degree murder is superfluous when the instructions are viewed as a whole.

Defendant complains that the jury was never told the heading or title of CALCRIM No. 520 and that negates the reference to the instruction in CALCRIM No.

521. However, the written instruction included at the end “First or second degree murder with malice aforethought.” (Capitalization omitted.) The jury was given the written instructions and had the proper definition of second degree murder in front of it.

Defendant also complains that because CALCRIM No. 521 referred to the fact that a murder committed rashly or impulsively is not a deliberate or premeditated killing, the jury would have understood its choices to be between first degree murder and voluntary manslaughter, which refers to a rash, impulsive murder, and would not know that it could find him guilty of second degree murder. However, this ignores the other instructions; verdict forms; and as will be discussed, *post*, the argument of counsel. The jury would not have interpreted the instructions as proffered by defendant.

Even if we were to consider that the instructions were somehow erroneous, “[i]n reviewing a claim that the court’s instructions were incorrect or misleading, we inquire whether there is a reasonable likelihood the jury understood the instructions as asserted by the defendant.” (*People v. Hernandez, supra*, 183 Cal.App.4th at p. 1332.) We consider whether, in the context of the entire charge, there is a reasonable likelihood that the jury misconstrued or misapplied its words. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016-1017.) Although defendant claims that his rights to due process and fair trial were implicated, the effect of the failure to instruct on a lesser included offense is tested under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Breverman* (1998) 19 Cal.4th 142, 178, citing *Watson* [reversal is warranted if it appears reasonably probable

the defendant would have obtained a more favorable outcome had the error not occurred].)⁹

The arguments of both counsel confirm that no error could have occurred here. The People argued to the jury that second degree murder is an act causing death with malice aforethought but that was not willful, deliberate, or premeditated. Defendant defined second degree murder as the intent to kill formed prior to the act. Defendant pointed out to the jury that what takes second degree murder to first degree murder was premeditation. In closing, defendant conceded that this was manslaughter and not first or second degree murder. Such argument clearly advised the jury that if it did not find premeditation or deliberation, it should find him guilty of second degree murder. (See *People v. Young* (2005) 34 Cal.4th 1149, 1202 [“[t]he reviewing court also must consider the arguments of counsel in assessing the probable impact of the instruction on the jury”].)

Moreover, the evidence of premeditated, deliberate, and willful first degree murder in this case was overwhelming. It was clear that defendant resented his mother. Barbette forced defendant to move to the garage because of his viewing pornography in the house. She embarrassed him on national television by calling him a “sex-crazed” kid. Defendant stabbed Barbette multiple times, some so deeply that her bones were chipped and the knife broke. Defendant continually lied to police. At trial, he admitted that Barbette’s back was to him when he stabbed her and that he stabbed her out of

⁹ Further, we have rejected defendant’s claim that there was no instruction on second degree murder.

frustration, not because she provoked him. The evidence clearly establishes that defendant committed premeditated, deliberate, and willful murder in this case. Any conceivable error was clearly harmless.

IV

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.