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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOHNATHON LEE SMITH, Defendant and Appellant.	B231583 (Los Angeles County Super. Ct. No. MA047755)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles A. Chung, Judge. Affirmed in part, modified in part with directions.

Cannon & Harris, Donna L. Harris 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, Marc A. Kohm and Sonya Roth, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant, Johnathon Lee Smith, of: first degree murder (Pen. Code,[1] § 187, subd. (a)); first degree residential robbery (§ 211); first degree burglary, person present (§§ 459, 667.5, subd. (c)); and arson of an inhabited structure. (§ 451, subd. (b).) Defendant admitted the following allegations were true: he had sustained one prior serious felony conviction (§§ 667, subds. (b)-(i), 1170.12); he had sustained a single prior serious felony conviction (§ 667, subd. (a)(1)); and he had served prior separate prison terms (§ 667.5, subd. (b).) Defendant was sentenced to a determinate term of 23 years consecutive to an indeterminate term of 55 years to life. Defendant argues: his murder conviction must be reversed because the trial court failed to instruct on voluntary intoxication as it relates to involuntary manslaughter; his arson conviction must be reversed because the trial court failed to give an aiding and abetting instruction; and a theft fine plus penalty assessments must be deleted from the abstract of judgment because the trial court did not orally impose any such fine. We modify the judgment, direct further limited sentencing proceedings and order correction of the abstract of judgment.

II. THE EVIDENCE

Defendant was a methamphetamine user. He both smoked and injected methamphetamine on a regular basis. Defendant admitted killing a friend and fellow drug-user, Alfonso Gonzalez. After the killing, over the next few days, defendant removed hundreds of valuable items, primarily electronic equipment, from Mr. Gonzalez's home. Mr. Gonzalez shared the home with Gary Shockley. Defendant was assisted in this endeavor by a friend, Andrew Gamez. On November 28, 2009, defendant set the house on fire. Investigators found Mr. Gonzalez's partially burned

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[1] All further statutory references are to the Penal Code unless otherwise noted.

body in a closet. One week prior to the murder, defendant spoke to a friend, Kristy Langosh. Defendant said he could easily get into the Gonzalez-Shockley home. During their conversation, defendant told Ms. Langosh: "[H]e brought up how he could just take [Mr. Gonzalez] . . . out to the middle of the desert and leave him there and nobody would ever find him."

When interviewed by two sheriff's detectives, defendant claimed Mr. Gonzalez was unintentionally killed in a fist fight. Defendant told the detectives: "I got in a fight with him. I snapped. [¶] . . . I blacked out when I started hitting him, and when I stopped hitting him . . . [¶] . . . he was just laying there." Defendant's explanation for the fight as described to the detectives was: "He tried to grab my dick. [¶] . . . I flipped out." During the in-custody interviews, defendant also admitted setting the house afire with Mr. Gonzalez's body inside. At trial, however, defendant testified it was Mr. Gamez, acting alone, who set the house afire.

III. DISCUSSION

A. Voluntary Intoxication Instruction

The trial court refused defendant's requested instruction that voluntary intoxication resulting in unconsciousness negates express malice so as to reduce a murder charge to involuntary manslaughter. (§ 22, subd. (b); *People v. Carlson* (2011) 200 Cal.App.4th 695, 699.) Involuntary manslaughter is a lesser included offense of murder. (*People v. Thomas* (2012) 53 Cal.4th 771, 813; *People v. Gutierrez* (2012) 28 Cal.4th 1083, 1145.) Section 22, subdivision (b) states: "Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought." Pursuant to section 188: "[Malice] is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation

appears, or when the circumstances attending the killing show an abandoned and malignant heart." The requested instruction, CALJIC No. 8.47, provided in part, "If you find that a defendant, while unconscious as a result of voluntary intoxication, killed another human being without an intent to kill and without malice aforethought, the crime is involuntary manslaughter."

A defendant is entitled, upon request, to instruction on voluntary intoxication as it relates to voluntary manslaughter only when substantial evidence supports the instruction. (*People v. Verdugo* (2010) 50 Cal.4th 263, 295; *People v. Williams* (1997) 16 Cal.4th 635, 677.) Here, the trial court found there was no substantial evidence defendant blacked out due to voluntary intoxication. The trial court reasoned the evidence showed only that defendant blacked out when punched by Mr. Gonzalez. We agree there was insufficient evidence of unconsciousness due to voluntary intoxication. Defendant had smoked methamphetamine earlier on the day of the murder, but due to his exhaustion, he did not feel the effects. Defendant was on the verge of injecting himself with methamphetamine when he discovered he was using a possibly tainted needle. Defendant aborted the injection. Defendant confronted Mr. Gonzalez and a fist fight ensued. Mr. Gonzalez punched defendant in the face. Only then did defendant black out. Moreover, defendant never testified his methamphetamine use rendered him unconscious.

And there was no evidence of the effects of methamphetamine on a chronic user. Further, on cross-examination, defendant testified as follows: "Q . . . Are you saying that you were under the influence that entire night that Alfonso died? [¶] A I was up for eight days before that. [¶] Q So you weren't functioning that night you [are] saying? [¶] A Not in a right mind, no. [¶] Q Were you able to walk around? [¶] A Yes. [¶] Q Were you able to talk? [¶] A Yes. [¶] Q Were you able to make decisions? [¶] A No. [¶] Q Were you able to look around the house? [¶] A Yes. [¶] . . . [¶] Were you able to take the car seat out of Alfonso's car? [¶] A Yes. [¶] Q And load up the car? [¶] Yes. [¶] Q And drive the car? [¶] A Yes." Defense counsel argued Mr. Gonzalez's death was the unintended consequence of a fist fight. Defense counsel further argued defendant was provoked by Mr. Gonzalez. Mr. Gonzalez seemed

unconcerned when accused of potentially exposing defendant to the human immunodeficiency virus. Under all of these circumstances, the trial court properly declined to instruct pursuant to CALJIC No. 8.47. (*People v. Haley* (2004) 34 Cal.4th 283, 313; *People v. Ochoa* (1998) 19 Cal.4th 353, 423-424.)

Even if the trial court erred, there was no prejudice. The jury was instructed on premeditated murder, second degree murder, voluntary manslaughter and involuntary manslaughter. The jury was further instructed that, if it found defendant was voluntarily intoxicated at the time of the murder, it should consider that fact in deciding whether he had the requisite mental state. (CALJIC No. 4.21.1.) The jury had the opportunity to find defendant not guilty of murder and guilty only of involuntary manslaughter on the basis of his voluntary intoxication. The jury rejected all other verdicts and found defendant guilty of first degree murder. The jury necessarily rejected defendant's claim he was unconscious due to voluntary intoxication when the killing occurred. (*People v. Boyer* (2006) 38 Cal.4th 412, 474-475; *People v. Haley, supra,* 34 Cal.4th at p. 314; *People v. Whitfield* (1994) 7 Cal.4th 437, 456, superseded by statute on another point as discussed in *People v. Mendoza* (1998) 18 Cal.4th 1114, 1125-1126.)

B. Aiding And Abetting Instruction As To Arson

Defendant argues his arson conviction must be reversed because the trial court failed to instruct on aiding and abetting liability. Defendant reasons, "[I]t is not inconceivable that the jury believed [defendant] was not the actual perpetrator [of the arson] but still concluded he was equally guilty because he set into motion the events that led to Gonzalez's injuries." Our Supreme Court has defined an aider and abettor as: "[One who] act[s] with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense. [Citations.]" (*People v. Beeman* (1984) 35 Cal.3d 547, 560; accord, *People v. Mendoza, supra,* 18 Cal.4th at p. 1123.) An aiding and abetting instruction is not required where there is no evidence to support such a theory. (*People v. Young* (2005) 34

Cal.4th 1149, 1201, citing *People v. Sassounian* (1986) 182 Cal.App.3d 361, 404.) Here, the trial court had no obligation to sua sponte instruct on aiding and abetting in connection with the arson charge. The evidence at trial reasonably led to only one of two conclusions, neither of which involved aiding and abetting. Either defendant acted alone in setting the fire or Mr. Gamez committed the arson.

C. Sentencing Errors

1. Count 1: First Degree Murder

The trial court sentenced defendant on count 1 to 50 years to life, that is, 25 years to life doubled pursuant to sections 667, subdivisions (b) through (i), and 1170.12. The abstract of judgment erroneously records the sentence as 25 years to life. The abstract of judgment must be corrected.

2. Counts 2 and 3

The abstract of judgment fails to record that the sentence imposed on count 2 was 12 years and on count 3 was likewise 12 years. The abstract of judgment must be amended to so provide.

3. The Local Crime Prevention Programs Fine

The abstract of judgment states a $10 local crime prevention programs fine (§ 1202.5, subd. (a)) plus $26 in penalties was imposed. However, the trial court did not orally impose the fine. Moreover, section 1202.5, subdivision (a) has an ability to pay provision. The failure of the trial court to orally impose the section 1202.5, subdivision (a) fine is presumed to result from a finding defendant did not have the ability to pay the fine plus the penalties and surcharge. (*People v. Tillman* (2000) 22 Cal.4th 300, 302-303;

People v. Sharret (2011) 191 Cal.App.4th 859, 864.) Because no section 1202.5, subdivision (a) fine was orally imposed, it must be deleted from the abstract of judgment. (*People v. Mesa* (1975) 14 Cal.3d 466, 471-472; *People v. Hartsell* (1973) 34 Cal.App.3d 8, 14.)

4. Fees

The trial court orally imposed "$70 in fees." However, defendant was subject to a $30 court security fee on each count for a total of $120. (§ 1465.8, subd. (a)(1); *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866; see *People v. Alford* (2007) 42 Cal.4th 749, 758, fn. 6.) This is notwithstanding the section 654, subdivision (a) stays imposed on counts 2 and 3. (*People v. Sharret, supra,* 191 Cal.App.4th at p. 865; *People v. Crittle* (2007) 154 Cal.App.4th 368, 370-371.) The oral pronouncement of judgment must be modified to reflect the imposition of $120 in court security fees. The abstract of judgment is correct in this respect and need not be amended.

Defendant was also subject to a $40 court facilities assessment as to each count for a total of $160 (Gov. Code, § 70373, subd. (a)(1); *People v. Castillo* (2010) 182 Cal.App.4th 1410, 1415, fn. 3) notwithstanding the section 654, subdivision (a) stay on counts 2 and 3 (cf. *People v. Crittle, supra,* 154 Cal.App.4th at pp. 370-371; see *People v. Woods* (2010) 191 Cal.App.4th 269, 271-273). The oral pronouncement of judgment must be modified to so provide. The abstract of judgment must be amended to record the assessments.

5. Conduct Credit

The trial court recognized that given defendant's murder conviction he was not entitled to presentence conduct credit. (§ 2933.2, subd. (c).) The trial court ordered, however, "As to the arson count, he gets 67 good time/work time credits." That order was in error. Section 2933.2, subdivision (c) imposes a complete ban on presentence

conduct credit for defendants convicted of murder. Section 2933.2, subdivision (c) does not allow presentence conduct credits against any part of a sentence imposed on a convicted murderer. (*People v. Duff* (2010) 50 Cal.4th 787, 792-801; *People v. McNamee* (2002) 96 Cal.App.4th 66, 69-74.) Therefore, the oral pronouncement of judgment must be modified to omit the reference to 67 days of conduct credit. The abstract of judgment is correct in this respect and need not be amended.

6. Prior prison term enhancements

The trial court stated in connection with the prior prison term enhancements: "Then to the overall sentence I will add two of the one-year priors. The other two either wash out or have already been used." The trial court's calculation that only two of the three one-year prior prison term enhancements could be imposed is correct in part. The trial court's assessment that only two one-year prior prison term enhancements may be imposed is correct. However, they must be imposed on *both* the determinate and indeterminate terms unless they are stricken. (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1559-1562; see *People v. Williams* (2004) 34 Cal.4th 397, 401-405.) A prior prison term enhancement must be imposed or stricken pursuant to section 1385, subdivision (a). (*People v. Langston* (2004) 33 Cal.4th 1237, 1241; *People v. Garcia, supra*, 167 Cal.App.4th at p. 1562.) The failure to either impose or strike a prior prison term enhancement pursuant to section 1385, subdivision (a) is a jurisdictional error correctable for the first time on appeal. (*People v. Garcia*, *supra*, 167 Cal.App.4th at p. 1562; *In re Renfrow* (2008) 164 Cal.App.4th 1251, 1254.) Thus, the order imposing the two one-year section 667, subdivision (b) enhancements on the determinate term is affirmed. Upon remittitur issuance, the trial court is to impose or strike pursuant to section 1385, subdivision (a), the two 667.5, subdivision (b) one-year enhancements on the indeterminate term. The trial court retains the jurisdiction to strike one single one-year enhancement and impose the other. Any order striking an enhancement must fully comply with the requirement that the reasons for such an action appear in the clerk's

minutes. (§ 1385, subd. (a); *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 531.) We leave all of these matters in the trial court's good hands.

IV. DISPOSITION

The judgment is modified to impose $160 in court facilities assessments (Gov. Code, § 70373, subd. (a)(1)) and $120 in court security fees (Pen. Code, § 1465.8, subd. (a)(1)), and to omit the award of 67 days conduct credit. Upon remittitur issuance, the abstract of judgment must be amended to reflect that: defendant was sentenced on count 1 to 50 years to life; the sentence imposed on count 2 was 12 years; the sentence imposed on count 3 was 12 years; and defendant was subject to $160 in court facilities assessments. (Gov. Code, § 70373, subd. (a)(1).) The abstract of judgment is to delete any reference to the Penal Code section 1202.5, subdivision (a) fine and any associated penalties. Upon remittitur issuance, the trial court is to impose or strike pursuant to section 1385, subdivision (a) the two Penal Code section 667.5, subdivision (b) one-year enhancements on the indeterminate term. Once the decision is made on the two prior prison term enhancements, the clerk is to prepare a corrected abstract of judgment. The corrected abstract of judgment is to be served on the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

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TURNER, P. J.

We concur:

ARMSTRONG, J. KRIEGLER, J.