Filed 9/4/12 P. v. Krall CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. VIRGINIA ANN KRALL, Defendant and Appellant.	B231290 (Los Angeles County Super. Ct. No. VA095907)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert J. Higa, Judge. Affirmed.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant Virginia Ann Krall of one count of second degree murder (Pen. Code, § 187, subd. (a))[1] (count 1), three counts of attempted murder (§§ 187, subd. (a), 664) (counts 2-4), and one count of first degree residential burglary with a nonaccomplice present (§ 459) (count 5). The jury found that defendant personally inflicted great bodily injury (§ 12022.7, subd. (a)) and personally used a deadly and dangerous weapon, a knife (§ 12022, subd. (b)(1)). At defendant's first sanity trial, the jury was unable to reach a verdict, and the trial court declared a mistrial. At a retrial, the jury found defendant legally sane.[2]

The trial court sentenced defendant to a total term of 21 years four months plus 15 years to life in prison. In count 1, the trial court imposed a term of 15 years to life plus one year pursuant to section 12022, subdivision (b)(1). In count 2, the trial court imposed a consecutive upper term of nine years, plus an additional three years pursuant to section 12022.7, subdivision (a), and an additional one year pursuant to section 12022, subdivision (b)(1) for a total term of 13 years. In each of counts 3 and 4, the trial court imposed consecutive terms of one-third the midterm of 84 months for a term of 28 months. In each of counts 3 and 4, the trial court imposed an additional one-third of one year, or four months, pursuant to section 12022, subdivision (b)(1) and one-third the midterm of three years, or one year, pursuant to section 12022.7, subdivision (a) for total terms of three years eight months in these counts. The trial court also imposed and stayed, pursuant to section 654, an upper term of six years in count 5.

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

2 Defendant does not raise any issues regarding the sanity phase of her trial. This opinion summarizes only the evidence presented at defendant's guilt phase on the issue of her mental health.

FACTS

Prosecution Evidence

On June 15, 2006, defendant was romantically involved with Justin Schmalz and lived with him at the Lakewood home of his mother, Kelly Schmalz (Schmalz). The Schmalz family lived three or four houses away from the Meraz family, the victims in this case. When Schmalz returned from work at approximately 9:30 p.m., defendant was acting normally. At approximately 11:30 p.m., Schmaltz went to bed.

Megan Bufford lived with her mother, Yolanda Meraz, her aunt, Samantha Meraz, and her grandmother, Jeanie Meraz. Bufford and Yolanda shared a bedroom. At approximately 1:30 a.m. on June 16, 2006, Bufford came home and got ready for bed. As she sat on her bed afterwards, she saw defendant open the door and enter the room with a knife in her hand. Bufford did not know who defendant was. Defendant then held the knife with her arms raised above her head. After a few seconds, defendant ran toward Bufford, jumped onto the bed, and stabbed her two times. Defendant then ran around the bed and began stabbing Yolanda. Yolanda fell on the floor and defendant stabbed her repeatedly as she lay there. Bufford saw Yolanda being stabbed approximately 10 times. Bufford ran out of the room, yelling for help and telling everybody to get out of the house. Bufford ran outside and hid behind a car.

Jeanie was awakened by the screaming and heard Samantha say that Bufford wanted them to call 911. Jeanie began to call as Samantha ran out after Bufford. Jeanie called out to ask what she should tell the 911 operator. As she did so, defendant came out of Bufford's room and attacked Jeanie. Defendant repeatedly stabbed Jeanie on her left side. She stabbed the top of Jeanie's head as well as her ear, cheek, jaw line, hand, wrist, and chest. When Jeanie slipped and fell, defendant kept stabbing her in the back. Then she suddenly stopped.

Samantha was asleep on the couch when she heard Bufford scream for her and Jeanie to get out of the house. Samantha originally ran after Bufford to see what was

going on but returned to the house when she heard Jeanie, her mother, screaming. Samantha saw defendant repeatedly stabbing Jeanie as Jeanie was on the ground.

Samantha ran out of the house again. She knew that defendant was chasing her. Defendant stabbed Samantha in the back and in the neck. Defendant grabbed Samantha by the shirt, brought her to the ground, and repeatedly stabbed her in the arm and chest. Defendant then got up and began walking away. When Samantha got up also, defendant turned around and took Samantha to the ground again. Defendant tried to stab Samantha in the head. The knife went into the grass and Samantha was able to grab it. Defendant then got up and walked away. Samantha recognized the knife as one that the Meraz household kept in a block of knives in the kitchen.

Jennifer De La O, a neighbor, was awakened by the sound of a woman screaming for help. De La O looked out her window and saw Bufford running northbound. De La O called 911. Through the window, she saw defendant walking southbound from the direction Bufford had gone. When she was connected to the 911 operator, De La O stepped outside to describe the scene. She saw defendant holding a knife and straddling someone. Defendant was raising the knife and plunging it downward. De La O recognized the person on the ground as Samantha. Defendant got up and began walking southbound toward a woman who was calling and motioning to her. Deputies arrived shortly thereafter.

Schmalz had also been awakened by screaming. She heard a woman saying, "Oh, God. Oh God. Help me." Schmaltz looked out from her balcony and saw what appeared to be a scuffle on the ground. When the struggle stopped, Schmalz saw one of the two people coming toward her, and she recognized the person as defendant. Defendant had "wild hair," a torn tank top, and blood on her shirt and hands. Defendant was screaming, "Oh, my God. Oh, my God. What have I done? Kill me now. Kill me now." Schmaltz told defendant to "shut up." Defendant seemed to calm down a little. Schmalz brought defendant back to her home and told her to sit on a bench outside while Schmalz called the police. When the police arrived, Schmalz told defendant to get up, and she did so.

The police drew their guns and ordered defendant to the ground. She complied with their orders. Defendant appeared calm as she was booked and processed. She answered questions appropriately and was cooperative.

Yolanda died as a result of the attack. She suffered 30 stab wounds, including defensive wounds to her hands. Defendant's attack caused Bufford to suffer a collapsed lung and a stab wound to her arm. She spent 10 days in the hospital. Samantha was treated for 16 stab wounds and suffered nerve damage to her arm. Jeanie also suffered 16 stab wounds. She had permanent nerve damage on two of the fingers of her left hand and was unable to use them. She also suffered a stab wound to her tongue.

Defense Evidence

Dr. Marshall Cherkas, a psychiatrist, testified that there was more than a 50 percent likelihood that defendant was grossly psychotic at the time of the stabbings, and that her thinking was delusional, fragmented, and without control. He believed that the psychosis was a product of long-term mental illness exacerbated by substance abuse. Dr. Cherkas acknowledged that drug use could have been part of the reason, or even the primary reason, for what he believed had been a psychotic episode.

Dr. Cherkas believed defendant had delusional thoughts. He based his opinion on his three interviews with defendant, a video made shortly after she was arrested, and her medical records. Defendant believed that there were devils in the world that were standing in the way of her going to heaven and of other people being saved. She believed she was selected by God to attack and kill these devils. She was to be a leader. Defendant's understanding that devils represented something bad and that heaven represented something good was an indication that defendant knew the difference between right and wrong.

Defendant told Dr. Cherkas that she specifically went to the Meraz home to kill. Defendant told Dr. Cherkas that she entered the house through a window with that intent, picked up a knife with that intent, and had that intent each time she stabbed Yolanda,

Jeanie, Samantha, and Bufford. She had formed the intent hours before the stabbings. Dr. Cherkas perceived that defendant understood what it meant to kill.

DISCUSSION

I. Imposition of Deadly Weapon and Great Bodily Injury Enhancements

In her opening brief, defendant contended that the enhancements imposed in counts 2 through 4 for knife use under section 12022, subdivision (b)(1) should have been stayed under section 654, since her sentence in those counts was enhanced for infliction of great bodily injury under section 12022.7. Defendant asserted that her enhancements for knife use and infliction of great bodily injury fell under the purview of section 654 because they were based on the same act and were committed with the same intent and objective.

In her reply brief, defendant concedes that the decision in *People v. Ahmed* (2011) 53 Cal.4th 156 (*Ahmed*), puts an end to this issue. *Ahmed* rejected the defendant's similar claim in that case, relying on section 1170.1, subdivisions (f) and (g)[3] rather than section 654. (*Ahmed*, at pp. 159-160, 168.) After discussing the legislative history of section 1170.1, the court stated, "[w]e can fairly discern a legislative intent to permit imposition of one weapon enhancement and one great-bodily-injury enhancement. Because section

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[3] Section 1170.1, subdivision (f) provides: "When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for the infliction of great bodily injury."

Section 1170.1, subdivision (g) provides: "When two or more enhancements may be imposed for the infliction of great bodily injury on the same victim in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for being armed with or using a dangerous or deadly weapon or a firearm."

1170.1 provides the answer to the question of this case, we do not consider section 654." (*Ahmed*, at p. 168.)

II. Knife-Use Finding in Count 5

A. Defendant's Argument

Defendant contends that, since there was no knife-use allegation under section 12022, subdivision (b)(1) in count 5, the jury's true finding on the enhancement for knife use in that count must be stricken.

B. Relevant Authority

Section 1170.1, subdivision (e) provides that "[a]ll enhancements shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact."

The purpose of the information is to provide a criminal defendant with notice of the charges and to allow him to prepare a defense and avoid surprise. (*People v. Valladoli* (1996) 13 Cal.4th 590, 607; *People v. Haskin* (1992) 4 Cal.App.4th 1434, 1438.) This means that, except for a lesser included offense, a defendant cannot be convicted of an offense with which he has not been charged, even if there was evidence at trial to show that he committed the offense. (*People v. Haskin*, at p. 1438.) The same rule applies to enhancements. (*Ibid*.)

C. Proceedings Below

The information alleged with respect to counts 1 through 4 that, in the commission of these offenses, defendant personally used a deadly and dangerous weapon, to wit, a knife. The trial court instructed the jury with CALCRIM No. 3145 in pertinent part as follows: "If you find the defendant guilty of the crimes charged in Counts 1 *through 5*, you must then decide whether for each crime the People have proved the additional allegation that the defendant personally used a deadly or dangerous weapon during the commission of that crime. You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime." (Italics added.) During the discussion of jury instructions, defense counsel made no objection to the

content of CALCRIM No. 3145. At the close of the discussion, the trial court asked, "Now, with those that we've discussed, do you agree all of these instructions should be given?" Defense counsel assented. No request was made to amend the information.

The prosecutor argued as follows: "With the charges of the attempted murder, as well as with the charge of murder, as well as the attempted murder, and the burglary, you're going to hear that you have an allegation that a weapon was used. . . . and certainly there is no question that that occurred." There was no objection.

Defense counsel argued, "I am not going to suggest that Miss Krall is not guilty. It's ludicrous. A little housekeeping matter out of the way. There's a jury instruction about use of a deadly weapon. Skip it. All you have to do is agree and say, yes, it was used. There doesn't need to be any discussion about it."

The verdict form for count 5 read in pertinent part as follows: "We, the jury in the above-entitled action, find the Defendant, Virginia Ann Krall, guilty of Burglary in violation of section 459 of the Penal Code, a felony, as charged in Count 5 of the information. [¶] . . . [¶] We, the jury, further find the allegation that the defendant, Virginia Ann Krall, personally used a dangerous or deadly weapon during the commission of the above crime in violation of section 12022(b)(1) of the Penal Code to be . . . True."

D. Claim Forfeited; No Prejudice

Respondent argues that defendant has forfeited any challenge to the absence of a deadly weapon allegation in count 5 by failing to object to the verdict form. Respondent further argues that any procedural error is harmless. We agree that defendant's claim has been forfeited. We further conclude that defendant was not deprived of adequate notice.

In *People v. Mancebo* (2002) 27 Cal.4th 735, on which defendant relies, our Supreme Court addressed the issue of fair notice with respect to pleadings. In that case, the defendant was convicted of eight different sex crimes against two victims. (*Id*. at p. 738.) The nature of the offenses justified sentencing under the one strike law, section 667.61. The information alleged that, in accordance with section 667.61, subdivisions (a)

and (e), the crimes against one victim were committed under the circumstances of kidnapping and gun use and the crimes against the second victim were committed under the circumstances of gun use and tying or binding. (§ 667.61, subd. (e)(1), (3), (5).) The trial court was thus able to sentence the defendant to two terms of 25 years to life under the one strike law. (*Mancebo* at p. 738.) The information did *not* allege, however, a multiple victim circumstance under section 667.61, subdivision (e)(4). (*Mancebo* at p. 739.) In order to apply two additional gun-use enhancements alleged under section 12022.5, subdivision (a) while still maintaining the "'minimum number of circumstances'" required to impose the longer sentence, the trial court, without giving defendant prior notice, substituted the multiple victim circumstance for the circumstance of gun use alleged with the sex crimes. (*Mancebo* at pp. 738-739.)

The Court of Appeal struck the two gun-use enhancements, and our Supreme Court affirmed the Court of Appeal's judgment. (*Mancebo*, *supra,* 27 Cal.4th at p. 739.) The court held that the "express pleading requirements of section 667.61, subdivisions (f) and (i), read together, require that an information afford a One Strike defendant fair notice of the qualifying statutory circumstance or circumstances that are being pled, proved, and invoked in support of One Strike sentencing." (*Id*. at pp. 753-754; § 667.61, subds. (f) & (i).) "Substitution of that unpleaded circumstance for the first time at sentencing as a basis for imposing the indeterminate terms violated the explicit pleading provisions of the One Strike law." (*Mancebo*, at p. 743.) *Mancebo* does not aid defendant's cause in that *Mancebo* is based on the express pleading requirements of section 667.61, which were violated by the trial court in that case. The statute in the instant case, section 12022, subdivision (b)(1), has no such express pleading requirement. Moreover, the trial court in *Mancebo* substituted the uncharged circumstance at sentencing, unlike the instant case, where the jury instructions and verdict forms contained the uncharged allegation in count 5.

Defendant's case is more analogous to that of *People v. Riva* (2003) 112 Cal.App.4th 981 (*Riva*), where the defendant was charged with several crimes after a

shooting. (*Id*. at p. 986.) It was alleged as to two counts that he discharged a firearm pursuant to section 12022.53, subdivision (d), but the allegation was not made as to a third count. (*Riva*, at p. 1000.) The verdict forms, however, asked the jury to return a finding as to all three counts whether the allegations under section 12022.53, subdivision (d) were true, and the jury found them true. (*Riva*, at p. 1000.) The trial court imposed a sentence for the enhancement in the count in which it was not alleged. (*Id*. at pp. 1000-1001.)

The defendant in *Riva* relied on *Mancebo* to appeal the imposition of the enhancement, claiming the failure to plead the allegation under section 12022.53, subdivision (d) on the third count violated his right to adequate notice and the statutory pleading provisions of section 12022.53, subdivision (j). The *Riva* court concluded that imposing the section 12022.53 enhancement did not violate section 12022.53, subdivision (j) nor Riva's right to due process of law. (*Riva, supra*, 112 Cal.App.4th at pp. 1001, 1002.) The court noted that the prosecutor complied with the literal requirements of section 12022.53, subdivision (j) by pleading the enhancement in other counts of the information. (*Riva*, at p. 1001.) More importantly, the Supreme Court's concern in *Mancebo* over lack of fair notice was not applicable because Riva was on notice he had to defend against the charge. (*Riva*, at p. 1003.) "[A]lthough the better practice is to allege the enhancement with respect to every count on which the prosecution seeks to invoke it, the failure to do so is not fatal so long as the defendant has fair notice of his potential punishment, which he did in this case." (*Id*. at p. 985.) In the instant case, the enhancement in question did not contain specific pleading requirements, unlike the statute involved in *Riva*. Therefore, the argument in favor of defendant having adequate notice is even stronger under the reasoning of *Riva*.

Defendant has cited other decisions disallowing convictions based on uncharged allegations, i.e., *People v. Botello* (2010) 183 Cal.App.4th 1014 and *People v. Arias* (2010) 182 Cal.App.4th 1009. Unlike in those cases, in the instant case the jury was provided with the verdict forms required to record their findings regarding the

allegations, and they found them to be true. (See *Botello*, at p. 1021; *Arias*, at p. 1017.) Moreover, the decisions in *Botello* and *Arias*, like *Mancebo*, were based on statutory pleading requirements as well as the notice requirement of due process. (*Botello*, at pp. 1017, 1022, 1027; *Arias*, at pp. 1017, 1019.)

Accordingly, in the instant case, considering defense counsel's failure to object to the inclusion of the allegation in the jury instructions and in the count 5 verdict form, we conclude the failure to allege the firearm-use enhancement in count 5 was forfeited, and the sentence imposed under that enhancement was proper. (See, e.g., *People v. Toro* (1989) 47 Cal.3d 966, 976-977, disapproved on other grounds in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3 [defendant's failure to object to instructions and verdict forms on lesser related offense may be viewed as implied consent to trier of fact's consideration of the lesser related offense].) Moreover, defendant had sufficient constitutional notice of the enhancement allegation, since it was engendered by the same conduct that gave rise to the same allegation in the other counts in the information. Defendant knew that the weapon allegation applied to the burglary as well as the other counts, and she prepared her defense accordingly. (*Riva, supra*, 112 Cal.App.4th at pp. 1002-1003.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.
BOREN

We concur:

_____, J.
DOI TODD

_____, J.
ASHMANN-GERST