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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.

ELIO ISIDRO MORENO,

Defendant and Appellant.

E054477

(Super.Ct.No. RIF153223)

OPINION

APPEAL from the Superior Court of Riverside County. Patrick F. Magers, Judge. (Retired judge of the Riverside Super. Ct., assigned by the Chief Justice pursuant to art. VI, § 6, of the Cal. Const.) Affirmed with directions.

Thomas Owen, 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, James D. Dutton and Donald W. Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Elio Isidro Moreno of attempted willful, deliberate, and premeditated murder (count 1—Penal Code §§ 664, 187, subd. (a)),¹ assault with a deadly weapon (count 2—§ 245, subd. (a)), and simple mayhem as a lesser of the charged offense of aggravated mayhem (count 3—§ 203). The jury additionally found true allegations defendant personally used a deadly and dangerous weapon and personally inflicted great bodily injury in his commission of the count 1 and 2 offenses (§§ 12022.7, subd. (a), 1192.7, subd. (c)(8), 12022, subd. (b)(1), 1192.7, subd. (c)(23)). Defendant admitted he had suffered a prior strike conviction (§§ 667, subds. (c) & (e)(1)), a prior serious felony conviction (§ 667, subd. (a)), and a prior prison term (§ 667.5, subd. (b)).

The court sentenced defendant to a determinate term of 10 years plus an indeterminate term of 14 years to life on the count 1 offense and attached allegations and priors.² The court imposed sentence on counts 2 and 3 and the attached allegations and priors, but stayed the sentence pursuant to section 654.³ On appeal, defendant contends his counsel below rendered constitutionally ineffective assistance of counsel (IAC) by failing to object to a prosecution query of defendant's mother, which defendant argues

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

² The superior court clerk does not appear to have prepared an abstract of judgment reflecting the court's imposition of the determinate term with respect to count 1. In our disposition, we will direct the trial court to do so.

³ The abstract of judgment for counts 2 and 3 inaccurately reflects the court imposed, but did not stay, sentence on the prior prison term and prior serious felony allegations. We will direct the trial court to prepare a corrected abstract of judgment with respect to counts 2 and 3.

resulted in the admission of impermissible and prejudicial propensity evidence.

Defendant additionally maintains the court's instruction of the jury with an unmodified version of CALCRIM No. 600, the attempted murder instruction, resulted in prejudicial, constitutional error by removing from the jury the requirement that it find defendant acted with the requisite specific intent to support conviction of the offense. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

In September 2009, Martha Trujeque lived with her two daughters; defendant; and the victim, defendant's father; the victim was Trujeque's boyfriend. On September 27, 2009, they were having a barbeque at their home in Fontana in celebration of defendant's birthday. At some point, one of Trujeque's daughters informed her defendant appeared "high." Defendant was wide-eyed, sweating, taciturn, pacing around, and saying things that did not make sense. That evening, defendant told the victim he had used drugs and apologized. The victim scolded defendant.

Around 10:00 p.m., Trujeque and her daughters became scared of defendant; her daughters felt unsafe. Defendant started yelling for about five minutes. He was angry with Trujeque and called her a "bitch." Defendant said she was only with the victim for his money. He made her so nervous that she armed herself with a hammer for protection and sought safety in her bedroom. Between 11:00 p.m. and 12:00 a.m., the victim drove defendant to defendant's mother's home in Riverside, because he was afraid defendant might harm Trujeque or her daughters.

On the drive over it became clear defendant was under the influence of drugs. Defendant kept talking about cameras recording him, spoke quickly, and broke the rear view mirror. Once they arrived at defendant's mother's residence, she remained with them outside for approximately two hours; the victim intended to leave defendant at her home, but defendant's mother was afraid to be left alone with defendant. Defendant's mother had previously kicked defendant out of the home.

Defendant was extremely angry with the victim; they engaged in a heated discussion. The victim appeared afraid of defendant. At some point the victim went inside the home; defendant's mother told defendant he was not allowed inside the home; nevertheless, approximately 20 minutes later, defendant followed the victim inside.

The victim told defendant he had disrespected the victim's home and was no longer welcome there. The victim went into one of the bedrooms to sleep because defendant's mother was afraid to be left alone at the home with defendant. Defendant's mother followed defendant around the house for about an hour because she was afraid he was planning on harming the victim. Defendant grabbed a piece of steel, which she believed he intended to use against the victim.⁴ She was eventually able to take it away from him. Defendant's mother asked if he wanted to hurt her, to which he replied, "Not you."

Defendant went into the kitchen cupboard where the knives were usually kept. However, defendant's mother had removed them because she was afraid he would use

⁴ Defendant's mother later described the object as a pair of pliers.

them against the victim. Nevertheless, defendant was able to find a brand new knife that was still in the packaging. Defendant told her he was going to the bathroom; however she soon heard grunts. Defendant's mother followed the noise to the room where the victim was sleeping; she saw defendant kneeling on top of the victim, while the victim lay face down on the bed covered in blood.

The victim awoke to being attacked by defendant. He first felt a stab wound to his back. He attempted to fend off the repeated stabs, but received stab wounds to his hands. The victim attempted to flee the attack by crawling down the hallway; defendant stabbed him as he fled. The victim eventually lost consciousness.

Defendant's mother ran to her bedroom and called the police, but the dispatcher did not speak Spanish. In the 911 call, which was played to the jury, defendant's mother could be heard repeatedly saying defendant was killing the victim. She then ran outside to her neighbors' house, knocked on the door, told them defendant was stabbing the victim, and asked them to call the police.

The victim managed to make it to the neighbors' home, where they laid him on the floor. The victim was "all bloodied up" and his eye was "sticking out." One of the neighbors called 911, a recording of which was played to the jury. Defendant's mother could be heard to say defendant caused the injuries to the victim.⁵

Riverside Police Officer Jorge Sepulveda responded to the call and encountered the victim inside the neighbors' home: "Basically his eye was out of his socket, dangling

⁵ Both the victim and defendant's mother testified reluctantly under subpoena. The victim did not want charges pressed against defendant.

out of the socket.” Officer Sepulveda rode with the victim in the ambulance to Riverside Community Hospital.

Riverside Police Officer Justin Mann also responded to the call and found defendant standing near the fence of defendant’s mother’s home. Defendant turned around with a knife in his right hand; he dropped the knife and exclaimed “I did it. I did it.” “Take the knife for evidence.” Defendant’s arms were covered in blood and his shoes had blood on them. Defendant appeared to be under the influence of drugs.

Officer Mann handcuffed defendant and activated his personal audio recorder. The recording was played to the jury. Officer Mann asked if any of the blood was defendant’s; defendant replied that it was the victim’s blood. Officer Mann asked if the victim was hurt; defendant responded he was: “I took one of his eye balls off.” Defendant told Officer Mann he stabbed the victim. Defendant asked Officer Mann, “that’s life right there right?”

Defendant told Officer Mann he was paranoid and high on crystal methamphetamine. Nevertheless, defendant had no problem following the officers’ directions and was able to have a reasonable conversation with them.

The victim incurred a number of stab wounds to his face, head, and body. The emergency room physician who treated the victim testified the victim arrived at the hospital by ambulance at 5:53 a.m.; the victim was unconscious. The paramedics estimated the victim had lost 45 percent of his blood at the scene.

The victim “had multiple stab wounds and lacerations around the head . . . the face and the scalp,” including wounds to his upper left eyelid, left temple, eye socket, left

inferior eyelid, right eyebrow, left upper lip, inside his mouth, right lower eyelid, right lower lip, right cheek, right upper lip, right and left forehead, and two large wounds to the back of the scalp; he had a total of 14 facial wounds. The victim also sustained five stab wounds to his back, one to his right upper arm, one to his right elbow, one to his left wrist, and two to his left forearm.

The victim underwent surgery, but lost all sight out of his left eye and had very little use of his left hand. The victim's injuries were life threatening; he would not have survived but for the medical treatment he received. The victim was released from the hospital on October 11, 2012. The victim was not able to return to work until almost two years after the attack.

Riverside Police Detective Greg Rowe interviewed defendant at the police station the morning of the attack. Defendant admitted using methamphetamine the previous evening; he said he used twice a week. Defendant repeatedly admitted stabbing his father. Defendant's blood was collected at 11:00 a.m. Defendant's blood tested positive for a moderate amount of methamphetamine and amphetamine.

Defense witness Dr. Ari Kalechstein, a psychologist with special training in neuropsychology and forensic psychology, testified, "When people get 'high' on methamphetamine, it can cause abnormalities in the way people think, meaning, for example, they can become more impulsive. They can act without thinking. They can act without planning." Methamphetamine in chronic users can cause psychosis in which a person's mental state is impaired; the individual may be "unable to plan or think through the consequences of their action" and "[i]t affects their . . . ability to think before they act,

their ability to consider the consequences of their actions.” Dr. Kalechstein opined that defendant was experiencing a temporary methamphetamine psychosis when he attacked the victim.

DISCUSSION

A. INEFFECTIVE ASSISTANCE OF COUNSEL

The following colloquy occurred during the prosecution’s questioning of defendant’s mother regarding the period of time after the victim went to sleep, but before the stabbing:

“[Defendant’s Mother]: [Defendant] told me why don’t you go to your room for awhile because I want to speak with [the victim].

“[The People]: Okay. Did you go to your room and leave him alone?

“[Defendant’s Mother]: No.

“[The People]: Why not?

“[Defendant’s Mother]: I knew that something was going to happen. I felt that something was going to happen.”

“[The People]: Okay. And what told you that something was going to happen?

“[Defendant’s Mother]: Because when my son gets very angered, he’ll—vengeance. He won’t just leave things—let things be.”

During closing argument, the People argued, “His mother said it best, when she said that—‘I know [defendant]. I know my son. When he gets angry, he seeks revenge.’

[¶] Stabbing somebody repeatedly in the head, in their body, that’s personal, that’s bloody, that’s violent, and that’s revenge and it’s assault.” The People further claimed,

“[Defendant’s mother] tells us, first of all, we already know that when my son is angry he seeks revenge.”

Defendant contends defense counsel should have interposed an objection on the basis of relevance and propensity evidence immediately after the People asked defendant’s mother why she did not go to her room and leave defendant alone. By failing to do so, defendant maintains defense counsel rendered constitutionally prejudicial ineffective assistance of counsel.⁶ We disagree.

“The law governing defendant’s claim is settled. “A criminal defendant is guaranteed the right to the assistance of counsel by both the state and federal Constitutions. [Citations.] ‘Construed in light of its purpose, the right entitles the defendant not to some bare assistance but rather to *effective* assistance.’” [Citations.] It is defendant’s burden to demonstrate the inadequacy of trial counsel. [Citation.] We have summarized defendant’s burden as follows: “In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel’s performance was “deficient” because his “representation fell below an objective standard of reasonableness . . . under

⁶ Defendant contends several other segments of questions and answers, between the People and defendant’s mother to which defense counsel did not object, likewise amounted to IAC; however, defendant fails to provide any analysis as to how these other portions of the People’s examination amount to IAC or even evidentiary error. (*Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 862 [An appellant forfeits an issue when he makes only a blanket, conclusory statement, with no discussion of authority as it applies to the facts of the case.].) Nonetheless, we find defendant’s mother’s testimony in these latter portions of the examination proper as they explicated her own opinion and conduct in reaction to defendant’s behavior on the night in question; thus, they did not amount to propensity evidence because she did not state they were based on defendant’s actions on prior occasions.

prevailing professional norms.” [Citations.] Second, he must also show prejudice flowing from counsel’s performance or lack thereof. [Citation.] Prejudice is shown when there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”” [Citation.] [¶] Reviewing courts defer to counsel’s reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” [Citation.] Defendant’s burden is difficult to carry on direct appeal, as we have observed: “Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.” [Citation.]’ [Citation.] If the record on appeal ““sheds no light on why counsel acted or failed to act in the manner challenged[,] unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,’ the claim on appeal must be rejected,”” and the ‘claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding.’ [Citation.]” (*People v. Vines* (2011) 51 Cal.4th 830, 875-876.)

First, even assuming the answer to the question, let alone the question itself, related, or in the latter case, called for the relation of, impermissible propensity evidence, the record sheds no light on why counsel failed to object in the manner challenged by defendant. Thus, we cannot be certain defense counsel had no tactical reason for

declining to object. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 [if record sheds no light on challenged act, IAC claim more appropriately brought in petition for writ of habeas corpus]; (*People v. Maury* (2003) 30 Cal.4th 342, 419 [“[F]ailure to object will rarely establish ineffective assistance.”].)

Second, even assuming error, we cannot find it at all prejudicial. Here, overwhelming evidence established defendant’s guilt for attempted willful, deliberate, and premeditated murder. The victim scolded defendant and told him he was no longer welcome in the victim’s home. Defendant thus became extremely angry with the victim. The victim was afraid. Defendant initially grabbed a pair of pliers, with which his mother suspected him of intending to use against the victim. Based simply on defendant’s behavior, defendant’s mother believed he intended to harm the victim. Defendant himself implied he wished to harm the victim. Defendant searched the home for a weapon to use against the victim. Defendant’s mother followed him around the house for at least an hour after the victim went to bed, but before defendant stabbed the victim. Thus, defendant had plenty of time to consider his subsequent actions, during which he actively searched for a weapon to use against the victim and impliedly threatened the victim. There was no probability the exclusion of defendant’s mother’s statement that defendant sought vengeance when angered would have made any difference in the outcome.

B. CALCRIM NO. 600

Defendant contends one sentence in the standard pattern jury instruction for attempted murder given to the jury negated the necessity of the jury finding defendant

bore the requisite specific intent; thus, defendant maintains the People's burden of proof was unconstitutionally lightened by the allegedly offending instruction. The People argue defendant forfeited the issue by failing to object. We disagree with the People that the issue is forfeited; nonetheless, assuming error, we hold defendant suffered no prejudice.

“In criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case. [Citation.]’ [Citations.]” (*People v. Enraca* (2012) 53 Cal.4th 735, 758.) “Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citation.] Attempted murder requires express malice, that is, the assailant either desires the victim's death, or knows to a substantial certainty that the victim's death will occur.’ [Citation.]” (*People v. Houston* (2012) 54 Cal.4th 1186, 1217.)

The court instructed the jury with an unmodified version of CALCRIM No. 600 reading as follows: “The defendant is charged in Count 1 with attempted murder. To prove that the defendant is guilty of attempted murder, the People must prove:

“Number one, the defendant took at least one direct but ineffective step towards killing another person;

“And, two, the defendant intended to kill that person. A direct step requires more than merely planning, or preparing to commit murder or obtaining and arranging [for] something needed to commit murder. A direct step is one that goes beyond arranging and preparation and shows that a person is putting his or her plan into action.

“A direct step indicates a definite and unambiguous intent to kill. It’s a direct movement towards the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt. A person who attempts to commit murder is guilty of attempt[ed] murder even if after taking a direct step towards killing he or she abandons further efforts to complete the crime, or his or her attempt fails or is interrupted by someone or something beyond his or her control.

“On the other hand, if a person freely and voluntarily abandons his or her plan before taking the step towards murder, then that person is not guilty of attempted murder.” (Italics added.)

Defendant contends the italicized sentence in the above instruction contradicted the enumerated elements of the crime resulting in a situation whereby the jury could find defendant guilty of an intent to commit murder simply by finding he had perpetrated the actus reus of the offense, but did not have the requisite mens rea. We disagree.

““With regard to criminal trials, “not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. The question is “whether the ailing instruction . . . so infected the entire trial that the resulting conviction violates due process.” [Citation.] “[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.” [Citation.] If the charge as a whole is ambiguous, the question is whether there is a “reasonable likelihood that the jury has applied the challenged instruction in a way” that violates the Constitution.” [Citation.]’ [Citations.]” (*People v. Letner* (2010) 50 Cal.4th 99, 182.)

Here, in CALCRIM No. 600 itself, the court instructed the jury unambiguously that it must find *both* that defendant had taken a direct, but ineffectual step toward the murder of the victim *and* must have intended to kill him. Moreover, the court also instructed the jury with CALCRIM No. 601 which provides: “If you find . . . the defendant guilty of attempt[ed] murder under Count 1, you must then decide whether the People have proved the additional allegation that the attempted murder was done willfully and with deliberation and premeditation. The defendant . . . acted willfully if he intended to kill when he acted. The defendant . . . deliberated if he carefully weighed the considerations for and against his choice and knowing the consequences, decided to kill. The defendant . . . premeditated if he decided to kill before acting. [¶] The length of time the person spends considering whether to kill does not alone determine whether the attempted 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 of the choice and its consequences is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is in the extent of the reflection, not the length of time. The People have the burden of proving this allegation beyond a reasonable doubt, but if the People have not met this burden, you must find this allegation has not been proved.” Thus, since the jury found defendant acted willfully, deliberately, and premeditatedly in attempting to kill the victim it, by necessity, found defendant acted with the intent to kill.

Furthermore, in *People v. Guerra* (1985) 40 Cal.3d 377, the court considered a similar issue with regard to CALCRIM No. 600's predecessor, CALJIC No. 8.66.⁷ There, the trial court instructed the jury that “[a]n attempt to commit a crime consists of two elements[:] [n]amely, a specific intent to commit the crime and a direct but ineffectual act [done] toward[] its commission.” It then instructed the jury that it could find defendant guilty of murder on any of three theories: express malice, implied malice, or felony murder. The court neglected, however, to inform the jury that the crime of attempted murder requires a specific intent to kill, a mental state coincident with express malice but not necessarily with implied malice or felony murder. The jury instructions thus implied that the jury should find [defendant] guilty of attempted murder if it determined that [he] intentionally committed an act which, were the victim to die, would constitute murder on an implied malice or felony-murder theory. . . .’ [Citation.]” (*Guerra*, at p. 386.)

The appellate court reversed, “Because we cannot know whether the jury convicted defendant of attempted murder on the permissible basis of a finding of specific intent to kill or on another, impermissible basis, the error cannot be deemed harmless and the conviction must be reversed. [Citation.]” (*People v. Guerra, supra*, 40 Cal.3d at pp. 386-387, fn. omitted.) In other words, “the court must instruct the jury that the crime of attempted murder requires proof of the specific intent to kill.” (Use Note to CALJIC No. 8.66 (Fall 2006 ed.) citing *Guerra*, at p. 386.) Thus, “Ordinarily CALJIC 3.31 will be

⁷ CALJIC No. 8.66 does not contain language similar to that which defendant complains of in CALCRIM No. 600.

required and perhaps CALJIC 2.01 or 2.02 will be likewise.” (Use Note to CALJIC No. 8.66 (Fall 2006 ed.).)

Here, the court instructed the jury with both CALCRIM No. 252 (the new corresponding version of CALJIC No. 3.31) and CALCRIM No. 225 (the new corresponding version of CALJIC No. 2.02). Both instructions require the jury find the defendant acted with the requisite specific intent. (CALCRIM Nos. 225, 252.)

Finally, in *People v. Lawrence* (2009) 177 Cal.App.4th 547, the court considered the precise point raised by defendant and concluded that CALCRIM No. 600 correctly states the law. (*Lawrence*, at pp. 556-558.) It found, “The challenged language is virtually identical in meaning to the analogous portion of CALJIC No. 8.66 (attempted murder), which states: ‘However, acts of a person who intends to kill another person will constitute an attempt *where those acts clearly indicate a certain, unambiguous intent to kill.*’” (*Id.* at p. 557.) We disagree with *Lawrence* that the challenged language is “virtually identical” to that contained in the prior instruction.

Nonetheless, *Lawrence* also noted that “When the challenged portion of CALCRIM No. 600 is considered in context, it is clear there is no reasonable likelihood jurors understood it as appellant asserts. [Citations.] The instruction as a whole makes it clear that in order to find an attempt, the jury must find two distinct elements: an act and an intent. These elements are related; usually, whether a defendant harbored the required intent to kill must be inferred from the circumstances of the act. [Citation.] Read in context, it is readily apparent the challenged language refers to the act that must be found, and is part of an explanation of how jurors are to determine whether the accused’s

conduct constituted the requisite direct step or merely insufficient planning or preparation.” (*People v. Lawrence, supra*, 177 Cal.App.4th at p. 557.) Thus, when considered in context with the other instructions given by the court and the jury’s ultimate finding, it is apparent there was no reasonable likelihood the jury applied the instruction in a constitutionally violative manner.

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the abstract of judgment for counts 2 and 3 to reflect that sentence on the prior prison term and prior serious felony allegations were stayed. The trial court is further directed to prepare an abstract of judgment to reflect the imposition of the determinate term imposed with respect to count one. In addition, the trial court is directed to forward certified copies of the amended abstracts to the Department of Corrections and Rehabilitation. (§§ 1213, 1216.)

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MILLER
J.

We concur:

RAMIREZ
P. J.

KING
J.