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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ANGEL EDDY CRUZ,

Defendant and Appellant.

F062420

(Super. Ct. No. BF127436B)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Paul V. Carroll, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Jeffrey Grant, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Angel Eddy Cruz challenges his convictions for murder, second degree robbery, and active participation in a criminal street gang on the grounds of instructional error and evidentiary error. We conclude any alleged instructional error was harmless. On the claim of evidentiary error, Cruz's objection was untimely. Therefore, we will affirm the judgment.

### **FACTUAL AND PROCEDURAL SUMMARY**

We summarize only those facts that are relevant to the issues raised in this appeal. On April 5, 2009, Cruz and his girlfriend Jennifer Hidalgo hosted a barbeque at their apartment, which lasted from about 2:00 p.m. to 9:30 p.m. After the barbeque ended, Jerry Mendoza and Sarah Luna came by the apartment. Cruz and Mendoza began drinking beer and smoking marijuana.

About 12:25 a.m. on April 6, Hidalgo's cell phone was used to exchange phone calls and text messages with Gilbert Sanchez, a drug dealer. Fourteen calls were exchanged between Hidalgo's and Sanchez's cell phones between 12:25 a.m. and 1:25 a.m. The text messages indicated Sanchez was coming to meet the person sending messages from Hidalgo's cell phone. The last text message from Sanchez's cell phone was at 1:14 a.m.

Sanchez sold marijuana, which he packaged in glass jars with distinctive gold lids. Sanchez arrived at an agreed-upon location near Cruz's apartment around 1:30 a.m. Mendoza and Cruz approached Sanchez, who had exited his car. Mendoza began stabbing Sanchez with a knife; Cruz hit Sanchez in the head with a bat.

The noise awoke a nearby resident. The resident saw a man with a bat standing over a man on the ground. The man with the bat stated, "Don't mess with me, I will fucking kill you." Sanchez suffered 28 stab wounds and several blunt-force injuries to his head. The blunt-force injuries were not fatal. Sanchez ultimately died of multiple stab wounds a short time after the attack.

Cruz's apartment was searched by sheriff's deputies later that morning and a jar containing marijuana was found in a closet. The marijuana Cruz usually purchased was stored in bags. Hidalgo first noticed the jar of marijuana with a distinctive lid that morning. Cruz told Hidalgo the marijuana in the jar was worth about \$100 and that she should sell it.

Mendoza was arrested on April 6, 2009. At the time of his arrest, Mendoza had a folding knife in his pants pocket. Detective Adrian Olmos interviewed Mendoza. Mendoza stated that if someone said he had stabbed Sanchez, then it was true.

Cruz was charged with murder and several special allegations were alleged. He also was charged with second degree robbery, to which numerous enhancements were appended, and with the offense of active participation in a criminal street gang. A jury found Cruz guilty of all charges. The jury also found true all but one of the special allegations and enhancements.

Cruz was sentenced to a term of life in prison without the possibility of parole.

## **DISCUSSION**

Cruz makes two challenges to his murder conviction: (1) the trial court failed to instruct the jury on aiding and abetting liability in connection with the special circumstance allegation appended to the murder charge, and (2) abuse of discretion by the trial court in admitting cell phone records of text messages and calls between Sanchez and Hidalgo.

### **I. Instructional Issue**

After the jury retired to deliberate, the trial court stated, with both counsel present, that a discussion regarding jury instructions had taken place and issues regarding instructions on accomplice testimony and lesser included offenses to murder were resolved. At that point, the trial court asked defense counsel if there were any objections to any other jury instructions defense counsel wanted to make for the record; defense counsel responded, "No, your honor."

Concerning the special circumstance allegation, the trial court instructed the jury with modified versions of CALJIC Nos. 8.80.1 and 8.81.22. Cruz now argues the modified version of CALJIC No. 8.80.1 omitted essential language and constitutes error. Cruz contends the trial court erred by failing to instruct the jury on aiding and abetting liability in connection with the special circumstance allegation appended to the murder charge. He claims this error is prejudicial because Mendoza killed Sanchez and his (Cruz's) liability was only as an aider and abettor.

Assuming, without deciding, that the objection was preserved for appeal, Cruz's claim of prejudicial instructional error fails on the merits because any error was harmless. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Hagen* (1998) 19 Cal.4th 652, 671; cf. *Neder v. United States* (1999) 527 U.S. 1, 19.)

Cruz contends the instruction was erroneous because it instructed the jury it had to find "[t]he defendant intentionally killed the victim," which language applies to the actual killer. (*People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1085-1086.) Instead, Cruz contends he was not the actual killer and the jury should have been instructed on aider and abettor liability, in language from Penal Code section 190.2, subdivision (c), to the effect that "Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree ...."

We reject Cruz's contention of prejudicial error for two reasons. First, Cruz was liable as an actual killer, not an aider and abettor, even though he did not personally deliver the fatal stab wound. (*People v. Cook* (1998) 61 Cal.App.4th 1364, 1370-1371.) In *Cook*, the defendant was charged with the special circumstance of murder during a robbery. The defendant's companion was the one who actually took the item from the victim. The defendant raised instructional error on appeal, contending the trial court erred prejudicially in instructing the jury in language used for actual perpetrators, instead of language used to instruct on aider and abettor liability. The defendant argued he was

not liable as a perpetrator because he did not perform a key element of the robbery, namely, the taking. (*Id.* at p. 1368.) We held that if the defendant performed an element of the offense, then the jury need not be instructed on an aiding and abetting theory of liability, even if an accomplice performed other acts that completed the crime. (*Id.* at p. 1371.) Here, for example, Cruz did more than aid and abet by providing Mendoza with a knife; he actively participated in the killing of Sanchez by hitting him with a bat while Mendoza simultaneously stabbed the victim. That Cruz did not deliver the fatal blow makes him no less liable as a perpetrator than the defendant in *Cook* who did not commit all of the elements of the offense himself.

Furthermore, the prosecutor's reference to Cruz in closing argument as an aider and abettor is of no consequence. The jury is presumed to have relied on the trial court's instructions, not the attorneys' arguments, and to have understood and followed the trial court's instructions. (*People v. Morales* (2001) 25 Cal.4th 34, 47; *People v. Nguyen* (1995) 40 Cal.App.4th 28, 36-37.)

And, second, assuming for purposes of argument that Cruz is correct and he was liable only as an aider and abettor, the challenged instruction was harmless because it required the jury to find the defendant satisfied a higher standard—intentionally killed—rather than the standard Cruz is asserting—intent to kill and aid and abet. Error in instructing the jury on lesser forms of culpability is harmless when it can be shown that the jury properly resolved the question under the instructions, as given. (*People v. Hart* (2009) 176 Cal.App.4th 662, 673-674, disapproved on other grounds in *People v. Favor* (2012) 54 Cal.4th 868, 879.)

The case of *People v. Lee* (2003) 31 Cal.4th 613 explained that “the person guilty of attempted murder as an aider and abettor must intend to kill. [Citation.]” (*Id.* at p. 624; see *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1166 (*Samaniego*)). Here, the jury resolved the question of Cruz's mens rea (i.e., his intent to kill) adverse to him when it was instructed that it had to find Cruz *intentionally killed the victim* in order

to find the special circumstance true, and the jury thereafter found true the special circumstance.

For all of these reasons, we conclude “beyond a reasonable doubt that the jury verdict would have been the same absent the error,” assuming for purposes of argument there was any instructional error. (*Samaniego, supra*, 172 Cal.App.4th at p. 1165.) There does not exist a reasonable possibility that the jury would have returned a more favorable verdict if the phrase “intent to kill” had been included in the challenged instruction, along with aider and abettor language, instead of the language requiring the jury to find Cruz intentionally killed the victim. We, therefore, conclude the alleged instructional error was harmless.

## **II. Evidentiary Issue**

Cruz contends that admission of the phone records of text messages and calls between Hidalgo’s cell phone and Sanchez’s cell phone was error because the prosecution failed to establish a proper foundation for admission of the records. He also contends the error was prejudicial because it was strong evidence that Mendoza and he intended to rob Sanchez.

During the course of the investigation, Olmos obtained a court order and subpoena directed to MetroPCS, a telecommunications company, for all outgoing and incoming calls, stored text messages, and voicemails during a specified period of time to and from Sanchez’s cell phone number. MetroPCS responded to the subpoena and provided a CD containing the requested information, along with a declaration from its custodian of records verifying that the CD contained records of regularly conducted business activity, made at or near the occurrence of the event set forth, and that the records were made and kept in the ordinary course of business.

At trial, the People noted, “People’s [exhibit No.] 62 is records received from metroPCS pursuant to a search warrant.” The People went on to state:

“Within the records there’s also a certification of domestic records of regularly conducted activity, that they were done at or near the time of the occurrence and the information is kept in the course of regularly conducted business, as a regular practice of that business. It is signed and notarized by metroPCS. It is in the form of a CD.”

The People moved exhibit No. 62 into evidence; there was no objection from the defense.

Exhibit Nos. 63, 64, and 65 were paper printouts of the copies of the data contained on the CD. After Olmos answered a few preliminary questions about the information received from MetroPCS, defense counsel stated, “Can I have a continuing objection as to hearsay and foundation?” The trial court deemed the objection continuing and overruled it.

Evidence Code section 1271<sup>1</sup> provides that evidence of a writing made as the record of an act, condition, or event is not made inadmissible by the hearsay rule if the following four conditions are met: (1) the writing was made in the regular course of a business; (2) it was made at or near the time of the event; (3) the custodian or another qualified witness testifies about the writing’s identity and mode of preparation; and (4) “[t]he sources of information and method and time of preparation were such as to indicate its trustworthiness.” (*Id.*, subd. (d).) “The proponent of the evidence has the burden of establishing trustworthiness. [Citations.]” (*People v. Beeler* (1995) 9 Cal.4th 953, 978.)

It appears that Cruz failed to make a timely objection. Exhibit No. 62 was the affidavit and CD; no objection was raised to the affidavit that purported to establish the foundation for admission of the CD into evidence and thereby the data contained on the CD. At the point the objection was raised, the CD and affidavit already had been admitted into evidence, so the objection was untimely. The erroneous admission of evidence must be challenged in a timely manner and on the proper grounds or the issue is forfeited on appeal. (§ 353; *People v. Doolin* (2009) 45 Cal.4th 390, 438.)

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<sup>1</sup>All further statutory references are to the Evidence Code unless otherwise stated.

As for the printed information from the CD shown in Exhibit Nos. 63, 64, and 65, Cruz did not contend the exhibits were an inaccurate reflection of what was contained in the CD. A printed representation of computer information is presumed to be an accurate representation of the information it purports to represent. (§ 1552, subd. (a).) Cruz was free to cross-examine Olmos about the accuracy or reliability of the printout. (*People v. Nazary* (2010) 191 Cal.App.4th 727, 755.) Testimony regarding the accuracy, maintenance, and reliability of computer records is not required as a prerequisite to their admission. (*People v. Goldsmith* (2012) 203 Cal.App.4th 1515, 1526 (*Goldsmith*).)

Moreover, data generated by the computer itself, as opposed to human entry, is not hearsay. Photographs, videos, and data captured and reported by the computer, such as date, time, and location, are types of information generated by a machine, not a person, and are not statements constituting hearsay and do not require a hearsay exception to be admissible. (*Goldsmith, supra*, 203 Cal.App.4th at pp. 1526-1527.)

Regardless, we dispose of Cruz's contention that absent information on the mode of preparation of the recorded information on the CD, the information is not trustworthy. We disagree.

The custodian of records of MetroPCS signed a declaration stating the information was collected and maintained in the regular course of business at or near the time of the recorded incident. We recognize that testimony as to the specific "mode of . . . preparation" of the information is lacking. (§ 1271, subd. (c).) Nonetheless, in our view, that and the other requirements of section 1271 were met in the instant case. We consider it within the sphere of common knowledge that telecommunications providers track and record text messages, phone calls, and voicemail usage; they charge customers for these services and obviously must track the information in order to prepare an accurate bill for a customer with appropriate charges.

On this point, we find instructive *People v. Dorsey* (1974) 43 Cal.App.3d 953. As in *Dorsey*, because of the nature of the writings in question, testimony concerning their

preparation “would not have a bearing on the basic trustworthiness of the records.” (*Id.* at p. 961.) A trial judge has broad discretion in admitting business records under section 1271, and it has been held that the foundation requirements may be inferred from the circumstances. (*Dorsey*, at p. 961.) “Indeed, it is presumed in the preparation of the records not only that the regular course of business is followed but that the books and papers of the business truly reflect the facts set forth in the records brought to court. [Citations.]” (*Ibid.*)

Consequently, the trial court did not err in admitting the cell phone records into evidence.

### **DISPOSITION**

The judgment is affirmed.

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CORNELL, Acting P.J.

WE CONCUR:

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KANE, J.

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DETJEN, J.