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

THE PEOPLE,

Plaintiff and Respondent,

v.

JONATHAN JAMES CANALEZ,

Defendant and Appellant.

F065882

(Super. Ct. No. MCR039193)

OPINION

APPEAL from a judgment of the Superior Court of Madera County. Ernest J. LiCalsi, Judge.

Peggy A. Headley, 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, Stephen G. Herndon and Daniel B. Bernstein, Deputy Attorneys General, for Plaintiff and Respondent.

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After a trial by jury, defendant Jonathan James Canalez was acquitted of murder (Pen. Code,¹ § 187, subd. (a)) but convicted of the lesser included offense of involuntary manslaughter (§ 192, subd. (b)). The jury further found true the allegation that defendant used a deadly weapon (§ 12022, subd. (b)(1)) in the commission of the offense. The trial court subsequently sentenced defendant to the mitigated term of two years in state prison for involuntary manslaughter, and enhanced the sentence by an additional year for the use of a deadly weapon. Additionally, the trial court imposed several fines and fees. As defendant's presentence custody credits exceeded the imposed sentence, defendant was released on parole at the sentencing hearing.

On appeal, defendant argues the trial court erred in imposing the deadly weapon enhancement, failed to apply section 2900.5, subdivision (a) credit to his punitive fines, and failed to state the statutory basis for the presentence report fee and booking fee in the abstract of judgment. We conclude the trial court properly imposed the deadly weapon enhancement, but agree the abstract of judgment contains several errors requiring correction.

FACTS

As the facts on appeal are not in dispute, we will only briefly recount them here.

Defendant and the victim Ruben Aguirre were roommates. There was evidence the two fought prior to the night in question and, on one occasion, an officer was dispatched to keep the peace while defendant retrieved his belongings from the home. During that incident, defendant stated the victim had locked him out of the home.

On March 22, 2010, a Madera police officer responded to a call regarding a disturbance at the victim's residence. He discovered the victim lying dead in the master bedroom. There were signs of a struggle in the room, including a large amount of blood, an overturned table, and broken glass; the victim had a shard of glass in his hand. An assault rifle was lying on the ground in the room along with three expended shell casings.

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

Three separate bullet holes and two bullets were located within the bedroom. The bullets were conclusively matched to the firearm found at the scene. A firearms expert analyzed the scene to determine the bullet trajectories. Based on his analysis, he concluded each shot was fired from under a height of three feet. The trajectories of the bullets were consistent with someone firing the gun while lying on his back on the ground, in the same manner which the victim's body was found.

An autopsy of the victim's body performed by Dr. Jerry Nelson revealed numerous injuries, including 33 abrasions, 13 bruises, two deep stab wounds, three superficial stab wounds, and three superficial bite wounds. Additionally, the victim's right ear was either cut or torn from his body and was recovered at the scene of the crime. The victim died from a deep stab wound to his neck that severed the jugular vein. Dr. Nelson could not determine whether the wound was made by a knife or perhaps a shard of glass, although it was more likely made by glass.

At the time of his death, the victim had a very high level of methamphetamine in his system. The amount would have been lethal for an inexperienced user. Methamphetamine can cause a person to become agitated, aggressive, paranoid, or violent. However, each person reacts to the drug differently.

The bite marks on the victim's body were tested for genetic material. A mixture of DNA was found in one bite mark and defendant could not be excluded as a contributor of the DNA.

In the hours following the victim's death, defendant arrived at the home of his father, saying the victim had tried to kill him. Defendant showed his father bite marks on his hands and a wound on his head, stating the victim had struck him in the head with a piece of glass, and further stating the victim had tried to shoot him. As a result, defendant's father called 911 and drove him to the police station. Defendant told his father he had stabbed the victim in the neck and in the abdomen as he tried to get away from him. Defendant had various injuries including redness to his knees, redness to his forearm and hand, and a bite mark on a finger.

Police seized defendant's bloodstained clothing, which was later tested and revealed DNA consistent with the victim's genetic profile. Additionally, the police tested both the victim's and defendant's hands for gunshot residue. The testing yielded positive results for both defendant and the victim. According to an expert, either person could have fired the gun, were in the vicinity of the gun when it was fired, touched the gun after it was fired, or touched the person who had fired the gun.

DISCUSSION

I. The Weapon Enhancement Was Properly Imposed

Defendant argues the trial court erred in imposing a term for the deadly weapon enhancement as the use of a deadly weapon was an element of the crime of involuntary manslaughter. Section 12022, subdivision (b)(1) provides that a person “who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, *unless use of a deadly or dangerous weapon is an element of that offense.*” (Italics added.) Relying upon *People v. McGee* (1993) 15 Cal.App.4th 107 (*McGee*), defendant contends we must consider his conduct in the commission of the offense in determining whether the weapon use was an element of the offense. We find *McGee* inapposite.

In *McGee*, the Third District Court of Appeal held a court must consider the conduct of the accused in determining whether the use of the weapon is an element of the offense within the meaning of section 12022, subdivision (b). (*McGee, supra*, 15 Cal.App.4th at p. 115.) *McGee* considered the application of a deadly weapon enhancement to a violation of section 245. At the time, section 245, subdivision (a)(1) prohibited two alternative forms of conduct, namely assaulting a person with a deadly weapon or by means of force likely to produce great bodily injury. (*McGee*, at p. 114.) The defendant was initially charged with “assaulting the victim ‘with a deadly weapon, to wit, [a] knife, *and* by means of force likely to produce great bodily injury.’” (*Id.* at p. 112.) Prior to trial, the defense argued that because section 12022, subdivision (b) could

not be used to enhance the crime of assault with a deadly weapon, the prosecution must make an election as to how section 245 was violated. The court agreed, and the prosecution amended the information to charge assault by means likely to inflict great bodily injury. The defendant was ultimately convicted of the charge as well as the weapon enhancement. (*McGee, supra*, at pp. 109-113.)

On appeal, the defendant argued the prosecution was effectively allowed to plead around the exception contained within section 12022, subdivision (b)(1), and as a result subjected him to an enhancement which could not have been otherwise imposed. (*McGee, supra*, 15 Cal.App.4th at p. 113.) In resolving the question, the court interpreted the meaning of the phrase “element of that offense” as used in section 12022, subdivision (b)(1). *McGee* initially acknowledged other courts had held that when determining whether the use of a weapon was an element of the offense, the court should consider the crime in the abstract. (*McGee, supra*, at p. 114, citing *People v. Read* (1983) 142 Cal.App.3d 900, 903 [“The phrase ‘element of the offense’ has a settled meaning in California law which the Legislature is presumed to know, i.e., an essential component of the legal definition of the crime considered in the abstract”]; *In re Anthony H.* (1980) 108 Cal.App.3d 494, 499 [deadly weapon enhancement required unless the offense cannot be committed without weapon use].) The *McGee* court explained the crime charged in section 245, unlike other statutes such as robbery, could be violated in two ways: either with the use of a weapon *or* by means of force likely to produce great bodily injury. Because there were multiple ways to violate section 245, which “‘defines only one offense,’” the court found it must look to the defendant’s conduct to determine whether the use of a weapon was an element of the crime. (*McGee, supra*, at pp. 114-115.)

McGee relied upon *People v. Ferguson* (1970) 7 Cal.App.3d 13, superseded by statute on other grounds as stated in *People v. Rubalcava* (2000) 23 Cal.4th 322, 329-331, in reaching its conclusion. In *Ferguson*, the court considered whether a weapon enhancement could be applied to a first degree burglary conviction. (*Id.* at pp. 16-17.) At the time, first degree burglary could be committed in three ways, entry into a home at

night, by being armed with a deadly weapon, or by committing an assault. (*Id.* at p. 17.) There the enhancement was applicable because the defendant's use of the weapon was not essential to the crime as he had entered the home during the night. (*Ibid.*)

Using this analysis, the court in *McGee* concluded the weapon enhancement was inapplicable as the defendant had violated section 245 by stabbing the victim with a knife. (*McGee, supra*, 15 Cal.App.4th at p. 115.) Permitting any other result would allow the prosecution to circumvent the proscription of section 12022, subdivision (b) by simply denominating the offense as assault by means likely to produce great bodily injury. (*McGee*, at pp. 116-117.) Allowing the prosecution to divide section 245 into two separate offenses would lead to absurd results. Prosecutors who charged a defendant who had stabbed another with assault by force likely to produce great bodily injury would subject the defendant to imposition of the deadly weapon enhancement, while a defendant who committed the exact same conduct would not be subject to the enhancement where the prosecutor charged the offense as assault with a deadly weapon. The court found such "absurd and unjust result[s] ... inconsistent with the legislative intent" of section 245. (*McGee*, at p. 117.)

Subsequently, the Fourth Appellate District, Division One considered whether a court could impose a firearm enhancement pursuant to section 12022.5 upon a voluntary manslaughter conviction where the killing was perpetrated with a firearm in *People v. Ross* (1994) 28 Cal.App.4th 1151. Like section 12022, subdivision (b), section 12022.5, subdivision (a) prohibited the imposition of the additional penalty where the weapon use "is an element of the offense of which he or she was convicted." (*Ross*, at p. 1156.) Relying on *People v. Read, supra*, 142 Cal.App.3d at page 903, the court explained weapon use is only considered an element of the offense where it "is 'an essential component of the legal definition of the crime considered in the abstract.'" (*Ross*, at p. 1156.) In reaching this conclusion, the court explained:

"On its face, *McGee* appears to contradict *Read*, but we do not so read the case. Instead, we believe the quoted language from *McGee* must be limited to the peculiar situation of a statute (§ 245, subd. (a)(1)) which

can be violated in two specified ways, ‘by assaulting a person with a deadly weapon other than a firearm *or* by means of force likely to produce great bodily injury.’ (*People v. McGee, supra*, 15 Cal.App.4th at p. 114, italics in original.)

“Whereas the statute in *McGee* had two alternative forms, as to one of which weapons use *was* an element, in contrast this case presents no such problem. The definition in section 192 of the offense of manslaughter (‘the unlawful killing of a human being without malice’) nowhere includes, as an element of that offense, the use of a firearm. For that reason *McGee* has no application to this case.” (*People v. Ross, supra*, 28 Cal.App.4th at p. 1156, fn. 7.)

Ross was subsequently cited with approval in *People v. Hansen* (1994) 9 Cal.4th 300, 317, overruled on other grounds by *People v. Chun* (2009) 45 Cal.4th 1172, 1199. There, the defendant was convicted of second degree murder. One of the theories to support the conviction was the felony-murder rule, based upon the underlying felony of shooting at an inhabited dwelling. (*People v. Hansen, supra*, at p. 307.) The defendant was convicted of murder as well as a firearm enhancement pursuant to section 12022.5, subdivision (a) and the trial court imposed the firearm enhancement. On appeal, the Court of Appeal struck the enhancement, reasoning that “although the jury returned a general verdict convicting defendant of second degree murder (without specifying the theory relied upon), the jury ‘found true all element[s] necessary for a conviction of murder based on the felony-murder,’ and firearm use was an essential element of the underlying felony of discharging a firearm at an inhabited dwelling.” (*Hansen*, at p. 316.) The Supreme Court reversed, explaining the firearm enhancement applied unless use of the weapon “‘*is an element of the offense of which he or she was convicted.*’” (*Id.* at p. 317.)

The court explained:

“The phrase ‘element of the offense’ signifies an essential component of the legal definition of the crime, *considered in the abstract*. (*People v. Ross*[, *supra*,] 28 Cal.App.4th 1151, 1156]; *People v. Zamora* (1991) 230 Cal.App.3d 1627, 1636.) In the present case, the crime of which defendant was convicted was second degree murder. That offense, considered in the abstract, does not include use of a firearm as an element. Second degree

murder may be committed in a myriad of ways, some that involve use of a firearm, and others, such as stabbing, poisoning, or strangling, that do not involve use of this type of weapon. Under section 12022.5, subdivision (a), the enhancement applies unless ‘use of a firearm is an element of the offense,’ and not merely the means by which the offense was committed or the factual predicate of a theory upon which the conviction was based. (See *People v. Ross*, *supra*, 28 Cal.App.4th at p. 1156; *People v. Quesada* (1980) 113 Cal.App.3d 533, 540 [‘The crime of manslaughter may be committed in many ways without a firearm; the fact that this particular crime was committed with use of a firearm does not make such use an ‘essential element’ of the offense.’].)” (*People v. Hansen*, *supra*, 9 Cal.4th at p. 317.)

Thus, it is apparent we are to consider the crime in the abstract when determining whether the use of a weapon is an element of the offense. (See, e.g., *People v. Hansen*, *supra*, 9 Cal.4th at p. 317; *People v. Ross*, *supra*, 28 Cal.App.4th at p. 1156; *People v. Read*, *supra*, 142 Cal.App.3d at p. 903; *People v. Smith* (2007) 150 Cal.App.4th 89, 94.) Unlike the crimes at issue in *McGee* and *Ferguson*, which expressly state they may be violated through the use of a weapon, the crime of manslaughter has no such provision. To the contrary, weapon use is never mentioned in section 192. The crime of manslaughter is defined as “the unlawful killing of a human being without malice.” (§ 192.) The statute further declares the crime of manslaughter is considered involuntary where “in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.” (§ 192, subd. (b).) While it is true a court must consider the circumstances of the commission of a misdemeanor to determine whether an unlawful act is dangerous, this inquiry is performed to ensure the defendant’s actions are sufficient to demonstrate criminal culpability. (*People v. Cox* (2000) 23 Cal.4th 665, 670-676.) It is not a declaration, as in other statutes, that the use of a weapon will satisfy the elements of the offense. Thus, we conclude *McGee* is inapplicable here and *Hansen* and *Ross* are controlling. As involuntary manslaughter does not require the use of a weapon, the imposition of the enhancement was proper.

II. Defendant's Fines Must Be Reduced

Defendant contends, and the People concede, that certain penalty fines should be stricken. We agree.

The trial court sentenced defendant to total term of three years in state prison and gave him credit for a total of 1,277 days spent in custody. A term of three years equals 1,095 days; therefore defendant exceeded his term by 182 days. Pursuant to section 2900.5, subdivision (a), when a defendant's custody time exceeds the sentence, the excess custody time may be applied to any fines:

“In all felony ... convictions ... when the defendant has been in custody, ... all days of custody of the defendant ... shall be credited upon his or her term of imprisonment, or credited to any fine, including, but not limited to, base fines, on a proportional basis, that may be imposed, at the rate of not less than thirty dollars (\$30) per day If the total number of days in custody exceeds the number of days of the term of imprisonment to be imposed, the entire term of imprisonment shall be deemed to have been served. In any case where the court has imposed both a prison or jail term of imprisonment and a fine, any days to be credited to the defendant shall first be applied to the term of imprisonment imposed, and thereafter the remaining days, if any, shall be applied to the fine, including, but not limited to, base fines, on a proportional basis.” (§ 2900.5, subd. (a).)

Under section 2900.5, subdivision (a), “if a defendant is ‘over-penalized’ by serving presentence days in custody in excess of his imposed imprisonment term, those excess days are to be applied to the defendant’s court-ordered payment of monies that serve as punishment.” (*People v. Robinson* (2012) 209 Cal.App.4th 401, 407.) The credit may not be applied to fees that serve a nonpunitive purpose. (*Ibid.*)

Here defendant suffered several punitive fines. Specifically, he was assessed a \$240 restitution fine pursuant to section 1202.4 and an equal restitution fine, which was suspended pursuant to section 1202.45. Restitution fines are encompassed within section 2900.5. (§ 2900.5, subd. (a); *People v. Robinson, supra*, 209 Cal.App.4th at p. 407.) The

court imposed a \$200 base fine pursuant to section 672,² which provides for an additional fine as punishment. (*People v. Mauch* (2008) 163 Cal.App.4th 669, 676.) In addition, the court assessed a \$340 fine pursuant to section 1464 and Government Code section 76000, a \$40 criminal surcharge pursuant to section 1465.7, and a \$100 court facility fee pursuant to Government Code section 70372. Each of these fines has also been deemed punitive. (*People v. High* (2004) 119 Cal.App.4th 1192, 1197-1199.) Likewise, the \$80 DNA assessment pursuant to Government Code section 76104.6 is considered punitive. (*People v. Batman* (2008) 159 Cal.App.4th 587, 591.) Finally, the \$40 Emergency Medical Service Fund assessment fee pursuant to Health and Safety Code section 1797.98a is punitive. (*Id.*, § 1797.98a, subd. (c) [the source of funds are from penalty assessment pursuant to Gov. Code, § 76000]; see *People v. Batman, supra*, at pp. 590-591 [when a statute explicitly denominates fine as penalty rather than fee, as well as imposed in proportion to culpability, fine is penal in nature].) These fines together total \$1,280.³

Defendant's 182 days of excessive credit translate into \$5,460 in monetary credit at the \$30 per day rate. Accordingly, the credit is more than sufficient to satisfy the above punitive fines. We will therefore order the abstract amended accordingly.

III. Correction of the Abstract of Judgment

Defendant argues the trial court erred in failing to delineate the source of the booking fee and presentence report fee in the abstract of judgment. The People agree the fines were not listed in the abstract but argue that because the statutory basis is readily apparent, remanding the matter would "be exalting form over substance." We agree the

²Although the abstract does not state the statutory basis for this fine, it was ordered in the oral pronouncement of judgment. We will order the trial court to state this basis on the corrected abstract.

³Defendant does not argue he is entitled to credit against the \$40 court operation fee pursuant to section 1465.8, subdivision (a), the \$30 criminal conviction fee pursuant to Government Code section 70373, the \$102.59 booking fee or the \$750 felony presentence report fee.

trial court failed to state the statutory basis for the fines and will order the trial court to amend the abstract of judgment accordingly.

In arguing remand is appropriate, defendant relies upon *People v. High*. There, the trial court imposed a “drug program fee, together with surcharges and penalties in the total sum of \$1,530” as well as a “clandestine drug lab fine, together with penalties, assessments and surcharges totaling \$1,700.” (*People v. High, supra*, 119 Cal.App.4th at p. 1200.) The total fines were listed in the abstract of judgment without specificity as to the amount of the surcharges and penalties and without listing the code provisions supporting those charges. The court explained that although “a detailed recitation of all the fees, fines and penalties on the record may be tedious, California law does not authorize shortcuts.” (*Ibid.*) Inclusion of each fine and fee as well as its statutory basis was necessary to allow the Department of Corrections to forward prisoner wages to the appropriate agency as well as assist in the collection efforts. (*Ibid.*) Therefore, the court remanded the matter to the trial court with directions to separately list all fines, fees, and penalties for each count along with its statutory basis. (*Id.* at p. 1201.)

Unlike the trial court in *High*, the trial court here did not list a sum of all the fees and fines without delineating each fine. Indeed, the trial court listed an “\$870 fine, including penalties” and then enumerated each specific fine, fee, and assessment. Rather, the trial court’s error here was the failure to list the statutory basis for the booking fee and the presentence report fee. While the trial court was required to list the statutory basis for the fees, we need not remand the matter to the trial court as the statutory basis is evident.

It is apparent the booking fee was authorized by Government Code sections 29550.1 and 29550.2, while the presentence report fee was authorized by section 1203.1b. Indeed, defendant does not argue these provisions do not authorize the fees, nor does he challenge their imposition. Defendant’s sole contention is the failure to list the statutory basis requires a remand to the trial court to list the appropriate fee. He further argues that upon remand, this court should direct the trial court to consider defendant’s ability to pay these fines in accordance with the statute. While we agree the trial court

must list the statutory basis of the fee in the abstract of judgment, we decline defendant's invitation to order the trial court to conduct any further hearings. As the People note, defendant did not object to the imposition of the fees below, therefore he has forfeited any argument the evidence was insufficient to support his ability to pay. (*People v. McCullough* (2013) 56 Cal.4th 589, 597.)⁴ As defendant has not raised any cognizable issues in this appeal relating to the propriety of the fees, we decline his invitation to order the trial court to conduct any further proceedings.

DISPOSITION

The judgment is modified to deem the fines ordered pursuant to sections 1202.4, 1202.45, 672, 1464, 1465.7, Government Code sections 76000, 70372, subdivision (a), 76104.6, and Health and Safety Code section 1797.98a, to have been paid in full. The trial court is ordered to amend the abstract accordingly. In addition, the trial court is ordered to identify the statutory basis for the \$200 base fine, the booking fee, and the presentence report fee in the abstract of judgment. The trial court shall forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

PEÑA, J.

WE CONCUR:

POOCHIGIAN, Acting P.J.

FRANSON, J.

⁴The issue of whether the forfeiture rule announced in *McCullough* applies to the failure to object to the imposition of presentence investigation fees is currently pending before the California Supreme Court in *People v. Aguilar*, review granted November 26, 2013, S213571, and *People v. Trujillo*, review granted November 26, 2013, S213687.