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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DANIEL DARNELL KIRKPATRICK, Defendant and Appellant.	B234202 (Los Angeles County Super. Ct. No. BA374162)

APPEAL from a judgment of the Superior Court of Los Angeles County. Craig Richman, Judge. Affirmed.

Rachel Lederman, 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, Lawrence M. Daniels and Allison H. Chung, Deputy Attorneys General for Plaintiff and Respondent.

Defendant and appellant Daniel Darnell Kirkpatrick (defendant) appeals his conviction of aggravated mayhem, challenging it as unsupported by substantial evidence of a specific intent to permanently disable or disfigure the victim. Defendant also contends that substantial evidence did not support his conviction as an actual perpetrator or as an aider and abettor; and that the trial court erred in instructing the jury regarding the natural and probable consequence theory of liability. Finding no merit to defendant's contentions we affirm the judgment.

BACKGROUND

1. Procedural history

Defendant was charged in an amended information with aggravated mayhem in violation of Penal Code section 205[1] (count 1), and two counts of second degree robbery in violation of section 211 (counts 2 and 3). As to count 2 it was alleged, pursuant to section 12022.7, subdivision (b), that defendant personally inflicted great bodily injury upon the victim Antonio Bahena (Antonio),[2] paralyzing him and causing him to become comatose due to the brain injury.

A jury found defendant guilty of all three counts as charged and found true the allegation that he personally inflicted great bodily injury. The trial court sentenced defendant to three years on count 2 and a consecutive eight months on count 3, plus life in prison as to count 1, for a total prison sentence of life plus three years eight months. The trial court awarded 407 days of custody credit, and ordered defendant to pay mandatory fines and fees, plus attorney fees of $5,000. Defendant filed a timely notice of appeal.

2. Prosecution evidence

Gumecinda Bahena (Gumecinda) and her husband Antonio operated a small clothing store in Los Angeles. On July 18, 2009, three young men came into the store.

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

[2] Because the husband and wife victims share last names, we refer to both by their first names to avoid confusion.

While one asked for change and to see a medium T-shirt, the other two leaned against a glass display case and said nothing. After rejecting the T-shirt, the young men left, only to rush back into the store about two minutes later. One ran directly to Gumecinda and the other two ran toward Antonio. Gumecinda saw one of the men raise his arm as he reached Antonio, but nothing after that. Gumecinda was grabbed violently and thrown to the floor by the one man who also covered her mouth, straddled her, and demanded money.

While immobilized by her assailant, Gumecinda could hear Antonio being beaten. She heard him gasping as though choking, and she heard "many, many blows" which continued for 10 minutes. Gumecinda said, "Please stop hitting my husband. All the money [is] inside the drawer by the desk." She was told by her assailant to shut up, and was struck hard on the side of the head, which caused her head to hit the cement floor which left her briefly unconscious. After she no longer heard the sounds of Antonio's beating, the man holding her told the others to put small and medium white T-shirts in a black bag. Gumecinda then heard drawers and cabinets opening and other noises.

When one of the men said, "Someone's coming," Gumecinda's assailant stood up, kicked her, and the three men then left the store. Gumecinda had yellow spots before her eyes, could barely breathe, and was too dizzy to rise. After a few minutes she called 911. She found Antonio unconscious, lying on the floor six feet further into the store from where he was when first attacked. Antonio was covered in blood and had numerous injuries. After the paramedics took Antonio to the hospital, Gumecinda was examined in an emergency room. When Gumecinda returned to the store the next day, she determined that the robbers had taken a dozen T-shirts, about $50 in cash, and her purse.

Trauma surgeon, Dr. Lydia Lam, testified that when Antonio arrived at the emergency room, he was in a coma, nonresponsive, could not breathe on his own, and had to be intubated. His ear and neck were swollen, a piece of his tongue was missing, and he had a large laceration on the back of his head, a cut lip, several missing teeth, and blood in his mouth. He was bruised all over his face, the left side of his head, his chest, and his shoulder, but there were no bruises on his hands or his body below his upper

chest. His left eye orbit was depressed. CT scans and X-rays revealed bleeding in the brain, significant facial fractures over his entire face, and a tooth lodged in his lung. Surgery was required. Dr. Lam testified that the head was more vulnerable to life-threatening injuries from blunt-force trauma than any other part of the body.

Antonio was 66 years old at the time of the robbery. Although he had been a bit incapacitated by back surgery, he had no problem moving around before the beating. At the time of trial, Antonio was being cared for in a convalescent hospital, still in a coma and paralyzed, with a feeding tube and an IV, and unlikely ever to emerge from the coma.

Several weeks after the robbery, Gumecinda identified a photograph of Marco Placido (Placido) as the young man who had assaulted her. The investigating officers, Los Angeles Police Department (LAPD) Detectives Humphreys and Michael Matsuda interviewed Placido and surreptitiously recorded the interview. At trial, Placido was granted use immunity and called by the prosecution as a witness. He was not very forthcoming, claiming not to know defendant very well and not to remember a great deal of what he had previously told the police. Placido testified that he had lied in his interview due to threats and promises by the detectives. He admitted that he had pled no contest to one count of robbery and one count of mayhem in this case. Placido denied that he was afraid to testify, suggested that defendant was innocent, and claimed that the person he named in his interview with the detectives was a person named "Daniel T." -- not defendant. He admitted however, that he had identified a photograph of defendant as the Daniel he meant, and that he laughed when he identified him because his "friend" looked funny in the photograph.

A redacted recording of Placido's police interview was played for the jury. In the interview Placido admitted being familiar with the store as he had been there many times to buy shirts and socks. He admitted that the couple was beaten in order to rob them, but claimed that his part in the robbery was solely as a lookout. He claimed that he merely watched as the others held the woman and beat up the man, who "definitely" looked to be old, in his 60's. The others involved were his friends "Mike" and "Fred." Later he gave Mike's full name as Michael Andrews and added there was fourth robber named Samuel

Turner. Placido claimed that Michael Andrews beat the man while Samuel Turner held the woman. Placido told the detectives he was afraid and did not want the others to know that he told the detectives about them. Placido then told the detectives that Daniel Thomas was one of the robbers, but when he was shown a six-person photographic lineup (six-pack), Placido identified a photograph of defendant and confirmed that Daniel's last name was Kirkpatrick.

LAPD Detective Kenneth Schmidt testified that he and Detective Humphreys interviewed defendant in July 2010. Detective Humphreys advised defendant of his *Miranda* rights[3] which defendant knowingly waived. When Detective Humphreys showed him photographs of the store, defendant told her he was not familiar with it, had not been there, and never shopped in the area. He also denied knowing Marco Placido. When defendant was asked questions about the robbery, he remained silent. When Detective Humphreys asked defendant whether he had personally beaten the man or was simply present, defendant gave no response.

Detective Matsuda described the state of the store after the robbery. He identified photographs showing pooling blood and blood spatter on the furniture, concentrated mostly at the bottom of the furniture. In addition to the blood, pictured on the floor were black plastic shopping bags, T-shirts, eye glasses, bloody shoe prints, and a tooth. A fingerprint was lifted from one of the black shopping bags. Forensic fingerprint specialist Anthony Ortiz testified that he obtained defendant's fingerprints and compared them to the print lifted from the bag. He was able to identify the fingerprint from the bag as belonging to the defendant.

Defendant did not provide any evidence.

DISCUSSION

I. Substantial evidence supports aggravated mayhem

Defendant contends that his conviction of aggravated mayhem was unsupported by substantial evidence.

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[3] See *Miranda v. Arizona* (1966) 384 U.S. 436, 444-445.

"A person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body." (§ 205.)

To determine whether the conviction lacks adequate evidentiary support, we "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.) We must "presume[] in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We do not reweigh the evidence or resolve conflicts in the evidence. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) We review circumstantial evidence under the same standard that applies to direct evidence. (*People v. Kraft*, at p. 1053.) Reversal for lack of substantial evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

A. Specific intent

Defendant contends there was insufficient evidence of an intent to cause permanent disability or disfigurement to Antonio.

"Aggravated mayhem is a specific intent crime which requires proof the defendant specifically intended to cause the maiming injury, i.e., the permanent disability or disfigurement. [Citation.]" (*People v. Quintero* (2006) 135 Cal.App.4th 1152, 1162 (*Quintero*).) "Evidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction. [Citations.]" (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208.)

"[S]pecific intent to maim may not be inferred solely from evidence that the injury inflicted actually constitutes mayhem; instead, there must be other facts and circumstances which support an inference of intent to maim rather than to attack indiscriminately. [Citation.]" (*People v. Ferrell* (1980) 218 Cal.App.3d 828, 835 (*Ferrell*).) Such circumstances may be those "attending the act, the manner in which it is done, and the means used, among other factors. [Citation.]" (*Id*. at p. 834.) "Thus evidence of a 'controlled and directed' attack or an attack of 'focused or limited scope' may provide substantial evidence of such specific intent. [Citation.]" (*Quintero, supra,* 135 Cal.App.4th at p. 1162, quoting *People v. Lee* (1990) 220 Cal.App.3d 320, 325-326 (*Lee*).) Evidence of specific intent may be sufficient where the "circumstances show defendant's attack was the product of deliberation and planning . . . ." (*People v. Park* (2003) 112 Cal.App.4th 61, 70 (*Park*).) "However, where the evidence shows no more than an 'indiscriminate' or 'random' attack, or an 'explosion of violence' upon the victim, it is insufficient to prove a specific intent to maim. [Citation.]" (*Quintero*, at p. 1162, quoting *Lee, supra,* at p. 326.)

Defendant contends that the circumstances of this case are analogous to three cases in which the evidence showed no more than a sudden indiscriminate, random, or unfocused attack. In *People v. Anderson* (1965) 63 Cal.2d 351, 356, the defendant, a boarder in the home of the victim's mother, became enraged when the child cursed him, and he stabbed her over 60 times over her entire body. In *People v. Sears* (1965) 62 Cal.2d 737, 740-741, defendant had not planned to strike the victim when he attacked her mother with a pipe, but when the child unexpectedly intervened, he hit her several times, causing lacerations on her face. In *Lee, supra,* 220 Cal.App.3d at page 326, the defendant suddenly punched his neighbor three times without any conceivable reason, leaving him partially paralyzed. (*Ibid*.) We discern no similarity between the facts of these cases and the facts of this case.

A better analogy may be found in *Ferrell, supra,* 218 Cal.App.3d at page 835, where the defendant's deliberate, directed, controlled attack was apparently planned in advance. There, the defendant had been sent by a friend from jail; her intent to disable

the victim permanently was demonstrated by her armed entry into the victims' home, where she immediately disabled the victim's father with a gunshot to the knee and restrained her mother at gunpoint, before firing one shot into the victim's neck at short range, paralyzing her, and then immediately leaving. (*Ibid*.) Similarly here, the evidence suggested that the attack on Antonio was planned, directed, and deliberate. Placido was well acquainted with the small store and thus most likely with Antonio and Gumecinda as well. The three robbers first entered the store under circumstances which suggest they were studying the location in advance of their intended robbery. They regrouped outside the store and reentered with their apparent plan: one of them went immediately to Gumecinda and restrained her violently, while the others went directly to Antonio, where he was knocked down violently on the concrete floor and later found six feet away from his original position, with a large laceration on the back of his head. The inference is inescapable that the robbers intended to disable the couple in order to carry out the robbery.

However, the beating of Antonio went further than merely disabling him for the duration of the robbery. Instead it was focused on his head, a particularly vulnerable area, and continued for 10 minutes, leaving nearly every bone in his face broken while he choked on his blood, a dislodged tooth, and perhaps a piece of his tongue. Antonio was 66 years old, and obviously so, according to Placido. A shorter, less severe beating would surely have disabled him long enough to take the desired items from the store. As the court reasoned in *Ferrell*, evidence of intent may be inferred from a violent act which anyone would know, without "special expertise . . . , if not fatal, is highly likely to disable permanently." (*Ferrell*, *supra*, 218 Cal.App.3d at p. 835.)

Defendant cites several cases in which the defendant knew the victim and used a weapon to disfigure the victim's face, and he concludes from such cases that evidence of intent to maim is insufficient unless the defendant used a weapon and harbored a grudge. (See *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 830-831 [angry defendant repeatedly slashed the face of his daughter's boyfriend with a box cutter after learning that the victim used drugs]; *Quintero*, *supra*, 135 Cal.App.4th at p. 1158 [angered by

victim's sexual advance, defendant cut his face with a utility knife]; *Park, supra,* 112 Cal.App.4th at p. 65 [perceiving disrespect for his gang, defendant broke eight of victim's teeth with a knife-sharpening steel]; *People v. Campbell* (1987) 193 Cal.App.3d 1653, 1668-1669 [jealous defendant used screwdriver and brick to sever girlfriend's ear].)

Defendant's conclusion would be somewhat less strained if the prosecution's theory had been that the robbers harbored a specific intent to *disfigure* Antonio. However, the prosecution proceeded on the theory that the robbers intended to *permanently disable* Antonio.[4] In any event, we reject defendant's suggestion that a weapon is required to establish intent. While the use of a weapon and a vengeful motive provided strong evidence of a specific intent to disfigure the victims' faces in the cases cited by defendant, none held such factors were required elements, without which intent cannot be proven. (See *People v. Szadziewicz, supra,* 161 Cal.App.4th 823; *Quintero, supra,* 135 Cal.App.4th 1152; *Park, supra,* 112 Cal.App.4th 61; *People v. Campbell, supra,* 193 Cal.App.3d 1653.) Moreover, as the injuries to Antonio demonstrate, fists and a concrete floor can be very effective weapons.

We conclude that substantial evidence supports the jury's implied finding that Antonio's assailants acted with the specific intent to permanently disable their victim.

B. Defendant was a principal

Defendant contends that substantial evidence did not support his conviction either as the actual perpetrator or as an aider and abettor. We agree with respondent that the evidence was sufficient to establish that defendant was either the actual perpetrator or that he aided and abetted Antonio's assailant in the aggravated mayhem.

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4 Defendant uses the more general word, "maim," which is a common abbreviation for inflicting both types of mayhem: permanent disability and disfigurement. (See, e.g., *People v. Szadziewicz, supra,* 161 Cal.App.4th at p. 831.) The Legislature used the disjunctive, "permanent disability *or* disfigurement," in defining aggravated mayhem. (§ 205, italics added.) As the use of the disjunctive indicates alternate ways to commit the crime (see *People v. Loeun* (1997) 17 Cal.4th 1, 9-10), we construed the required mental state as the specific intent to inflict either type of injury, not both, as defendant's argument suggests.

"All persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission . . . are principals in any crime so committed." (§ 31.) "Aider-abettor liability exists when a person who does not directly commit a crime assists the direct perpetrator by aid or encouragement, with knowledge of the perpetrator's criminal intent and with the intent to help him carry out the offense. [Citation.]" (*People v. Miranda* (2011) 192 Cal.App.4th 398, 407, citing *People v. Beeman* (1984) 35 Cal.3d 547, 560-561.) Aider and abettor liability attaches to anyone who is concerned in the crime, either directly or indirectly and even slightly, with the requisite state of mind. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 529-530 (*Nguyen*).)

Factors relevant to determining whether substantial evidence supports a finding that defendant was an aider and abettor include companionship and conduct before or after the offense. (E.g., *In re Juan G.* (2003) 112 Cal.App.4th 1, 5; *People v. Campbell* (1994) 25 Cal.App.4th 402, 409; *In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094-1095.) For aiding and abetting liability to attach, the intent to aid and abet may be formed either prior to or during commission of the offense. (See *People v. Cooper* (1991) 53 Cal.3d 1158, 1164-1165.) Indeed, "advance knowledge is not a prerequisite for liability as an aider and abettor." (*People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 742.) "Aiding and abetting may be committed 'on the spur of the moment,' that is, as instantaneously as the criminal act itself. [Citation.]" (*Nguyen, supra*, 21 Cal.App.4th at p. 532.)

1. Shared intent

There were three robbers; Placido immediately restrained Gumecinda; defendant and the third robber ran together toward Antonio, one with arm raised and ready to strike. Gumecinda testified that Placido continued to restrain her while one or both of the others beat Antonio for 10 minutes before ransacking the store. Defendant's fingerprint on a shopping bag confirms that defendant was one of those two men. Thus, defendant either personally beat Antonio into a coma or assisted his companion in doing so. The attack lasted approximately 10 minutes and targeted Antonio's head -- a particularly vulnerable

part of his body. The force was so great that four of Antonio's teeth were dislodged and he sustained multiple facial fractures and brain swelling. As the prosecutor argued to the jury, any reasonable person would know that striking another's head repeatedly for 10 minutes would likely cause permanent disability or disfigurement. Accordingly, "[defendant's act of] limiting the scope of his attack to [Antonio's] head shows this was not an indiscriminate attack but instead was an attack guided by the specific intent of inflicting serious injury upon [Antonio's] head." (*Park, supra,* 112 Cal.App.4th at p. 69.)

2. Natural and probable consequence

Defendant contends that aggravated mayhem was not a natural and probable consequence of the robbery in this case.

When the crime charged was not the crime the defendant intended to aid and abet, the jury "must also find that . . . the defendant's confederate committed an offense *other than* the target crime; and . . . the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted." (*People v. Prettyman* (1996) 14 Cal.4th 248, 262, fn. omitted.) A natural and probable consequence is one that was reasonably foreseeable, determined under an objective standard. (*People v. Medina* (2009) 46 Cal.4th 913, 920.) Whether an unplanned crime is a reasonably foreseeable consequence of the target crime is a factual question for the jury to assess in light of all the circumstances. (*Ibid*.; *Nguyen*, *supra*, 21 Cal.App.4th at p. 531.)

Defendant contends that aggravated mayhem was not a foreseeable consequence here because he "only intended to commit robbery." Both parts of his contention, the premise and the conclusion, are without merit. When several men enter a store with the intent to commit an unarmed robbery, it is at least foreseeable that an assault causing great bodily injury may be the natural and probable consequence. (See *People v. Fagalilo* (1981) 123 Cal.App.3d 524, 528, 532.) Here however, more than just a robbery was contemplated. Placido admitted to Detective Humphreys that the purpose of beating Antonio and Gumecinda was to take their money. Further, Gumecinda testified and Placido admitted that the beating began immediately after the men entered the store the

second time. Thus, the target offense contemplated by the robbers was twofold: a robbery accomplished by means of a physical assault apparently intended to disable the victims while the robbers stole items from the store. These circumstances amply supported a jury determination that a reasonably foreseeable consequence of the shared intent to temporarily disable the victims with a violent physical assault, would become an intent on the part of at least one of the assailants to disable the victim permanently.

II. CALCRIM No. 402

Defendant contends that because the evidence was insufficient to support a finding that the natural and probable consequence of the robbery was aggravated mayhem, the trial court erred in instructing the jury with CALCRIM No. 402, which explains the doctrine.[5] The prosecution requested the instruction, and as we have determined, substantial evidence supported a finding that aggravated mayhem was a natural and probable consequence of the robbery in this case. Thus the trial court was required to give the instruction, and there was no error. (See *Nguyen*, *supra*, 21 Cal.App.4th at pp. 528-529.)

DISPOSITION

The judgment is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
ASHMANN-GERST

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5 Defendant claims to have objected to the instruction, but includes no reference to the record to support his claim. We found a discussion of natural and probable consequences in relation to defendant's request for a pinpoint instruction based upon *People v. Woods* (1992) 8 Cal.App.4th 1570, but we found no objection to CALCRIM No. 402.