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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.

FERNANDO BECERRA,

Defendant and Appellant.

E061398

(Super.Ct.No. SWF1201058)

OPINION

APPEAL from the Superior Court of Riverside County. Albert J. Wojcik, Judge.

Affirmed with directions.

Sharon G. Wrubel, under appointment by the Court of Appeal, for Defendant and Respondent.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Scott C. Taylor, and Warren J. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION¹

In an exchange of gunfire between rival gang members, Ruben Alfaro, age 14, was shot and killed. A jury convicted defendant Fernando Becerra of first degree murder (§ 187, subd. (a)), with the special circumstances of discharging a firearm from a motor vehicle with the intent to inflict death and of intentionally killing to further criminal street gang activities. (§ 190.2, subd. (a)(21)-(22).) The court sentenced defendant to life imprisonment without parole, plus 25 years to life under section 12022.53, subdivisions (d) and (e).

On appeal, defendant argues the trial court committed several kinds of instructional error, primarily related to the issue of specific intent for aiding and abetting liability, and prohibited relevant character evidence. The People concede some errors but argue any error was harmless. We reject defendant's contentions and affirm the judgment.

II

STATEMENT OF FACTS

A. The Incident at Depot Deli

Defendant and his brother, Michael DeLaCruz, were members of the Hemet Trece gang. Maria Lemus, defendant's accomplice, was DeLaCruz's girlfriend and his son's

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

mother. Stephanie Marquez was the mother of defendant's child. Also involved were Danny, Diana, and Gilbert Villanueva.² Everyone knew Alfaro, the victim.

On the afternoon of May 31, 2010, defendant, DeLaCruz, and Lemus had attended a child's birthday party. By day's end, defendant and his brother were intoxicated. Later, around 10:30 p.m., Lemus drove a Ford Explorer to the Depot Deli on Florida Avenue in Hemet. The passengers were defendant and Danny, Diana, and Gilbert. DeLaCruz stayed behind at the Villanueva residence.

Danny and Gilbert entered the Depot Deli to buy beer while defendant, Lemus, and Diana stayed in the Explorer. A Toyota containing about five or six male passengers pulled up near the Explorer. Alfaro got out of the car and greeted the Explorer occupants, asking, "what's up," in a friendly way. Some of the Toyota passengers entered the Depot Deli. The others approached the Explorer passengers and asked "[w]here are you from," meaning what gang were they from. Defendant responded, "Hemet 13," and an argument ensued about Marquez with the Toyota passengers refusing to shake hands with defendant.

After Danny and Gilbert returned, both groups got back in their cars. When Lemus tried to drive away, the Toyota blocked her car. Someone exited the Toyota and punched defendant through the Explorer's open window. The Toyota occupants threw cans full of beer, hitting the Explorer and splashing Lemus with liquid. To escape,

² When necessary, we use first names for ease of reference.

Lemus had to drive over the curb. Both defendant and Lemus were angry. Lemus drove to the 100 block of North Alessandro where Marquez lived. While he remained in the car, defendant and Marquez had an argument but there were no gunshots at that point.

Marquez's preliminary hearing testimony was read into the record. She offered a different account about what had happened. Marquez denied that defendant argued with her. Instead, she said defendant had left the Explorer and yelled, "Fuck you guys. I'll be back. Watch, I'll be back." Defendant "threw out Hemet Trece, started gang banging," and then the Explorer drove away. A person called "Troubles" ran up to the Explorer and fired a shot. The people with Marquez armed and positioned themselves, anticipating defendant would return.

B. The Shooting by Michael DeLaCruz

Next Lemus drove to the Villanueva residence where defendant and DeLaCruz discussed retaliation. Lemus agreed to drive them, Diana, and Gilbert back to North Alessandro, where a group of 15 to 20 people stood yelling in the middle of the block. At some point, as Lemus drove by defendant proclaimed "Shoot that shit" and "Varrio Hemet Trece." Lemus heard two bangs. From inside the car, DeLaCruz fired a shotgun.

According to David McVade, right before the shooting, he was walking from the Depot Deli and was about to turn on North Alessandro Street, when an SUV drove by with the rear passenger door open. McVade heard, "What's up, esse?" and saw DeLaCruz holding a shotgun with both his hands and facing outside the vehicle. It was

dark and the car occupants were yelling. After the car turned right, McVade heard a shot and then screaming, and the words, “They shot him.”

According to Marquez, the Explorer returned to North Alessandro less than 10 minutes after it had left, with Lemus still driving. The vehicle pulled up with its lights out and a door open. DeLaCruz was shooting while defendant sat in the vehicle. Alfaro was standing two or three feet in front of Marquez. She said DeLaCruz aimed the shotgun at Alfaro. Later defendant threatened Marquez about testifying.

C. Cause of Death and Ballistics Evidence

Alfaro was shot to death on a driveway on North Alessandro. The cause of death was a shotgun wound to his right side. He had nine entrance wounds.

The Explorer was struck by birdshot fired from about 30 to 40 feet away. The vehicle had several indentations near the right rear tail light, continuing along the right passenger side. When DeLaCruz was arrested a few days after the shooting, he had three defects on his left upper arm and similar defects on his left hand, consistent with being hit with birdshot pellets. Both shots, from inside or outside at the Explorer, were fired within a second of each other.

D. Defendant's Statements

In a recorded interview, defendant stated that someone had confronted Lemus at the Depot Deli. There was no fight but a person tried to punch defendant through the car window and landed a full blow as the Explorer was leaving. Eventually, defendant, DeLaCruz, Lemus, Diana, and Gilbert returned to the Depot Deli and drove down

Alessandro. Defendant was drunk and only remembered that someone started shooting and DeLaCruz was shot. Defendant did not drive down Alessandro intending to confront anyone. Defendant did not know his brother had a gun. Defendant heard two or three shots but he claimed DeLaCruz did not shoot a gun and defendant did not associate with Trece.

E. Gang Evidence

A gang expert testified that Hemet Trece is the oldest street gang in Hemet. Defendant and DeLaCruz were active members of Hemet Trece in May 2010. The gang's primary activities include assaults with firearms and drug dealing. Respect in gang culture is paramount and is earned through fear. Asking "where you from" is a challenge, which typically results in a fight or flight. Gang members commonly work together as a team. If a gang member is not respected and he does not retaliate with violence, his reputation is damaged within the gang. Yelling out or "claim[ing] a gang" after violence shows pride and intimidates others. Perceived disrespect leads to arming to retaliate.

Based on these facts, yelling out "Hemet Trece" indicated this was a gang shooting and that any witnesses should not come forward. In the expert's opinion, killing Alfaro benefited Hemet Trece.

F. Defense Case

Lemus gave a statement to an investigator with the district attorney's office in which she said that, when she drove to Alessandro the second time and before shots were

fired, she heard something and looked back to see DeLaCruz holding a shotgun in his hand. DeLaCruz said to her, “Don’t trip, I’m only going to scare them.” Defendant said, “Shoot that shit,” before DeLaCruz fired the gun, and both defendant and DeLaCruz said, “Varrio Hemet Trece” afterward. Lemus told a defense investigator she was not 100 percent sure defendant said, “Shoot that shit,” but it could have been DeLaCruz or Gilbert or any of the gang members who were outside her vehicle.

Marquez told an interviewer that the first time the SUV drove by on Alessandro, the SUV’s door was open, and the interior light went on, and defendant exited the vehicle, yelled out gang challenges and said he would be back. After the SUV left, Troubles armed himself with a large gun and hid behind a tree. “Little Man,” who was armed with a shotgun, joined Troubles. The second time Marquez saw the SUV, a door opened and an interior light was on. There were gunshots and muzzle flashes from the SUV’s right rear door, and she saw three shots fired from the SUV. She also saw gunshots come from the area where Troubles and Little Man were hiding behind the tree. She believed she heard approximately six gunshots in total. Before shots were fired from the SUV, Alfaro left his hiding place. Marquez testified at DeLaCruz’s preliminary hearing that the second time the SUV was there, crossfire occurred for five to 10 seconds.

III

INSTRUCTION ON INTENT TO KILL

The parties agree that the court gave the wrong instruction on the natural and probable consequences doctrine, in violation of *People v. Chiu* (2014) 59 Cal.4th 155.

The People argue the error was harmless beyond a reasonable doubt because the jury sustained the special circumstance allegation of drive-by murder under section 190.2, subdivision (a)(21). Defendant counters that, although a special circumstance finding would usually serve to convict a defendant of first degree drive-by murder, in defendant's case there was additional instructional error regarding the liability of an aider and abettor for the special circumstance.

First degree drive-by murder requires a finding of specific intent to kill. (*People v. Chavez* (2004) 118 Cal.App.4th 379, 385-386.) Defendant was prosecuted solely as an aider and abettor to the murder. An aider and abettor must know of the perpetrator's unlawful purpose and intend to facilitate the crime: "There must be proof that the accused [aider and abettor] not only aided the actor but at the same time shared the criminal intent [citation]." (*Pinell v. Superior Court* (1965) 232 Cal.App.2d 284, 287.) The prosecution was required to prove defendant aided and abetted the shooting with specific intent to kill to convict defendant of first degree drive-by murder.

The court gave a number of instructions related to aiding and abetting liability and the element of intent. CALJIC No. 3.01 states that an aider and abettor must act "[w]ith the intent or purpose of committing or encouraging or facilitating the commission of the crime." CALJIC No. 8.25.1 states drive-by murder is perpetrated "when the perpetrator specifically intended to inflict death" and the "defendant specifically intended to kill a human being."

With regard to special circumstances, the court instructed the jury based on CALJIC No. 8.80.1: “If you find that a defendant was not the actual killer of a human being . . . you cannot find the special circumstance to be true as to that defendant unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill aided, abetted, counseled, commanded, induced, solicited, requested, or assisted any actor in the commission of the murder in the first degree, or *with reckless indifference to human life* and as a major participant, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of the crime . . . which resulted in the death of a human being. [Emphasis added.]” Additionally, based on CALJIC No. 8.81.21, the perpetrator “specifically intended to inflict death” and, based on CALJIC No. 8.81.22, “defendant intentionally killed the victim” as the member of a street gang.

Defendant focuses on the phrase “with reckless indifference to human life” and argues the jury was wrongly told it could convict defendant of aiding and abetting first degree murder based on reckless indifference to human life rather than specific intent to kill. However, the jury made a special finding that defendant murdered Alfaro by aiding and abetting in a shooting from a vehicle “with the intent to inflict death.” Therefore, the jury found there was a specific intent to commit murder and the jury was not misled into basing its finding on the natural and probable consequences doctrine or on a theory of reckless indifference. The record shows the verdict was based on a valid legal ground. (*People v. Chiu, supra*, 59 Cal.4th at p. 167; see *People v. Guiton* (1993) 4 Cal.4th 1116, 1129.)

Furthermore, the evidence that defendant aided and abetted first degree murder was overwhelming. After the initial confrontation at the Depot Deli, defendant confronted the group at North Alessandro and issued a gang threat. He enlisted his brother as the shooter and returned to the scene where he incited his brother to fire on the people in the street, killing Alfaro. Any instructional error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

IV

INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE

Defendant next claims the trial court incorrectly instructed the jury about circumstantial evidence by not giving CALJIC No. 2.01 and giving CALJIC No. 2.02. We conclude the latter was the appropriate instruction because the ultimate issue at trial was defendant's specific intent when he aided and abetted in the murder which was established by circumstantial evidence.

Based on CALJIC No. 2.02, the court instructed the jury: "The specific intent with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find the defendant guilty of the crime charged or find the allegations to be true, unless the proved circumstances are not only, (1), consistent with the theory that the defendant had the required specific intent but, (2), cannot be reconciled with any other rational conclusion. [¶] Also, if the evidence as to a specific intent permits two reasonable interpretations, one of which points to the existence of the specific intent and the other to its absence, you must adopt that

interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to the specific intent appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.”

A trial court is required to instruct on the general principles of law. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) The trial court did not give CALJIC No. 2.01, which generally instructs the jury about circumstantial evidence as it applies to all matters, including specific intent or mental state. CALJIC No. 2.01 must be given sua sponte on those occasions when it is applicable. (*People v. Wiley* (1976) 18 Cal.3d 162, 174; *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49.) The comment to CALJIC No. 2.01 provides that it is applicable only when circumstantial evidence is “substantially relied upon for proof of guilt.” (*People v. Williams* (1984) 162 Cal.App.3d 869, 874, 876; *People v. Anderson* (2001) 25 Cal.4th 543, 582.)

CALJIC Nos. 2.01 and 2.02 are similar but CALJIC No. 2.01 is more inclusive. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1142.) As explained in *People v. Honig* (1996) 48 Cal.App.4th 289, 341: “CALJIC No. 2.02 was designed to be used in place of CALJIC No. 2.01 when the defendant’s specific intent or mental state is the only element of the offense that rests substantially or entirely on circumstantial evidence. (See Use Note to CALJIC No. 2.02.) It should not be given where the evidence is either direct or, if circumstantial, is not equally consistent with a conclusion of innocence. (*People v. Heishman* (1988) 45 Cal.3d 147, 167; *People v. Wiley*[, *supra*, 18 Cal.3d at pp.] 174-

176.) Furthermore, it should not be given simply because the incriminating evidence is indirect, but is appropriate only when proof of guilt depends upon a pattern of incriminating circumstances. [Citations.]” The Use Notes state that the two instructions “should never be given together. . . . [T]hey are alternative instructions. If the only circumstantial evidence relates to specific intent or mental state, CALJIC 2.02 should be given. If the circumstantial evidence relates to other matters, or relates to other matters as well as specific intent or mental state, CALJIC 2.01 should be given and not CALJIC 2.02. [Citations.]”

DeLaCruz indisputably was the shooter. The only element premised primarily upon circumstantial evidence was the specific intent necessary to establish that defendant was aiding and abetting the murder and attempting to further the interests of a criminal street gang, which was appropriately covered by CALJIC No. 2.02. CALJIC No. 2.02 was the correct instruction.

Furthermore, any instructional error was harmless. Although CALJIC No. 2.01 would have informed the jurors of the reasonable theory of innocence (*People v. Lewis* (1963) 217 Cal.App.2d 246, 258), the same principle was presented by the instructions on the standard of beyond a reasonable doubt, believability of witnesses, willfully false witnesses, weighing conflicting testimony, and opinion testimony of lay witnesses. Based on all of these instructions, including the general circumstantial evidence instruction, the jury was fairly advised how to evaluate circumstantial evidence and was instructed to draw reasonable inferences and weigh the competing inferences from the

evidence. There was no plausible possibility that the jury would have been misled by CALJIC No. 2.02. The jury was also instructed that it could use circumstantial evidence to prove the existence or nonexistence of any fact at issue in the trial, which would necessarily include deliberation and premeditation. For all of these reasons, it is not reasonably probable that defendant would have achieved a better result had CALJIC No. 2.01 been given rather than CALJIC No. 2.02. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Lasko* (2000) 23 Cal.4th 101, 111.)

Furthermore, no federal constitutional right to a fair trial was implicated. The common law right to a circumstantial evidence instruction does not rise to the level of a liberty interest protected by the due process clause. (*People v. Breverman, supra*, 19 Cal.4th at pp. 170-172, citing *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.) As already explained, any federal constitutional error would be harmless.

V

INSTRUCTION ON VOLUNTARY INTOXICATION

Next defendant contends his trial counsel rendered ineffective assistance of counsel (IAC) by failing to request a voluntary intoxication instruction based on CALJIC No. 4.21.2 because there was substantial evidence that he was intoxicated at the time of the shooting, and the relevant instruction would have informed the jury that voluntary intoxication was relevant to the determination of his mental state or intent. The People counter that the defense attorney likely did not request such an instruction because the evidence did not warrant it and, further, no prejudice resulted.

The evidence showed that defendant and his brother had been drinking all day. CALJIC No. 4.21.2 provides: “In deciding whether a defendant is guilty as an aider and abettor, you may consider evidence of voluntary intoxication in determining whether a defendant tried as an aider and abettor had the required mental state.”

When a criminal defendant complains that trial counsel was ineffective, the defendant must first show the legal representation fell below an objective standard of reasonableness. (*Strickland v. Washington* (1984) 466 U.S. 668, 688.) The defendant must also demonstrate prejudice. (*People v. Ledesma* (1987) 43 Cal.3d 171, 217.) Prejudice exists only when it is reasonably probable that a result more favorable to the defendant would have occurred absent the challenged act or omission. (*Strickland*, at p. 694; *Ledesma*, at pp. 217-218.) Prejudice must be proved as a “demonstrable reality,” not simply speculation as to the effect of the errors or omissions of counsel. (*People v. Williams* (1988) 44 Cal.3d 883, 937.) The appellate court will not apply judicial hindsight to trial tactics. (*People v. Kelly* (1992) 1 Cal.4th 495, 520.)

Here defendant has not shown his trial counsel was deficient. A defendant is not entitled to a voluntary intoxication instruction absent substantial evidence that the defendant was intoxicated and that the intoxication affected the defendant’s “actual formation of specific intent.” (*People v. Williams* (1997) 16 Cal.4th 635, 677.) Evidence of intoxication can be established by eyewitness testimony, expert testimony, evidence of the amount of consumption, and common knowledge. (*People v. Kaurish* (1990) 52 Cal.3d 648, 696.) Lemus testified that defendant had been drinking and was

intoxicated after the afternoon birthday party. Lemus did not testify about defendant's condition at the time of the murder or its effect on his specific intent. (*Williams*, at p. 677.) In defendant's police interview, he stated that he could not remember anything because he was "kind of drunk."

In *Williams*, a jury convicted defendant of four counts of first degree murder. On appeal, Williams claimed the trial court erred in refusing his request for an instruction on voluntary intoxication as a defense to a specific intent crime. (*People v. Williams, supra*, 16 Cal.4th at p. 677.) A witness testified that Williams was "probably spaced out" on the morning of the killings and Williams told police in a recorded interview that he was "doped up" and "smokin' pretty tough then" at the time of the killings. (*Id.* at p. 676.)

The Supreme Court rejected Williams's claim of instructional error and stated:

"Assuming this scant evidence of defendant's voluntary intoxication would qualify as 'substantial,' there was no evidence at all that voluntary intoxication had any effect on defendant's ability to formulate intent." (*Id.* at pp. 677-678.)

No evidence was presented that defendant was so intoxicated that it affected his ability to formulate the specific intent to kill. Furthermore, his actions show he was lucid enough to organize a response to a gang confrontation by enlisting Lemus and his brother's assistance in a drive-by shooting. Accordingly, there was no justification for giving the voluntary intoxication instruction, and any request by trial counsel to do so would have been futile. (*People v. Solomon (2010)* 49 Cal.4th 792, 843.) Defendant

cannot demonstrate deficient performance because his trial counsel was not required to make an unmeritorious request for a voluntary intoxication instruction.

It is also not reasonably probable defendant would have received a more favorable result absent the omission because there was so little evidence that defendant was extremely intoxicated at the time of the murder. Defendant was not a passive aider and abettor but the principal instigator of the entire sequence of events leading to Alfaro's murder. No reasonable jury could have found that defendant's voluntary intoxication interfered with his ability to form the specific intent necessary to aid and abet. Accordingly, counsel was not ineffective for not requesting the instruction. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1037-1038.)

VI

LEMUS'S OPINION OF MARQUEZ'S HONESTY

During cross-examination of Lemus, trial counsel asked whether Lemus had told a defense investigator that Marquez "lies a lot." The trial court sustained the prosecutor's relevance objection and instructed the jury to disregard Lemus's response. Defendant maintains the trial court abused its discretion by excluding as irrelevant Lemus's opinion of Marquez's honesty because it could serve to impeach Marquez's credibility. We agree Lemus's opinion was irrelevant and involved inadmissible hearsay, and the trial court did not exercise its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 193.)

On appeal, a trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. (*People v. Brown* (2003) 31 Cal.4th 518, 547.)

Evidence Code section 352 states: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." *People v. Doolin* (2009) 45 Cal.4th 390, 439, explains: "The code speaks in terms of *undue* prejudice. Unless the dangers of undue prejudice, confusion, or time consumption "substantially outweigh" the probative value of relevant evidence, a section 352 objection should fail. [Citation.] "The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging." [Citation.] [Citation.]"

When trial counsel attempted to elicit information about Marquez's reputation for truthfulness, it was irrelevant. The inquiry on cross-examination was outside the scope of direct examination, which was focused on Lemus's version of the sequence of events on the day of the murder. Marquez had not testified yet. The trial court could reasonably conclude that Lemus's testimony about whether Marquez "lied a lot" had negligible probative value at the time the question was posed.

Furthermore, Lemus's response was inadmissible hearsay. Hearsay evidence is "evidence of a statement that was made other than by a witness while testifying at the

hearing and that is offered to prove the truth of the matter stated.” (Evid. Code, § 1200, subd. (a).) Trial counsel’s question to Lemus called for a prior out-of-court statement offered to prove that Marquez was a liar. Such a statement was inadmissible hearsay. It cannot be said the trial court exceeded the bounds of reason by sustaining the prosecutor’s objection. Furthermore, by failing to make an offer of proof as to the relevance of the inquiry, trial counsel did not provide an adequate record for appellate review. (*People v. Foss* (2007) 155 Cal.App.4th 113, 127.)

Nor was defendant prejudiced. Even assuming the jury believed Lemus that Marquez was a liar and disbelieved Marquez’s testimony, Lemus’s testimony provided ample evidence that defendant had the specific intent to kill when he aided and abetted DeLaCruz. Furthermore, the trial court did not violate defendant’s constitutional rights by sustaining the evidentiary objection. (*People v. Abilez* (2007) 41 Cal.4th 472, 503; *People v. Gurule* (2002) 28 Cal.4th 557, 620; *People v. Cunningham, supra*, 25 Cal.4th at p. 999.)

VII

OTHER ARGUMENTS

There was no prejudicial error sufficient to constitute cumulative error. (*People v. Beeler* (1995) 9 Cal.4th 953, 994; *People v. Fernandez* (2013) 216 Cal.App.4th 540, 568.)

We agree the \$300 parole revocation fine was properly imposed because parole is possible in theory. (§ 1202.45, subd (a); *People v. Brasure* (2008) 42 Cal.4th 1037, 1075.)

We also agree the abstract of judgment should be amended to make the State Restitution Fund the correct payee of the restitution fine of \$8,004.

VIII

DISPOSITION

We affirm the judgment as corrected and order the trial court to forward a corrected copy of the abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

RAMIREZ
P. J.

MILLER
J.