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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.

JOE C. JOHNSON,

Defendant and Appellant.

E054490

(Super.Ct.No. FSB058147)

OPINION

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

Michael B. McPartland, 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, Barry Carlton, Garrett Beaumont, and Susan E. Miller, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant, Joe C. Johnson (defendant), guilty of numerous crimes including second degree murder. At the conclusion of a five-day trial on defendant's claim that he was legally insane at the time he committed the crimes, the jury was unable to reach a verdict and the trial court declared a mistrial. A second jury rejected his defense and found defendant sane. The trial court then sentenced defendant to serve a total term of 36 years four months to life in state prison.

Defendant contends in this appeal that the trial court committed prejudicial error when it failed to sua sponte instruct that if the jurors had a reasonable doubt about whether the crime was murder or involuntary manslaughter, they had to give defendant the benefit of the doubt and find him guilty of involuntary manslaughter. Defendant also contends that we must strike the Penal Code section 667, subdivision (a), sentence enhancement the trial court found true because the prosecutor did not amend the information to include that allegation until after the original jury was discharged. We agree with defendant's second contention; therefore, we will strike that sentence enhancement and otherwise affirm the judgment.

FACTS

The pertinent facts are undisputed; the only issue at trial was whether defendant was legally insane at the time he committed the crimes. Because they are not in dispute, we take our statement of the pertinent facts from the parties' opening briefs.

In the morning on September 17, 2006, defendant walked across the street from the mobilehome where his mother lived, to the mobilehome where the victim lived. Defendant was holding an ax handle in his right hand as he approached the victim, 75-year-old Anoya Shamon, and his son, Marcil Youkhana, who were sitting outside Shamon's mobilehome on lawn chairs. When he got close enough, defendant raised the ax handle and swung it at Shamon hitting him on the left side of the head. Shamon fell from the chair to the ground. Defendant just laughed when Youkhana asked why defendant had hit his father. As he lay on the ground, blood flowed from the wound in Shamon's head. Youkhana tried to get the ax handle from defendant. Defendant hit Youkhana in the mouth with the ax handle during the struggle. Ultimately, defendant walked back across the street. He sat on the hood of his mother's car and laughed.

Officer Kenneth Edwards of the San Bernardino Police Department responded to the call reporting the assault. When he arrived at the scene, Officer Edwards parked his patrol car and got out of the vehicle. Defendant was about 20 feet away, standing in front of his mother's mobilehome, holding a hammer in his hand. Officer Edwards directed defendant to drop the hammer. Defendant threw the hammer down and ran at Officer Edwards yelling, "Fuck you, Pig." When he got within about two feet of the officer, defendant pulled back his clenched right fist, as if he intended to punch Officer Edwards. The officer stepped aside, grabbed defendant by the shoulder, and threw him to the ground. Defendant struggled when Officer Edwards tried to handcuff him. He repeatedly threw his head back in order to hit Officer Edwards in the forehead. When

Youkhana tried to help the officer, defendant bit Youkhana in the left forearm.

Eventually, Officer Edwards subdued and handcuffed defendant.

Paramedics took Mr. Shamon to a hospital where he died, five weeks later, from the injury to his head. The blow defendant inflicted fractured Shamon's skull. The force of that blow caused subdural and intracerebral hemorrhages, which resulted in damage to Shamon's brain. The brain damage caused Shamon's death.

In his defense, defendant offered evidence to show that at the time he committed the crimes he suffered from severe mental illness, which one expert described as schizoaffective disorder—a combination of bipolar mood disorder and schizophrenia thought disorder. Another expert described defendant's mental illness as schizophrenia disorganized type, which involves hallucinations, delusions, disorganized and unusual thoughts and behavior, and inappropriate affect or emotional response. In the guilt phase, defendant argued, as a result of his mental illness, that he did not form the mental state necessary to commit the alleged crimes. Defendant also presented evidence to show that he was legally insane and, therefore, not guilty by reason of insanity.

DISCUSSION

1.

SUA SPONTE JURY INSTRUCTION

As set out above, defendant contends the trial court had a sua sponte duty to give a so-called *Dewberry*¹ instruction on the effect of reasonable doubt in deciding whether he

¹ *People v. Dewberry* (1959) 51 Cal.2d 548 (*Dewberry*).

was guilty of the greater crime of murder or the lesser included crime of involuntary manslaughter and, therefore, the trial court should have given CALJIC No. 8.72, which instructs that if the jury unanimously agrees the killing is unlawful but they have a reasonable doubt whether the crime is murder or manslaughter, they have to give defendant the benefit of that doubt and find him guilty of manslaughter. We do not share defendant's view.

We begin our analysis with the established principle that the trial court must instruct the jury on the general principles of law applicable to the case but need not use any particular form as long as the instructions are complete and correct. (*People v. Roberge* (2003) 29 Cal.4th 979, 988; *People v. Fiu* (2008) 165 Cal.App.4th 360, 370.) We review a claim of instructional error to determine “whether it is reasonably likely that the trial court’s instructions caused the jury to misapply the law.” (*People v. Carrington* (2009) 47 Cal.4th 145, 192.) “The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant’s rights.” (*People v. Smith* (2008) 168 Cal.App.4th 7, 13.) Further, we presume jurors are sufficiently intelligent to understand and follow the trial court’s instructions. (*People v. Butler* (2009) 46 Cal.4th 847, 873.) Finally, in reviewing the trial court’s instructions to determine whether they are correct and sufficient, we consider the entire charge to the jury. (*People v. Carrington*, at p. 192.)

This court discussed *Dewberry* in *People v. Crone* (1997) 54 Cal.App.4th 71 (*Crone*) (Fourth Dist., Div. Two), a case in which the defendant was charged with both the greater offense (possession of methamphetamine for sale) and the lesser offense (simple possession of methamphetamine). At the outset of our discussion, we noted that the *Dewberry* trial court had instructed the jury on the effect of reasonable doubt in general, i.e., if jurors had a reasonable doubt about the defendant's guilt they had to acquit him; on the effect of reasonable doubt in deciding the degree of murder, i.e., if they had a reasonable doubt whether the defendant was guilty of first or second degree murder they could only convict him of second degree murder; and the effect of reasonable doubt on deciding between the lesser included offense of manslaughter and justifiable homicide, i.e., if they had a reasonable doubt whether the crime was manslaughter or justifiable homicide they had to acquit the defendant. (*Crone*, at p. 75, citing *Dewberry*, *supra*, 51 Cal.2d at p. 554.)

As we also observed, the trial court in *Dewberry* refused the defendant's request to instruct the jury that if they had a reasonable doubt whether the defendant was guilty of murder or manslaughter it had to find him guilty of manslaughter. (*Crone*, *supra*, 54 Cal.App.4th at p. 75.) The Supreme Court held in *Dewberry* that it was error not to give the requested instruction. In doing so, it cited the general rule that “[W]hen the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed they must find the defendant guilty only of the lesser

offense.’ [Citation.]” (*Crone*, at pp. 75-76.) Since *Dewberry*, it has “been held that in any case involving a lesser included offense, the trial court has a duty to give a *Dewberry* instruction sua sponte. [Citations.]” (*Crone*, at p. 76.) “When the defendant is charged with a greater offense which has one or more *uncharged* lesser included offenses, the trial court ordinarily will give CALJIC No. 17.10, which satisfies the requirement of *Dewberry*. [Citations.]” (*Ibid.*, fn. omitted.) “[T]he pertinent portion of CALJIC No. 17.10 (1989 rev.) states, ‘If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, you may nevertheless convict [him][her] of any lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime.’” (*Id.* at p. 76, fn. 1.)

In this case, the trial court gave CALCRIM jury instructions, rather than CALJIC instructions. The trial court instructed the jury according to CALCRIM No. 220 on the prosecutor’s duty to prove defendant’s guilt beyond a reasonable doubt. The trial court also instructed the jury on the effect of reasonable doubt with regard to the charged crime of first degree murder by giving CALCRIM No. 521, which states, “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 also instructed the jury according to CALCRIM No. 580 that, “When a person commits an unlawful killing but does not intend to kill and does not act with conscious disregard for human life, the crime is involuntary manslaughter. [¶] The

difference between murder and involuntary manslaughter depends on whether the person was aware of the risk to life that his or her actions created and consciously disregarded that risk. An unlawful killing caused by a willful act done with full knowledge and awareness that the person is endangering the life of another, and done in conscious disregard of that risk, is murder. An unlawful killing resulting from a willful act committed without intent to kill and without conscious disregard of the risk to human life, as a result of the defendant's mental impairment, is involuntary manslaughter. [¶] If the People cannot prove beyond a reasonable doubt the defendant willfully committed an unlawful killing, you must find him not guilty."

Finally, as pertinent to this issue, the trial court instructed the jury according to CALCRIM No. 641 that they will be given verdict forms for guilty of first degree murder, guilty of second degree murder, guilty of involuntary manslaughter, and not guilty. "Follow these directions before you give me any completed and signed, final verdict form. You will complete and sign only one verdict form. Return the unused verdict forms to me, unsigned. [¶] 1. If all of you agree that the People have proved beyond a reasonable doubt that the defendant is guilty of first degree murder, complete and sign that verdict form. Do not complete or sign any other verdict forms. [¶] 2. If all of you cannot agree whether the defendant is guilty of first degree murder, inform me only that you cannot reach an agreement and do not complete or sign any verdict forms. [¶] 3. If all of you agree that 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. Do not complete or sign any other verdict forms.

[¶] 4. If all of you agree that the defendant is not guilty of first degree murder but cannot agree whether the defendant is guilty of second degree murder, inform me that you cannot reach agreement. Do not complete or sign any verdict forms. [¶] 5. If all of you agree that the defendant is not guilty of first degree murder and not guilty of second degree murder, but also agree that the defendant is guilty of involuntary manslaughter, complete and sign the form for guilty of involuntary manslaughter. Do not complete or sign any other verdict forms. [¶] 6. If all of you agree that the defendant is not guilty of first degree murder and not guilty of second degree murder, but cannot agree whether the defendant is guilty of involuntary manslaughter, inform me that you cannot reach agreement. Do not complete or sign any verdict forms. [¶] 7. If all of you agree that the defendant is not guilty of first degree murder, not guilty of second degree murder, and not guilty of involuntary manslaughter, complete and sign the verdict form for not guilty. Do not complete or sign any other verdict forms.”²

Although the instructions do not use the term reasonable doubt, that concept is implicit from the instructions viewed as a whole. In particular, the trial court instructed the jury that they could only find defendant guilty if the prosecution met its burden to prove guilt beyond a reasonable doubt. From that instruction, the jury would necessarily understand the reverse, namely that if they had a reasonable doubt about defendant’s guilt

² The Bench Notes for CALCRIM No. 641 indicate the instruction is intended to satisfy the *Dewberry* requirement.

on a particular charge they had to find defendant not guilty of that charge. When we consider the instructions as a whole, we conclude they properly informed the jury that if they decided defendant unlawfully killed the victim but had a reasonable doubt about whether the crime was murder or involuntary manslaughter because defendant did not form the requisite intent due to his mental impairment, the jury had to find defendant not guilty of murder, and thereby give him the benefit of that reasonable doubt. That is all *Dewberry* requires. (See *Dewberry, supra*, 51 Cal.2d at p. 555 [“when the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense”].)

2.

AMENDMENT AFTER JURY DISCHARGED

The trial court declared a mistrial and discharged the jury after the jurors were unable to reach a verdict in the sanity phase of the trial. Defendant had previously waived his right under Penal Code section 1025³ to have a jury determine the truth of the allegations that in 1997 he had been convicted of burglary, a serious or violent felony within the meaning of the three strikes law (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)), and that in 2004 he had been convicted of elder abuse and served a term in prison or

³ All further statutory references will be to the Penal Code.

jail within the meaning of section 667.5, subdivision (b). At the start of the court trial on defendant's prior convictions, the trial court noted that the prosecution had not alleged defendant's 1997 burglary conviction as a prior serious felony under section 667, subdivision (a), a so-called five-year or "nickel" prior. The prosecutor explained his belief that it was too late to amend the information to allege the five-year prior. The trial court disagreed and permitted the noted amendment over defendant's objection that it was untimely. The trial court then found the allegations true.⁴

Defendant contends the trial court acted in excess of its jurisdiction when it permitted the prosecutor to amend the information after the jury had been discharged. To support his claim, defendant cites *People v. Tindall* (2000) 24 Cal.4th 767 (*Tindall*), in which the Supreme Court held that after the jury that decided guilt is discharged, the trial court may not permit the prosecution to amend the information to add new prior conviction allegations unless the defendant waives or forfeits the right under section 1025, subdivision (b), to have the same jury decide both guilt and the truth of the prior conviction. (*Tindall*, at p. 772.)

⁴ The trial court had second thoughts and gave the parties additional time to submit authority on whether the amendment was appropriate. Consequently, the trial court found the alleged prior convictions to be true but purportedly withheld ruling on the section 667, subdivision (a), five-year prior until the parties briefed the timeliness issue. If the parties actually submitted additional authority or argument on that issue, we cannot find it in the record on appeal. In any event, at defendant's sentencing hearing, the trial court imposed the five-year prison term on the section 667, subdivision (a), allegation, without any objection or additional discussion.

In *Tindall*, after the jury had reached verdicts on the charges and had been discharged, the trial court permitted the prosecution to amend the information to allege three recently discovered robbery convictions as “strikes.” Before the amendment, the information had alleged only that the defendant had previously been convicted of two drug crimes, which made him statutorily ineligible for probation, and that he had served a prior term in prison within the meaning of section 667.5, subdivision (b), which also made him ineligible for probation. (*Tindall, supra*, 24 Cal.4th at p. 770.)

The Attorney General argues *Tindall* is distinguishable because in this case the prosecution had alleged defendant’s burglary conviction as a strike, but had not alleged that conviction as a five-year prior under section 667, subdivision (a). Therefore, the amendment did not allege a new prior conviction; it alleged only additional punishment based on a prior conviction alleged in the information as a strike. We agree; *Tindall* is inapposite.

In our view, the issue in this case is whether the trial court had discretion to permit a postverdict amendment of the pleadings to include the section 667, subdivision (a), enhancement. The Supreme Court addressed that issue in *People v. Valladoli* (1996) 13

Cal.4th 590, in which it held section 969a⁵ authorizes a trial court, in its discretion, to grant the prosecution leave to amend an information to include prior felony conviction allegations up until sentencing. (*Valladoli*, at p. 603.) The court identified five factors a trial court should consider in exercising that discretion: “(i) the reason for the late amendment, (ii) whether the defendant is surprised by the belated attempt to amend, (iii) whether the prosecution’s initial failure to allege the prior convictions affected the defendant’s decisions during plea bargaining, if any, (iv) whether other prior felony convictions had been charged originally, and (v) whether the jury has already been discharged (§ 1025).” (*Id.* at pp. 607-608, fn. omitted.)

In this case, the first factor militates against permitting the amendment. The prosecutor did not explain why he had not alleged the five-year prior, or why he had not discovered the omission before the jury was discharged. In fact, the record suggests, if the trial court had not raised the issue, the prosecutor would not have known or been concerned about the oversight. Because defendant objected to the amendment and the prosecutor had no explanation for the oversight or the belated amendment, we must

⁵ Section 969a states, “Whenever it shall be discovered that a pending indictment or information does not charge all prior felonies of which the defendant has been convicted either in this State or elsewhere, said indictment or information may be forthwith amended to charge such prior conviction or convictions, and if such amendment is made it shall be made upon order of the court, and no action of the grand jury (in the case of an indictment) shall be necessary. Defendant shall promptly be arraigned on such information or indictment as amended and be required to plead thereto.”

conclude the trial court abused its discretion in granting leave to amend the information to include the section 667, subdivision (a), allegation.

DISPOSITION

The sentence is modified and the judgment amended by striking the five-year sentence imposed under section 667, subdivision (a), on count 1. Otherwise, the judgment is affirmed. The trial court is directed to prepare and forward to the appropriate agencies an amended abstract of judgment that reflects defendant's modified sentence.

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McKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.

CODRINGTON
J.