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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

BERNARD SMITH,

Defendant and Appellant.

G047789

(Super. Ct. No. 06ZF0138)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer. Affirmed with directions.

Arthur Martin, 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, Steve Oetting and Michael T. Murphy, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Bernard Smith of first degree murder (Pen. Code, § 187, subd. (a); all statutory references are to the Penal Code unless noted), second degree robbery (§§ 211, 212.5, subd. (c)), felon in possession of a firearm (former § 12021, subd. (a)(1), as amended by Stats. 2008, ch. 599, § 4, p. 4281 [now § 29800, subd. (a)(1), Stats. 2010, ch. 711, § 6]), and transportation of cocaine (Health & Saf. Code, § 11352, subd. (a)). The jury also found Smith committed murder during a robbery (§ 190.2, subd. (a)(17)(A)), a special circumstance mandating a life sentence without parole. Smith contends the trial court erred by failing to instruct the jury sua sponte to determine whether trial witness Ruben Avery was an accomplice whose testimony and statements to police officers required corroboration and cautious treatment, and by admitting accomplice Stephen Bennett’s hearsay statement as a declaration against Bennett’s interest (Evid. Code, § 1230).¹ For the reasons expressed below, we affirm with directions to correct the sentencing minute order and abstract of judgment.

I

FACTS AND PROCEDURAL BACKGROUND

Around 11:20 p.m. on Super Bowl Sunday, February 5, 2006, Irvine police officers responded to a shooting at an apartment complex near the corner of Culver and Michelson Drive in Irvine. They found 36-year-old Brian Gray lying on a sidewalk or parkway unresponsive and without a pulse. Officer Michael Hallinan testified it was dark and “unbelievably foggy” that night.

Gray’s neighbor, Jesse Morrow, lived in a ground floor unit. Around 11:00 p.m. he heard seven or eight popping noises and “excited yelling” coming from outside.

¹ This was Smith’s second trial on the murder and robbery charges. We reversed the original convictions due to prejudicial *Aranda-Bruton* error. (*People v. Smith* (June 28, 2011, G041645) [nonpub. opn.]; see *Bruton v. U.S.* (1968) 391 U.S. 123; *People v. Aranda* (1965) 63 Cal.2d 518.)

Morrow looked out his west-facing bedroom window and spotted two men run into view from the south side of the well lit but deserted parking lot. The first man yelled and jumped around, and appeared agitated and unhappy. The second man followed closely behind, and made a motion with his arms as if he was throwing firecrackers at the first man. Both were African-American, relatively slender, and wore dark or drab clothing. The men ran north out of Morrow's view, but a third African-American man appeared from the south. Heavy-set and also wearing dark clothing, it appeared he had just stopped running. He walked slowly, catching his breath. He hitched up his pants and said insistently "get him, get him, get him." He then walked out of view in the direction of the other men. Morrow then heard three or four popping or cracking sounds. Morrow said it was not extremely foggy until the "police showed up" around 1:00 a.m.

Amy Anton lived in another ground floor unit. She was watching television around 11:15 p.m. when she heard four gunshots. She looked out and saw a man with a silver or chrome-colored gun chasing another man. They ran north towards a cul-de-sac. Both men were African-American. The man with the gun was in his 20's, five feet eight inches tall, with a husky build, and wore pants, a dark blue sweatshirt or jacket, and a baseball cap. Anton saw the shooter pause to fire one or two shots, and heard the victim yell for security. Anton heard another shot after she left to call 911.

Rosanna Murray, Gray's girlfriend and mother of the couple's three children, testified Gray sold illegal drugs. On the night of Gray's murder, Gray was in the living room of the family's upstairs unit when Murray went to bed. As she was about to fall asleep, she heard approximately six gunshots. She opened the window and looked out but it was very dark and foggy. She heard a male voice say something like, "Did you pick that fool?" Another male voice responded, "The mother fucker is down."

Murray saw two people walk away southbound. She described one of the assailants as about six feet tall with a heavy build and wearing a puffy jacket. The other man was shorter, stocky, and may have worn a hoodie sweatshirt. She previously testified this man was thinner, and about five feet eight or nine inches tall. Murray walked downstairs and heard Gray call her name. She phoned 911.

Roberto Morales, residing in a downstairs unit, heard two shots around 11:15 p.m. He looked out his window and spotted a dark-skinned man chasing another with a gun. The shooter was “a bit tall” and “somewhat heavy” and wore dark-colored clothing, including a big jacket. He watched the shooter eject the gun’s magazine, insert another, and continue shooting. The victim yelled “security” more than once. When the victim collapsed Morales ran to tell his wife to call the police. Morales returned to his window, and watched the shooter walk back with another man. This man, also African-American, was shorter and thinner than the shooter.

The pathologist who conducted Gray’s autopsy found six gunshot wounds. One small caliber bullet entered Gray’s lower right back, lacerated his heart and left lung, and lodged in Gray’s front chest. Another entered his back, pierced his liver, and lodged in his abdominal wall. Both were independently lethal. Gray suffered a nonlethal wound to his right calf caused by small pellets different than the ammunition used to inflict the other five wounds. These pellets, also known as snake, bird or varmint shot, are typically contained in cartridges and fired from a revolver, which does not expel casings.

Investigators collected seven .22-caliber casings at the crime scene. They found no drugs on Gray’s body, but collected his cell phone and wallet among other items. Gray’s cell phone showed several phone calls from phones possessed by Stephen “Red” Bennett and Rhonda “Fat Daddy” Connor on the night of the murder.

Video from Alfie's, a service station and car wash on the southwest corner of Culver and Michelson, taken around the time of the shooting, showed a mid-to-late 1990's Buick-type car driving in the parking lot. The left front wheel was missing its center wheel cap. Police surveillance subsequently spotted Bennett driving an Oldsmobile matching the one in the video around Oceanside and Vista. The parties stipulated that on February 8, 2006, Oceanside police detained Bennett during a traffic stop. He wore a dark-colored New Orleans Saints jacket that appeared similar to a jacket worn by one of the suspects depicted in the Alfie's surveillance video.

The parties at trial stipulated Reuben Avery was unavailable and his prior testimony would be read to the jury. In 2006, Avery lived in the City of Oceanside with his girlfriend, Tisa. An acquaintance named Tasha lived nearby.

Avery admitted he was addicted to crack cocaine in 2006 and used it daily. Avery had known Bennett about six years, considered him a very good friend, and admitted they often ingested crack cocaine together. Avery had known Smith for about two years and they also smoked crack cocaine together. Avery and his former roommate, Connor, also used crack cocaine together, and she often served as a source for the drug. Avery met Brandon Turner a few weeks before the murder.

Avery watched the 2006 Super Bowl at home. After the game, Bennett arrived. Smith arrived sometime later, and Brandon Turner and his minor brother, Deshaun, arrived after that. The men conversed in Avery's backyard. Smith announced he wanted to obtain drugs, but none of the men had the money to purchase narcotics. Nevertheless, Smith asked Bennett where they could get some drugs. Bennett later asked Avery if he wanted to ride with them to Irvine to get the drugs, but Avery declined, explaining he was going to eat dinner.

Detective Victoria Hurtado interviewed Avery about two weeks after the murder. Avery told the detective Bennett admitted he did not have any money or gas in his car, and discussed with the others a plan to “just [] take” Gray’s drugs. Bennett called Gray to arrange a “purchase” of “two zips, \$1,200 worth.” Avery stood next to Bennett as he phoned Gray to order the drugs. Avery told Bennett he did not want to go with them and remarked to Hurtado “\$1,200 bucks worth of dope is not worth anybody’s life especially when you have a kid too.” Sometime after the men left, Avery spoke to Connor and told her about “this dumb ass [Bennett] . . . going down to rob” Gray.²

Later that evening, Avery met Connor at Tasha’s. While there, Avery spoke with Bennett on the phone, and then handed the phone to Connor. Avery told Detective Hurtado that Bennett told him, “we got the dope . . . you should’ve came.”

The parties stipulated Connor told Michael Gaynor, a friend of Bennett’s and Connor’s, that Bennett had run out of gas on Interstate 5. Gaynor drove Connor and Tasha from Oceanside to a spot just north of the border patrol checkpoint, where Bennett had stalled on the southbound side of Interstate 5. Gaynor put about two gallons of gas in Bennett’s car. Bennett was outside the car and Gaynor saw two or three people inside, but it was too dark to recognize anyone. Gaynor returned with Connor and Tasha to Oceanside.

Avery saw Bennett, Smith, and the Turners later at Tasha’s. Avery told Detective Hurtado he and Bennett had a “one-on-one” and Bennett told him “never in your life tell nobody, anybody what, if we gonna do this,” and Avery responded he only told Connor. At Tasha’s, Smith asked for Avery’s drug pipe. Smith returned the pipe with some crack in it and Avery took a hit.

² Avery at trial either denied or could not recall many of his statements to Hurtado.

Avery drove the men back to the house Turners had been staying. Turner had a quarter ounce of cocaine and a .22-caliber gun and bullets, which Turner put in a closet. Avery learned that morning from Smokey Lamont that Gray was dead.

Avery spoke with Bennett a few days after the Super Bowl. Avery told Detective Hurtado that a distraught Bennett tearfully declared “they were supposed to go there and just get the dope, man, and when they told me they shot him, I was like, no, you’re not supposed to shoot him, man, you’re not supposed to shoot, you’re supposed to get”

The parties at trial stipulated a week or two after the murder, Avery was walking down the street in Oceanside when the Turners jumped out from bushes and surprised him. Avery believed the men planned to rob him until they recognized him. Brandon Turner had the .22-caliber handgun used to kill Gray.

Detective Hurtado interviewed Bennett and Smith after she spoke to Avery. Bennett revealed to her he was in Avery’s backyard on the night of the murder and “hard up for some dope.” He phoned Gray and ordered two ounces of crack cocaine. Smith admitted to Hurtado he got high every day and woke “up getting high.”

After interviewing Bennett and Smith, officers placed them in a police car together and secretly recorded their conversation. The prosecutor played the tape for the jury. During the conversation Smith asserted Avery, Tisa, and Connor were “talking” and “[t]old every mother . . . every God damn thing.” The men discussed what the police told them about the crime. Smith claimed “the only thing they got is us in that parking lot” and that he “got out of the car to piss.” He also acknowledged “they see me running.” Smith stated an officer “showed me a picture I don’t know I’m telling you what’s happening, I was high, I’m the only witness I told you I was pissing and I heard

somebody say 'hey, cuz, don't run,' they got the shooting, I dove over in the bushes, and I've seen, see Red [Bennett] coming across I took off running say hey man they already shooting." Smith stated, apparently referring to his explanation to the police officers, "let me tell you something all, all you know dude, I'm a witness to something, you know what I'm saying, you want me to tell, you want me to tell you something, but you ain't telling me nothing man. I ask, I ain't telling, incriminate me, based [on] I haven't done shit and I know Red ain't did it, we ain't did shit like that," and "this, just going to buy us some dope." Bennett responded, "[t]hat's what I'm saying" and "that's what I told, I said man." Smith said he had "money in pocket, man" and that they "weren't broke we just ran out of gas." Bennett stated he told the officers he ran out of gas because he had "passed all the exits."

On the evening of February 23, 2006, officers arrested Brandon Turner in Oceanside. Officers previously had seen Bennett near Turner's apartment. Turner fled as officers attempted to apprehend him, discarding as he fled the .22-caliber semiautomatic handgun used to kill Gray, as well as a magazine for the weapon and some clothing. The magazine held 10 bullets. Turner admitted to Hurtado he fired a gun at Gray, and he took the drugs from the dealer. Officers found three boxes of .22-caliber ammunition, but no snake shot, in Turner's room at his parents' house. The parties stipulated a jury convicted Turner in April 2008 of special circumstance first degree murder during a robbery, and found he personally and intentionally discharged a firearm causing death.

Hurtado testified that Brandon Turner (born in November 1985) was six feet one inch tall and weighed 200 pounds; Smith (born July 1964) was five feet six inches tall and weighed 180 pounds; Bennett (born July 1971) was five feet 10 inches tall

and weighed 190 pounds; and Deshaun Turner (born January 1999) was five feet nine inches tall and 150 pounds. Smith's voice came across as an adult male. Deshaun sounded like a 16-year-old male.

II

DISCUSSION

A. *The Trial Court Did Not Err in Failing to Give a Sua Sponte Cautionary Instruction On Accomplice Testimony*

Smith contends the trial court prejudicially erred by failing to instruct the jury sua sponte to determine whether Avery was an accomplice whose testimony and statements to police officers required corroboration and cautious treatment. We do not find Smith's contention persuasive. Simply put, the court had no duty to give a cautionary instruction because Avery was not an accomplice.

Section 1111 provides, "A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. [¶] An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." CALCRIM No. 334 defines an accomplice as one who personally committed the crime or who knew of the criminal purpose of the person who committed the crime and intended to, and did in fact, aid, facilitate, promote, encourage, or instigate the commission of the crime or participated in a criminal conspiracy to commit the crime. Accomplice testimony is "viewed with care, caution and suspicion" because "accomplice may try to shift blame to the defendant in an effort to minimize his or her own

culpability.” (*People v. Wallin* (1948) 32 Cal.2d 803, 808; *People v. Tobias* (2001) 25 Cal.4th 327, 331.) The court must provide accomplice instructions sua sponte when there is substantial evidence the witness was an accomplice. (*People v. Boyer* (2006) 38 Cal.4th 412, 466; *People v. Frye* (1998) 18 Cal.4th 894, 967-969; *People v. Bevins* (1960) 54 Cal.2d 71, 76 [the defendant has the burden to establish by a preponderance of the evidence that a witness was an accomplice whose testimony must be corroborated].) We independently review the claim of instructional error. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.)

Although defense counsel at trial agreed it was “clear” that Avery was not an accomplice, Smith now argues substantial evidence established Avery was an accomplice to the robbery. Smith contends a juror reasonably could find the evidence established that Avery was present at the formation of the conspiracy, knew of the plan in advance, was present when Bennett called Gray and set the conspiracy in motion, facilitated the group’s escape from the robbery by helping arrange the delivery of gas, and benefited from the robbery by using some of the drugs. Smith also notes “Avery testified that he had moved out of his house on Grant Street and was in the process of moving out of state, to Minnesota, when Detective Hurtado tracked him down and interviewed him.”

The foregoing does not constitute substantial evidence Avery was an accomplice. When invited to join the group, Avery expressly declined and elected to remain in Oceanside. Avery declared that \$1,200 in drugs was not worth a person’s life. Although Avery’s statements to Connor after the men left suggested he knew the group planned to rob Gray, he took no action to aid the robbery or encourage it. It is not enough that Avery overheard the group plan a robbery. (*People v. Johnson* (1973)

33 Cal.App.3d 9, 22 [overhearing others plotting a crime does not render one an accomplice as a matter of law].) There simply is no evidence he shared the perpetrators' specific intent to rob Gray. (*People v. Snyder* (2003) 112 Cal.App.4th 1200, 1220.) The evidence reflected Avery was not part of the group that put gas in Bennett's car. But even if Avery was somehow involved in helping assist his friend Bennett *after* the crime, there still was no evidence implicating him as a principal in the robbery and murder. (*People v. Snyder, supra*, 112 Cal.App.4th at pp. 1211-1212 [rejecting accomplice instructions where codefendant refused to become involved in the robbery, but drove defendants before and after the robbery].) Smith did not establish Avery was an accomplice.

B. The Erroneous Admission of Bennett's Hearsay Statement Does Not Warrant Reversal

Smith also argues the trial court committed prejudicial error in admitting Bennett's hearsay statement to Avery that "they" were not supposed to shoot the victim. We agree the court erred in admitting the statement under Evidence Code section 1230, but conclude the error does not require reversal because a different result absent the error was not reasonably probable.

As noted above, on February 21, 2006, Avery told Detective Hurtado that a few days after the murder Bennett told him, "[T]hey were supposed to go there and just get the dope, man, and when they told me they shot him, I was like, no, you're not supposed to shoot him, man, you're not supposed to shoot, you're supposed to get, he was like, you know." The prosecution offered the statement under the hearsay exception for declarations against interest. (Evid. Code, § 1230.) Smith objected, arguing Bennett's statement was "entirely exculpatory" and therefore unreliable because Bennett

placed the blame for the murder on his cohorts. The trial court overruled Smith's objection and admitted the evidence, explaining Bennett's statement was not exculpatory because he admitted planning a robbery with his accomplices, and his account of the murder was merely a description the robbery did not unfold as planned.

The hearsay exception under Evidence Code section 1230 for declarations against interest provides: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of . . . criminal liability, . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." The party offering the statement must demonstrate the declarant was unavailable, the declaration was against the declarant's penal interest when made, and the declaration was sufficiently reliable to warrant admission despite its hearsay character. (*People v. Lucas* (1995) 12 Cal.4th 415, 462.) We review the trial court's ruling under an abuse of discretion standard. (*People v. Valdez* (2012) 55 Cal.4th 82, 143.) Under this standard, the test is whether the trial court exceeded reasonable bounds, and "[w]hen two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 272.)

The hearsay exception for declarations against interest does not apply to a portion of a statement not itself specifically disserving to the interests of the declarant. (*People v. Duarte* (2000) 24 Cal.4th 603, 612 (*Duarte*); *People v. Leach* (1975) 15 Cal.3d 419, 439, fn. 15.) As the Supreme Court observed in *Duarte*, "a hearsay statement 'which is in part inculpatory and in part exculpatory (e.g., one which admits some complicity but places the major responsibility on others) does not meet the test of

trustworthiness and is thus inadmissible.’ [Citations.]” (*Duarte, supra*, 24 Cal.4th at p. 612.) Trial courts therefore must redact or excise any portion of a statement not specifically disserving to the declarant’s interest, and admit “only those portions” of a declarant’s statements that expose the declarant to criminal liability. (*Ibid.*)

Here, Bennett placed the blame for the murder on others when he told Avery he expected “they” would just “get the dope,” but “when they told me they shot him, I was like no, you’re not supposed to shoot him.” There is no other inference to draw other than Bennett denied responsibility for the murder by implicitly claiming he was not present when Gray was shot and blaming his companions for the unplanned homicide. Bennett’s self-serving statement about the homicide was exculpatory in nature and should not have been admitted into evidence. (*Duarte, supra*, 24 Cal.4th at pp. 612-613.)

Smith argues the erroneous admission of the statement requires reversal “because it tended to implicate Smith as the second person, along with Brandon Turner, who was chasing and shooting at Gray, as opposed to Bennett himself who admittedly set up the bogus drug purchase, drove to Irvine, and called Gray out of his apartment just before the robbery.” We disagree. We must affirm the judgment unless it is reasonably probable a different result would have occurred had the statement been excluded. (*People v. Watson* (1956) 46 Cal.2d 818 [probability does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility].)

At trial, the defense did not dispute the prosecutor’s assertion during closing argument that Bennett was not one of the men chasing Gray based on the video showing the man wearing the Saints jacket was urinating at the time of the shooting. The parties disagreed whether the second man chasing Gray was Smith or Deshaun. Bennett’s

statement did not resolve that issue. The prosecutor relied on Bennett's statement to argue the original plan was *to rob* Gray of the two ounces of crack cocaine. Bennett's statement was cumulative to other admissible evidence on that point: The group discussed having no money and no drugs; Smith stated he wanted drugs and asked where they could get some; Bennett agreed to buy two ounces of cocaine from Gray despite having no money; Avery told Connor that Bennett was going to rob Gray and later told the police the group planned to "take" the drugs; Bennett ran out of gas on the freeway between Irvine and Oceanside; Smith smoked crack cocaine after the murder at Tasha's; and Turner admitted shooting Gray and taking the drugs. To establish Smith's identity as the second shooter, the prosecutor relied on the video from the service station, the eyewitness descriptions of the men chasing Gray, and Smith's admissions to Bennett while in custody. Bennett's statement to Avery did not establish Smith was the second man chasing Gray.

Most significantly, Smith's guilt did not depend on the theory he was the second man who chased Gray. As the court instructed the jury, Smith was guilty of the charged offenses under the felony murder rule if he aided and abetted Gray's robbery, and Smith does not challenge the sufficiency of the evidence to support this theory of liability, nor does Smith argue insufficient evidence supported the special circumstance finding. It is not reasonably probable a result more favorable to Smith would have been reached had Bennett's hearsay statement not been admitted.

C. *No Cumulative Error*

Smith argues multiple errors combined to violate his due process right to a fair trial. (*People v. Hill* (1998) 17 Cal.4th 800, 844-845 [multiple trial errors independently harmless may in combination create reversible error].) As explained

above, we have found only one error, and that error was not prejudicial. The cumulative error doctrine does not apply.

D. *The Sentencing Minute Order and Abstract of Judgment Requires Correction to Reflect the Trial Court Imposed a \$1,000 Restitution Fine*

The trial court orally pronounced a \$1,000 restitution fine (§ 1202.4, subd. (b)). The court's sentencing minutes and the abstract of judgment erroneously list the fine amount as \$10,000. The Attorney General concedes the sentencing minute order and abstract of judgment should be corrected. (See *People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2; *People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.)

E. *The Abstract of Judgment Requires Correction to Reflect Smith, Bennett, and Turner Are Jointly and Severally Liable for Victim Restitution*

The trial court imposed victim restitution (§ 1202.4, subd. (f)) in the amount of \$7,425.87. The court noted Smith was jointly and severally liable for victim restitution with codefendants Bennett and Brandon Turner. The clerk's minutes correctly note liability for victim restitution was joint and several. The abstract of judgment does not contain that notation. The Attorney General concedes the abstract of judgment should be corrected. (See *People v. Arnold* (1994) 27 Cal.App.4th 1096, 1098-1100 [joint and several restitution appropriate; defendant is responsible for the full amount of the victim's losses but payments by other responsible parties are deducted from the amount owed].)

III

DISPOSITION

The trial court is directed to correct its sentencing minute order to reflect the court imposed a \$1,000 restitution fine under section 1204.2, subdivision (b). The

court is further directed to prepare an amended abstract of judgment reflecting the \$1,000 restitution fine, and indicating Smith is jointly and severally liable for victim restitution under section 1202.4, subdivision (f) with codefendants Stephen Bennett and Brandon Turner. The judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.