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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.

SERGIO CAMACHO GONZALEZ,

Defendant and Appellant.

G048543

(Super. Ct. No. 11NF0950)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
John Conley, Judge. Affirmed.

Michael B. McPartland, under appointment by the Court of Appeal, for
Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and
James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Sergio Camacho Gonzalez was convicted of the first degree murder of a transient, whom defendant believed had stolen his wallet. Defendant raises two arguments for reversing his conviction. Finding no merit in either, we affirm.

First, defendant argues that the trial court erred by admitting statements he made to the police during a custodial interrogation. Having independently reviewed the record, we conclude defendant intelligently and voluntarily waived his right to remain silent after being advised of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Therefore, the court did not err in denying defendant's motion to suppress his statements.

Second, defendant argues the trial court erred by failing to instruct the jury that if it had a reasonable doubt as to whether the murder was of the first or the second degree, it must give defendant the benefit of the doubt and render a verdict of second degree murder. We conclude the jury instructions fully and adequately instructed the jury as to this point of law.

Defendant correctly argues, and the Attorney General concedes, that he was awarded custody credits, but the abstract of judgment fails to reflect those credits. We will direct the trial court to amend the abstract of judgment accordingly.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Defendant was living in a garage apartment in Fullerton in September 2010. At the same time, the victim, Andrew Petrusiak, was homeless; he lived in a makeshift camp he had set up near the Arbor Market in Fullerton. Defendant and Petrusiak became acquainted. Defendant became convinced that Petrusiak had stolen his wallet, containing \$600, although Petrusiak denied having anything to do with it.

During the afternoon of September 25, 2010, defendant and Petrusiak got into an argument at the Arbor Market. Defendant appeared "very angry," tried to grab Petrusiak, and threatened to kill him.

About 8:15 p.m. that evening, Petrusiak bought beer at the Arbor Market, and walked toward his camp. About an hour later, defendant also purchased beer from the Arbor Market. Defendant drank nine or 10 beers that evening.

Defendant walked to Petrusiak's camp and confronted him about the theft of defendant's wallet, but Petrusiak told defendant he was crazy and Petrusiak did not know what had happened to defendant's money. Petrusiak's comments made defendant angry; defendant then picked up a nearby piece of wood and struck Petrusiak in the head about five times. Petrusiak did not have any weapons, and did not threaten defendant in any way.

Petrusiak's body was not discovered until two days later. A three-foot-long two-by-four with blood on it was found near Petrusiak's body; the two-by-four was consistent with the item defendant admitted using to hit Petrusiak in the head. Video recordings from nearby surveillance cameras showed Petrusiak going into the area of his camp at 8:26 p.m. on September 25; defendant entering the camp area at 9:13 p.m.; defendant walking out of the area at 9:17 p.m.; and defendant running from the area at 9:18 p.m.

Defendant was arrested six months later and interrogated by the police. In response to the detective's questions, defendant stated he intended to kill Petrusiak when he went to Petrusiak's camp area.

Defendant testified at trial that he did not intend to kill Petrusiak. Defendant testified the loss of his money, with which he had been planning to pay his rent, had caused him to lose his apartment and become homeless. Defendant also testified he was drinking and was not thinking about the consequences of his actions the evening of September 25. When defendant asked Petrusiak about his missing wallet that evening, Petrusiak said, "I don't care," and laughed, causing defendant to "los[e his] mind."

Defendant was charged in an information with first degree murder (Pen. Code, § 187, subd. (a).) The information alleged that defendant had personally used a deadly weapon in the commission of the crime. (*Id.*, § 12022, subd. (b)(1).) A jury convicted defendant as charged, and found true the deadly weapon allegation. The trial court sentenced defendant to 25 years to life on the murder conviction, and imposed a consecutive one-year term on the deadly weapon allegation. The court awarded defendant 801 days of actual custody credits. Defendant timely appealed.

DISCUSSION

I.

THE TRIAL COURT DID NOT ERR BY DENYING THE MOTION TO SUPPRESS.

Defendant argues the trial court erred by denying his motion to suppress statements he made during a police interrogation. We accept the trial court's findings of fact and its determinations of credibility, if supported by substantial evidence. (*People v. Haley* (2004) 34 Cal.4th 283, 299.) We then independently determine whether the challenged statements were illegally obtained. (*People v. Cunningham* (2001) 25 Cal.4th 926, 992.)

Suspects in custody may not be interrogated by the police unless they have been advised of the right to remain silent, the right to an attorney, and that any statements made may be used against them in court. (*Miranda, supra*, 384 U.S. at pp. 467-470.)

After a suspect has been advised of his or her *Miranda* rights, an express waiver of those rights is not required before an interrogation begins. Instead, the police may conduct an interrogation of a suspect at that point as long as the suspect does not expressly invoke his or her right to remain silent. (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 384-385; *North Carolina v. Butler* (1979) 441 U.S. 369, 373.) “‘A suspect’s expressed willingness to answer questions after acknowledging an understanding of his or her *Miranda* rights has itself been held sufficient to constitute an implied waiver of such rights.’” (*People v. Saucedo-Contreras* (2012) 55 Cal.4th 203, 218-219.) If “the

prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver" of his or her *Miranda* rights. (*Berghuis v. Thompkins, supra*, at p. 384; see *Moran v. Burbine* (1986) 475 U.S. 412, 422-423; *People v. Riva* (2003) 112 Cal.App.4th 981, 989.)

Before defendant's interrogation began, Detective Mario Magliano advised defendant of his *Miranda* rights. Although defendant spoke English, he told the officers that Spanish was his stronger language. Therefore, another officer, Detective Jose Flores, translated for Magliano. As with the actual transcript, the statements made in English are italicized:

"Magliano: *Ok, um, um because, because you are here*

"Gonzalez: Mm-hmm.

"Magliano: *at the police department,*

"Gonzalez: Yeah.

"Magliano: *um, before I can talk to you, you know I need to read your Miranda Rights? Ok do you understand that?*

"J. Flores: Because you are here at the police department,

"Gonzalez: Yes.

"J. Flores: and before I can talk to you, I have to read you your Miranda Rights. Do you understand?

"Gonzalez: Yes, I understand.

"J. Flores: *Yes.*

"Magliano: *Ok I am going to read them to you.*

"J. Flores: He is going to read them to you.

"Gonzalez: Ok.

"Magliano: *You have the right to remain silent. Do you understand?*

"J. Flores: You have the right to remain silent. Do you understand? Yes or no?

“Gonzalez: Yes, perfectly.

“J. Flores: *Yes, perfectly.*

“Magliano: *Ok. Anything you say may be used against you in a court. Do you understand?*

“J. Flores: Anything you say may be used against you in a tribunal or in court. Do you understand that? Yes or no?

“Gonzalez: Yes.

“J. Flores: *Yes he understands.*

“Magliano: *You have the right to the presence of an attorney during and before any questioning? Uh, do you understand?*

“J. Flores: You have the right to the presence of an attorney during and before any questioning, if you choose to. Do you understand? Yes or no?

“Gonzalez: Yes I understand.

“J. Flores: *Yes I understand.*

“Magliano: *If you can not [sic] afford an attorney, one will be appointed for you free of charge before any questions if you want. Do you understand that?*

“J. Flores: If you can not [sic] afford an attorney, one will be appointed to you free of charge before any questioning if you choose to. Do you understand? Yes or no?

“Gonzalez: Yes I understand.

“J. Flores: *Yes I understand.*” (Some capitalization omitted.)

When Magliano asked defendant if he knew why he was being interviewed, defendant responded: “I know . . . I know the problem that brings me here.” When Magliano asked defendant to tell his side of the story, defendant detailed his dispute with Petrusiak regarding the stolen money. Defendant then admitted killing Petrusiak and intending to kill him before arriving at Petrusiak’s camp.

In denying defendant's motion to suppress, the trial court found defendant's statements had not been coerced by the police, and the interrogating detective had acted in a professional manner. The court noted defendant acknowledged his rights as they were read to him and he stated he understood each of those rights. The court also noted defendant had lived in the United States for 20 years and had been previously arrested. No tricks were played on defendant; the detectives were both low key in their approach. Defendant was not intoxicated at the time of the interrogation. Defendant told the officers he did not leave for Mexico after attacking Petrusiak because he had to pay for what he had done. This statement demonstrated an acceptance of responsibility. The detectives did not use intimidation, coercion, or deception.

Substantial evidence supported a finding defendant impliedly waived his *Miranda* rights. Defendant was advised of his *Miranda* rights. He answered in the affirmative when he was asked if he understood each of those rights. Although English was defendant's second language, the *Miranda* warnings were read to him in Spanish, and he specifically acknowledged he understood them.

Defendant contends his failure to explicitly invoke his *Miranda* rights was due to Magliano's minimization of the importance of those rights when Magliano stated he had to read defendant his rights because defendant was at the police station. Magliano's statement was nothing more than a statement of the basis of the *Miranda* rights. Nothing about the statement would tend to confuse a reasonable person or to improperly cause a minimization of his or her constitutional rights.

Accordingly, the trial court did not err by denying the motion to suppress.

II.

THE TRIAL COURT DID NOT COMMIT INSTRUCTIONAL ERROR.

Defendant argues the trial court erred by failing to instruct the jury with CALJIC No. 8.71, which reads: "If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you

unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree [as well as a verdict of not guilty of murder in the first degree].” When a defendant challenges the appropriateness of a jury instruction, we consider the instructions as a whole to determine whether there was error. (*People v. Bolin* (1998) 18 Cal.4th 297, 328.) The trial court instructed the jury with CALCRIM Nos. 520 and 521.¹

¹ CALCRIM Nos. 520 and 521 were read to the jury as follows: “Defendant is charged in count 1 with murder, in violation of Penal Code section 187. To prove that the defendant is guilty of this crime the People must prove: [¶] Number one, the defendant committed an act that caused the death of another person. [¶] And, two, when the defendant acted, he had a state of mind called malice aforethought. [¶] There are two kinds of malice aforethought: express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder. [¶] The defendant acted with express malice if he unlawfully intended to kill. [¶] The defendant acted with implied malice if: [¶] Number one, he intentionally committed an act. [¶] Two, the natural and probable consequences of the act were dangerous to human life. [¶] Three, at the time he acted, he knew his act was dangerous to human life. [¶] And, four, he deliberately acted with conscious disregard for human life. [¶] Malice aforethought does not require any hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time. [¶] An act causes death if the death is the direct, natural and probable consequence of the act. And, the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. [¶] If you decide that the defendant committed murder, you must then decide whether it is murder of the first or second degree. [¶] First degree murder. The defendant is guilty of first degree murder if the People have proved he acted willfully, deliberately, and with premeditation. [¶] The defendant acted willfully if he intended to kill. [¶] The defendant acted deliberately if he carefully weighed the considerations for and against his choice, and knowing the consequences, decided to kill. [¶] The defendant acted with premeditation if he decided to kill before completing the acts that caused death. [¶] The length of time a person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person-to-person, and according to the circumstances. A decision to kill made rashly, impulsively or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated

The Attorney General contends this argument has been forfeited because defendant did not request the trial court to give CALJIC No. 8.71 or to modify or clarify the instructions actually given. “Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.” (*People v. Guiuan* (1998) 18 Cal.4th 558, 570; see *People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1060-1061.) Defendant argues that because the evidence was sufficient to support either a finding of guilt on first or second degree murder, the court had a sua sponte duty to give an instruction similar to CALJIC No. 8.71, although he does not explicitly argue that CALCRIM Nos. 520 and 521 are not legally correct. Without deciding whether defendant forfeited this argument in the trial court, we will proceed to consider it on the merits.

When the evidence is sufficient to support a finding of guilt of both the charged offense and a lesser included offense, the court must instruct the jury, sua sponte, that if there is a reasonable doubt as to which offense the defendant committed, the jury must find the defendant guilty of the lesser crime. (*People v. Dewberry* (1959) 51 Cal.2d 548, 555.) CALJIC No. 8.71 specifically tracked the holding of *People v. Dewberry* with respect to evidence sufficient to support both first and second degree murder. We conclude, however, that the jury instructions in this case sufficiently met the requirement of *People v. Dewberry*.

Specifically, the jury was instructed (1) if it found the elements of murder had been proven, it must decide whether the murder was of the first or second degree;

decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time. [¶] Requirements for second degree murder based on express or implied malice are explained in CALCRIM 520, first or second degree murder with malice aforethought. See page 26, which I had just read you. [¶] The People have the burden of proving beyond a reasonable doubt the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder.”

(2) what was required to be proven to establish first degree murder; (3) if it found the prosecution had failed to prove first degree murder beyond a reasonable doubt, then it must find defendant not guilty of first degree murder; and (4) the manner in which the verdict forms for first and second degree murder should be completed. The jury was properly instructed under the rule of *People v. Dewberry*, and the trial court did not commit instructional error.

III.

*THE ABSTRACT OF JUDGMENT MUST BE CORRECTED TO REFLECT
DEFENDANT'S CUSTODY CREDITS.*

Defendant argues, and the Attorney General concedes, the abstract of judgment must be corrected to reflect defendant was awarded 801 days of custody credit. We will direct the trial court to correct this clerical error.

DISPOSITION

The judgment is affirmed. We direct the trial court to prepare an amended abstract of judgment reflecting that defendant was awarded 801 days of custody credit, and to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

FYBEL, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.