

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH ROBERT SUESS,

Defendant and Appellant.

G050203

(Super. Ct. No. 12CF2591)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
William R. Froeberg, Judge. Affirmed.

Doris M. LeRoy, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney
General, William M. Wood and Brendon W. Marshall, Deputy Attorneys General, for
Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Joseph Robert Suess was found guilty of the first degree murder of Michael Williams. He was sentenced to 51 years to life in prison. On appeal, defendant raises two issues. First, he argues that the trial court's failure to instruct the jury regarding aiding and abetting liability might have permitted the jury to find him guilty of first degree murder based on felony murder, despite an alleged lack of evidence of defendant's knowledge of his cohort's intent to rob the murder victim. Any error was harmless because there was more than sufficient evidence supporting a conviction for first degree murder based on the alternative theory of premeditation and deliberation.

Second, defendant argues the trial court committed prejudicial error by providing an incorrect statement of the law regarding malice aforethought in response to a question from the jury during deliberations. The error was harmless because the court, in its response to the jury's question, reiterated that the jury must reread the instructions, which contained a correct statement of the law.

Finally, we find no cumulative error requiring reversal of defendant's conviction. Therefore, we affirm the judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

About 9:30 p.m. on August 29, 2012, Anaheim Police Officer Andre Pedroza responded to a call that two men with baseball bats were knocking on a woman's door. On the scene, Officer Pedroza contacted Williams, an African-American male who was holding a baseball bat, and defendant, a Caucasian male. Officer Pedroza searched Williams and found a folding knife and a wad of cash in his pants pockets. Williams and defendant were released, and left together in Williams's car.

Arnold Delatorre had spent time with Williams and defendant on August 29 in the alley next to Delatorre's home. Williams and defendant had left the alley and returned twice that evening. They began drinking when they returned about 10:00 p.m. Later that evening, Williams and defendant got into a loud argument. Delatorre was

unable to calm them down or get them to leave. About 30 minutes later, Heriberto Calvillo, a Hispanic male and a member of a local criminal street gang, arrived. At some point, Williams told defendant that he could not get something out of Williams's car. A physical fight began involving defendant, Williams, and Calvillo. Defendant punched Williams, Williams dropped a beer bottle, and then Calvillo and defendant pushed Williams up against a car and punched him. Delatorre and a woman he was with ran back to Delatorre's house for safety. Delatorre saw a bloody hand reach over his gate to open it, then saw defendant and Calvillo run through his property toward the street.

A neighbor heard a conversation in the alley escalate to a loud argument shortly before midnight on August 29. The neighbor heard a male, Hispanic voice say, "Nigger, you will pay." The neighbor then heard the sounds of kicking and punching, followed by the sound of moaning. The neighbor called 911, then looked out her window and saw a man with his arm over a neighbor's gate, trying to open it.

Anaheim Police Officer Kenneth Johnson responded to the 911 call shortly after midnight on August 30, and found Williams's body in a large pool of blood. Williams had multiple puncture wounds in his left thigh. Two small baggies of methamphetamine and a broken beer bottle were found near Williams's body. When his body was found, Williams did not have the folding knife or the cash he had possessed when stopped a couple hours earlier by Officer Pedroza. Williams's car, in which he and defendant had left after the earlier encounter with Officer Pedroza, was found at the scene of the murder.

Defendant was taken into custody the next morning. He was wearing shoes with reflectors. Calvillo's shoes did not have reflectors on them. DNA testing revealed that bloodstains on defendant's shorts were from Williams's blood.

Footage from a video surveillance camera at the home of the neighbor who called the police showed defendant and Calvillo attacking Williams, defendant making three stabbing motions toward Williams, and Calvillo searching through Williams's

pockets while he was on the ground. The footage was not clear enough to identify the individuals in it, but the identities were established based on their shoes, heights, and fingerprints taken from the scene.

An autopsy concluded Williams bled to death due to stab wounds in his left thigh. One of the wounds was three and one-half inches deep, and the other two were four and one-quarter inches deep. The parties stipulated that Williams's blood contained methamphetamine.

Defendant was charged in an information with first degree murder. (Pen. Code, § 187, subd. (a).) The information alleged that defendant personally used a deadly weapon in the commission of the murder (Pen. Code, §§ 12022, subd. (b)(1), 1192.7), and had four prior strike convictions (Pen. Code, §§ 667, subds. (d) & (e)(2)(A), 1170.12, subds. (b) & (c)(2)(A)). A jury found defendant guilty of murder, and found the deadly weapon enhancement to be true.

At the sentencing hearing, the trial court granted the prosecution's motion to strike three of the prior strike allegations, and defendant admitted the remaining prior strike allegation. The trial court sentenced defendant to prison for 51 years to life: 25 years to life for murder, doubled due to the prior strike allegation, and one year for the deadly weapon enhancement. Defendant filed a timely notice of appeal.

DISCUSSION

I.

FAILURE TO INSTRUCT ON AIDING AND ABETTING LIABILITY

Defendant was prosecuted for first degree murder under two different theories. First, the prosecution contended that defendant committed the murder of Williams with premeditation and deliberation. Second, the prosecution contended that the felony-murder rule applied because defendant killed Williams during the course of a robbery. The robbery theory was based on the fact that the cash and folding knife in Williams's possession when he was stopped by Officer Pedroza earlier in the evening

were not on his body after the murder. The video surveillance tape does not clearly show either defendant or Calvillo taking anything from Williams, although during closing argument the prosecutor suggested that Calvillo might have gone through Williams's pockets after Williams was on the ground, but before defendant stabbed him. There is no evidence of defendant taking anything directly from Williams at any point.

The trial court correctly instructed the jury regarding felony murder. The court did not, however, instruct the jury regarding aiding and abetting liability. Defendant argues that the trial court had a sua sponte duty to do so as a ““general principle[] of law relevant to the issues raised by the evidence.”” (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

The Attorney General argues that the failure to instruct on aiding and abetting liability actually benefitted defendant. The trial court instructed the jury that it could find defendant guilty of first degree murder if it found he intentionally committed a robbery and caused the death of Williams while doing so. The court also instructed the jury that to prove defendant guilty of felony murder during the course of a robbery, the prosecution must have proved that defendant took Williams's property from Williams's possession and against his will, by the use of force or fear, and with the intent to permanently deprive Williams of it. Defendant challenges the court's failure to instruct the jury that he could also be liable for felony murder if (1) Calvillo had robbed Williams, (2) defendant knew Calvillo had intended to do so, and (3) defendant intended to and did, by his words or conduct, aid and abet Calvillo in robbing Williams. (CALCRIM No. 401.) The prosecutor argued that Calvillo took Williams's money, and defendant took Williams's knife, with which defendant stabbed Williams. But the prosecutor also referred to Calvillo and defendant working cooperatively to rob and murder Williams. The instruction on aiding and abetting liability should have been given to provide the jury the legal basis it needed to evaluate the evidence. (*People v. Montoya*

(1994) 7 Cal.4th 1027, 1047 [aiding and abetting instructions must be given when the defendant's liability is based on aiding and abetting the charged offense].)

The parties dispute whether the failure to instruct the jury regarding aiding and abetting liability lowered the prosecution's burden of proof, thereby denying defendant due process. If it did, the error is subject to harmless error review under the standard of *Chapman v. California* (1967) 386 U.S. 18, 24; if it did not, the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, applies.

We conclude that the error was harmless under either potentially applicable standard. The prosecution of defendant for first degree murder proceeded under two different theories: (1) the murder was premeditated and deliberate, and (2) the murder was committed during the commission of a robbery. In this case, there was overwhelming evidence supporting the first degree murder verdict based on premeditation and deliberation. Defendant and Williams engaged in a lengthy verbal argument, which escalated into a physical altercation, during which Williams was stabbed by defendant. While Williams was prone on the ground of the alley, defendant paced back and forth, and bent over Williams and appeared to berate him. While Williams was apparently unconscious, defendant walked away from Williams's prone body, only to return and stab him three times with enough force to penetrate his thigh from three to four inches with each thrust. The evidence of premeditation and deliberation was overwhelming.

II.

RESPONSE TO JURY'S QUESTION

The jury was instructed with CALCRIM No. 521 regarding premeditation and deliberation: "The defendant has been prosecuted for first-degree murder under two theories: One, the murder was willful, deliberate and premeditated, and, two, the murder was committed during the course of a robbery. [¶] Each theory of first-degree murder has different requirements and I will instruct you on both. [¶] You may not find the

defendant guilty of first-degree murder unless all of you agree that the People have proved that the defendant committed murder. But all of you do not need to agree on the same theory. [¶] The defendant is guilty of first-degree murder if the People have proved that 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 act that caused death. [¶] The length of time the 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 decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time. [¶] The requirements for second-degree murder based on express or implied malice are explained in CALCRIM 520, first or second-degree murder with malice aforethought. [¶] The People have the burden of proving beyond a reasonable doubt that 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 and the murder is second-degree murder.”

During deliberations, the jury sent a note to the trial court, reading:

“Clarity on document 521. What is the difference between 1st degree murder and 2nd degree murder? [¶] Our interpretation is 1st degree must meet all 3 conditions: Willful, deliberate, AND Premeditation. But there is an AND robbery. Is it and or?” After conferring with counsel, the court responded as follows: “The complete answer to your question of what is the difference between first and second degree murder is contained in the jury instructions; please re-read instructions numbered 29 through 34. I will respond to your question in a condensed fashion. [¶] Murder is the unlawful killing of another

human being with malice aforethought. *Malice aforethought means the defendant intended to kill when he acted.* Intent to kill is either express or implied. Express malice and implied malice are defined in the instruction numbered 29. All murders are of the second degree with two exceptions. [¶] First Exception. If the murder was willful, deliberate and premeditated it is murder of the first degree. See instruction numbered 31 when making this determination. [¶] Second Exception. Any murder that is committed during the commission of certain felonies, in this case robbery, is considered first degree as a matter of law. Instruction numbered 34 sets forth the requirements for what has been referred to as felony murder. [¶] In order to reach a verdict, the jury must unanimously agree which degree of murder has been committed. A finding of first degree murder can be based on either of the two exceptions set forth above; however not all of the jurors need to agree on the same exception as long as all of the jurors agree that one or both of the exceptions have been proven beyond a reasonable doubt.” (Italics added.)

The italicized portion of the trial court’s response to the jury’s question contains an incorrect statement of the law. Malice aforethought may be express or implied. (Pen. Code, § 188.) While express malice requires proof that the defendant had the intent to kill, implied malice is the intentional commission of an act, the natural and probable consequence of which is dangerous to human life, with knowledge that the act was dangerous to human life and with conscious disregard therefor. (Pen. Code, § 188; *People v. Blakeley* (2000) 23 Cal.4th 82, 87.) Because malice aforethought could be established without a showing of an intent to kill, the court’s response to the jury was incorrect.

When the trial court misinstructs the jury on an element of the offense, reversal is required unless the prosecutor shows the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Wilkins* (2013) 56 Cal.4th 333, 348.) Here, the Attorney General essentially concedes the trial court’s error, by arguing only that the error was harmless beyond a reasonable doubt.

The Attorney General notes that the trial court bookended its incorrect statement regarding malice aforethought with directions to reread the instructions for CALCRIM Nos. 520, 521, 522, and 540A, which correctly state the law regarding, respectively, first or second degree murder with malice aforethought, first degree murder, provocation, and felony murder. We presume the jury followed the trial court's instructions. (*People v. Boyette* (2002) 29 Cal.4th 381, 436.) Therefore, the error was harmless.

III.

CUMULATIVE ERROR

Finally, defendant argues that the cumulative impact of the foregoing instructional errors denied him a fair trial. “[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.” (*People v. Hill* (1998) 17 Cal.4th 800, 844.) As explained *ante*, the errors of which defendant complains either were not errors, or were harmless. The evidence of defendant's guilt was strong. We conclude there was no cumulative error.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.