Filed 3/8/17 P. v. Hernandez CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. HECTOR MAX HERNANDEZ, Defendant and Appellant.	B262760 (Los Angeles County Super. Ct. No. SA088167)

APPEAL from a judgment of the Superior Court of Los Angeles County, Deborah S. Brazil, Judge. Affirmed as modified.

Joshua Schraer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Chung L. Mar and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Hector Max Hernandez appeals from a judgment following a jury verdict convicting him of one count of second degree robbery on an aiding and abetting theory. (Pen. Code, § 211.)[1] Hernandez's sentence of 18 years included two consecutive one-year terms for prior prison term enhancements, allegations of which the trial court found true.

Hernandez makes three arguments on appeal. First, the trial court's response to a question it received from the jury during deliberations was reversible error under section 1138. Second, the failure of Hernandez's attorney to object to the trial court's response to the jury's question constituted ineffective assistance of counsel. And third, the trial court improperly imposed two separate sentence enhancements for the same prior conviction.

We conclude that any error by the trial court in responding to the jury's question was invited because it was Hernandez's attorney who proposed the response the trial court gave. We also conclude that Hernandez's attorney had valid tactical reasons for proposing that response, thus vitiating Hernandez's claim of ineffective assistance of counsel. We do conclude, however, that one of the two one-year sentencing enhancements under section 667.5, subdivision (b), was unauthorized and must be stricken. Accordingly, we modify the judgment in that respect. The judgment is otherwise affirmed.

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1 All statutory references herein are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Robbery*

Eskandar Yermain owned an antiques shop in Los Angeles. He had a son named Saum Yermain.[2] On February 17, 2014, Eskandar was 75 years old.

That day, at approximately 11:30 a.m., Eskandar was working in his shop when Robert Williams entered and asked to see a ring. Eskandar showed Williams the ring, and Williams left the store. A short time later, Williams and Hernandez both entered the store one or two minutes apart. Eskandar had seen Hernandez in the store on about three prior occasions. Eskandar told Hernandez that he suspected Williams was going to rob him. Hernandez did not respond. Hernandez walked to another room, leaving Eskandar alone with Williams.

Williams stated, "I want that diamond ring," referring to the ring he had seen earlier, and punched Eskandar in the head. The back of Eskandar's head struck a wall. Williams took the ring and ran from the store. Hernandez also left the store and drove away in a car.

Surveillance videos showed Hernandez removing some items from the counter and putting them in his pocket before Hernandez and Williams left the store. In one of the videos, two voices can be heard calling out "go, go, go."

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[2] Because Eskandar Yermain and Saum Yermain share the same last name, we will refer to them by their first names to avoid confusion.

B. *Events After the Robbery*

The same morning, at about 11:45 a.m., Saum received a phone call regarding the incident at his father's store. Saum immediately drove to the store; he arrived there as the paramedics were arriving. Eskandar received a call on his cell phone while the paramedics were treating him and handed the phone to Saum. The caller stated that his name was "Victor" and that he had been in the store during the robbery. Saum asked what Victor had seen. Victor stated that he witnessed the attack and tried to help Eskandar "to ground himself"; Victor also apologized to Saum that he had to leave the store before the police arrived. Saum gave Victor his own cell phone number.

The paramedics transported Eskandar to a hospital. He suffered a stroke there that evening.

On February 17, 2014 and for several days thereafter, the man calling himself Victor phoned Saum several times asking about Eskandar's condition. When Saum asked Victor about the robbery, Victor stated that a man entered the store and struck Eskandar and that Victor led Eskandar to a chair and helped him to sit down. Victor said the man drove away in a black compact car, and he offered to provide the license plate number and other unspecified information if Saum paid him $500.[3] Victor stated that he needed the money because he was unemployed, had been evicted, and his wife was pregnant. Victor said he would provide the license plate number, but he never did provide the number.

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[3] The person identifying himself as Victor initially stated that the assailant was a passenger in the black car but later stated that the assailant was the driver.

Victor asked Saum whether he had seen the surveillance video. Saum responded that he had not seen it. Victor then admitted that he had taken bracelets and a sword from the store during the robbery and apologized.

Thereafter, Saum provided Victor's phone number to the police. Using the phone number and GPS location service, the police located the phone and identified Hernandez as the person in possession of the phone. On March 4, 2014, police officers executed a search warrant of an Anaheim hotel room and detained Hernandez in the room. After the search, officers transported Hernandez to a police station. While in transit to the station, Hernandez admitted to the officers that he stole bracelets and a sword from Eskandar's store during the robbery. Hernandez initially stated that he had entered the store alone and did not know the man who struck Eskandar; by the end of the interview, however, Hernandez identified Williams and admitted that he entered the store with Williams.

Hernandez told the police officers that he went to the store to sell a lamp and that Williams was supposed to stay in the car. Hernandez stated that Williams entered the store wearing a wig and a hat and that Hernandez "had a feeling [Williams] was going to do something bad." A search of Hernandez's phone revealed 17 outgoing calls to Williams on the day of the robbery and 29 incoming calls from Williams that day, in addition to several text messages between Hernandez and Williams.

On June 13, 2014, Eskandar died. His doctor stated that she could not attribute his death to the injury he sustained during the robbery.

C. *The Trial, Verdict and Sentencing*

The People filed an information in November 2014 charging Hernandez with one count of second degree robbery. The information alleged that the victim of the robbery was over 65 years old at the time of the robbery (§ 667.9, subd. (a)) and that Hernandez had suffered a prior qualifying conviction under the three strikes law (§§ 667, subd. (d), 1170.12, subd. (b)), had suffered a prior conviction of a serious felony (§ 667, subd. (a)(1)), and had served two prior prison terms (§ 667.5, subd. (b)). Hernandez pled not guilty and denied the allegations.

On Friday January 16, 2015, the trial court instructed the jury on robbery and on theft as a lesser included offense. The court also instructed the jury on aiding and abetting, and thus whether Hernandez could be convicted of robbery on the theory that he aided and abetted Williams in the commission of a robbery; the aiding and abetting instructions the trial court gave were CALCRIM Nos. 400 and 401.

The jury began deliberations around 11:00 a.m. on January 16, 2015. That afternoon, at 3:25 p.m., the jury sent the trial court a note that contained the following question: "If [Hernandez] continued to steal items after the punch was delivered by Williams, would he now be considered a co-conspirator in the actual robbery?" Conspiracy was not at issue in the case; aiding and abetting was. It appears from the record that the trial court, the prosecutor, and Hernandez's attorney all assumed that the jury's question referred to whether Hernandez could be guilty on an aiding and abetting theory if he continued to steal items from Eskandar's store after Williams punched Eskandar, not whether Hernandez would be a co-conspirator if

that happened.[4] This shared assumption is evident from the trial court's statement, following receipt of the jury's question, that it had conferred with the prosecutor and Hernandez's attorney off the record "and the consensus" coming out of that conference was "that the court should refer the jurors to CALCRIM [No.] 400, aiding and abetting, general principles, and CALCRIM [No.] 401." The court then asked the prosecutor and Hernandez's attorney whether that correctly described the consensus, and both responded in the affirmative. Having received assent from both sides, the court next stated that it would respond to the jury's question by stating that the jury "should refer to the jury instructions[, CALCRIM Nos.] 400 and 401."

Hernandez's attorney immediately indicated, however, that he now had second thoughts about the trial court's proposed response, and expressed concern that referring the jury to the two aiding and abetting instructions "may telegraph that [Hernandez] is an aider and abettor"; Hernandez's attorney proposed instead that the court should respond to the jury's question by referring the jury to "all the instructions" the court had given. The court remarked, "That's a very good point." The prosecutor did not object. He proposed a minor modification to the suggestion of Hernandez's counsel, stating that the court's response should state that the "instructions that have been read . . . and provided in written form contain the legal principles in

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[4] Hernandez's opening brief on appeal formally adopts that view, stating that "the jury was most likely asking whether the fact that [Hernandez] stole the sword after Williams punched [Eskandar] was sufficient to convict [him] of robbery as an aider and abettor."

response to [the jury's] question." The court then held another off-the-record conference with both sides. Following that conference, the court went back on the record and stated that the written response it had prepared read as follows: "The jury instructions read out loud and provided in written form covered all of the law applicable to this issue." Hernandez's attorney and the prosecutor both assented to the court's written response, which was given to the jury at 3:33 p.m.

The jury deliberated the rest of that afternoon and then adjourned. It resumed deliberations on the next court date, which was Tuesday January 20, 2015. That morning, the jury reported that it had reached a verdict. The jury found Hernandez guilty of one count of second degree robbery and found true the allegations that Hernandez knew or reasonably should have know that the victim was over 65 years old. Hernandez waived his right to a jury trial on the other allegations, and the trial court found true the allegations that he had suffered a prior strike, had suffered a prior conviction of a serious felony, and had served two prior prison terms. The court sentenced Hernandez to five years for his robbery conviction, which was doubled because of his prior strike, plus a consecutive five-year term for his prior serious felony conviction (§ 667, subd. (a)(1)), a consecutive one-year term for the age of the victim (§ 667.9, subd. (a)), and two consecutive one-year terms for his prior prison terms (§ 667.5, subd. (b)), making an aggregate determinate prison term of 18 years.

DISCUSSION

Hernandez challenges his conviction on two grounds. First, he argues that the trial court's response to the jury's question on whether Hernandez would be "considered a co-conspirator in the actual robbery" if he continued to steal items after Williams punched Eskandar was contrary to the requirements section 1138 imposes on courts in handling legal questions from juries and thus constitutes reversible error. Second, and alternatively, Hernandez argues that his attorney's approval of the trial court's response amounted to ineffective assistance of counsel. Neither argument has merit. Any error the trial court made in its response to the jury's question was invited by Hernandez's attorney, who proposed the response the court gave. At the same time, his attorney's proposal of that response made tactical sense and therefore was not ineffective assistance. Because Hernandez's challenges to his conviction are unavailing, we affirm it. We do modify the judgment in one respect, however: the trial court incorrectly imposed two separate enhancements for the same prior conviction; because only one enhancement was permissible we direct that the second be stricken.

A. *Any Error the Trial Court Made in its Response to the Jury's Question Was Invited By Hernandez's Attorney*

Section 1138 requires trial courts to respond to questions through which the jury "desire[s] to be informed on any point of law arising in the case . . . ."[5] In discharging this obligation, trial

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[5] Section 1138 addresses both jury questions on the law and jury requests for a read back of the trial transcript. In full, it provides: "After the jury have retired for deliberation, if there be

courts must "help the jury understand the legal principles it is asked to apply." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) Applying that admonition here, it could be said that the trial court, at minimum, should have responded to the jury's conspiracy-related question by stating that conspiracy was not at issue in the case, but that aiding and abetting was at issue, and then referring the jury to the specific aiding and abetting instructions that were given.[6]

The trial court's failure to remind the jury that they were sitting as jurors in an aiding and abetting case rather than a conspiracy case is not, however, where Hernandez says the section 1138 error lies. Hernandez claims instead that the question revealed the jury's uncertainty as to whether Hernandez could be guilty of robbery based on a theory of aiding and abetting even if, before Williams punched Eskandar, Hernandez did not know that Williams was going to use force. According to Hernandez, rather than referring the jury to review all of the instructions that it had been provided, the trial court's response to the question should have explained that the jury could find Hernandez guilty of robbery as an aider and abettor only if it

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any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

[6] Conspiracy and aiding and abetting are, of course, two different concepts. (*People v. Smith* (2014) 60 Cal.4th 603, 616.) It is understandable, however, that a jury could confuse them.

found beyond a reasonable doubt that, before Williams delivered the punch, Hernandez knew that Williams was going to use force. The trial court's failure to provide this explanation and clarify the aiding and abetting instructions, Hernandez says, breached the duty that section 1138 imposes on courts.

While it is true that section 1138 obligates trial courts "'to clear up any instructional confusion expressed by the jury'" through a question on a point of law (*People v. Loza* (2012) 207 Cal.App.4th 332, 355), this does not necessarily mean that the court always must elaborate on the standard instructions. If the instructions given were full and complete, the court has broad discretion to determine whether any additional explanation is needed in formulating a response to a jury's question on a point of law. (*People v. Williams* (2015) 61 Cal.4th 1244, 1267; *People v. Iboa* (2012) 207 Cal.App.4th 111, 121.) Here, Hernandez does not argue that the aiding and abetting instructions were incomplete and thus needed shoring up, or that there were any other instructional errors that a different response to the jury's question could have rectified.

We need not decide, however, whether Hernandez's section 1138 claim is valid because any section 1138 error the trial court made in failing to provide the response that Hernandez asserts should have been provided was invited by Hernandez's attorney. It was Hernandez's attorney who proposed the basic contours of the response the trial court gave. Initially, the trial court stated that it was inclined to respond by referring the jury to the aiding and abetting instructions specifically. But after Hernandez's attorney balked at that idea and suggested that the response refer to all of the instructions,

the trial court abandoned its proposal and adopted the approach that Hernandez's attorney urged.

In sum, because Hernandez's attorney invited the trial court's response that Hernandez claims was erroneous, this alleged error cannot form the basis for reversal of his conviction. (*People v. Murtishaw* (1989) 48 Cal.3d 1001, 1022 [the defendant's attorney invited the trial court's purported section 1138 error by proposing the response to the jury's question that the court gave]; see also *People v. Thoi* (1989) 213 Cal.App.3d 689, 698 [the defense attorney invited any section 1138 error by "actively and vigorously lobb[ying] against further instruction," which was the course the trial court took in responding to the jury's query].)[7]

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[7] Citing *People v. Butler* (1975) 47 Cal.App.3d 273, Hernandez suggests that a section 1138 error never can be invited or forfeited. *Butler* is inapposite. It involved a jury's request for a read back of the trial transcript, not a jury's request to be informed on points of law. In *Butler*, the defendant's attorney failed to object when the trial court refused to read back a certain portion of the transcript. (*Id.* at p. 283.) The Court of Appeal declined to find forfeiture arising from the non-objection. (*Id.* at p. 284.) Even if *Butler* is correct as to non-forfeiture of read back requests, courts have routinely found forfeiture of section 1138 error when defense counsel failed to object to a trial court's response to a jury's question on a point of law. (E.g., *People v. Rogers* (2006) 39 Cal.4th 826, 877; *People v. Loza*, *supra*, 207 Cal.App.4th at p. 370.) And as indicated from the cases cited above in the text, courts similarly have not hesitated to find section 1138 errors to be invited when the defendant's attorney proposed the response to the legal question the trial court ended up giving.

B. *The Failure of Hernandez's Attorney To Object to the Trial Court's Response to the Jury's Question Does Not Amount to Ineffective Assistance of Counsel*

In the alternative, Hernandez argues that if the trial court's section 1138 error was invited, his attorney's failure to object to the response to the jury's question—or more accurately, the attorney's proposal of that very response—amounted to ineffective assistance of counsel. We disagree.

A defendant claiming ineffective assistance of counsel must show first, that his or her attorney's representation fell below an objective standard of reasonableness under the prevailing professional norms, and second, that there is a reasonable probability, sufficient to undermine confidence in the outcome, that the defendant would have obtained a more favorable result absent the error. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 693-694 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Vines* (2011) 51 Cal.4th 830, 875-876.)

In determining whether an attorney's representation met professional norms, appellate courts generally will defer to "'reasonable tactical decisions'" the attorney made, and there is a ""'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." [Citation.] [A d]efendant's burden is difficult to carry on direct appeal . . . .'" (*People v. Vines*, *supra*, 51 Cal.4th at p. 876.) Indeed, ""'[r]eviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.'" [Citation.]' [Citation.]" (*Ibid.*; see *People v. Mai* (2013) 57 Cal.4th 986, 1009.)

Here, Hernandez's attorney objected to the trial court's initial idea of responding to the jury's question by referring the jury to the specific instructions on aiding and abetting, on the ground that taking that tack "may telegraph that [Hernandez] is an aider and abettor." In our view, it was a reasonable tactical decision for the attorney to advocate that the court refrain from drawing the jury's attention to those instructions by name and number and instead to respond at a level of generality, with an admonition that all of the instructions addressed the law applicable to the jury's question.[8]

Because we conclude that the challenged actions of Hernandez's attorney met professional norms, we do not address whether Hernandez would have obtained a more favorable result had the attorney acted in the way that Hernandez says he should have and objected to the trial court's response to the jury's question.

C. *The Trial Court Improperly Imposed Two Separate Enhancements for the Same Prior Conviction*

Hernandez contends the trial court improperly imposed two separate enhancements, under sections 667, subdivision (a)(1)

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[8] In his claim of ineffective assistance of counsel, Hernandez does not argue that his attorney should have proposed to the trial court the response that Hernandez argues the court should have given, i.e., an explanation that the jury could find Hernandez guilty of robbery as an aider and abettor only if it found beyond a reasonable doubt that, before Williams delivered the punch, Hernandez knew that Williams was going to use force. Hernandez's claim is based solely on the notion that his attorney should have objected to the response the trial court gave.

(five years) and 667.5, subdivision (b) (one year), for the same prior conviction of making criminal threats (§ 422). The People concede on appeal that the court could properly impose only the greater of the two enhancements. (*People v. Jones* (1993) 5 Cal.4th 1142, 1149-1153 [a court cannot impose enhancements under both sections 667 and 667.5 for the same prior conviction].) The appropriate remedy for the court's sentencing error is to strike the lesser of the two enhancements. (*Id.* at p. 1153; *People v. Perez* (2011) 195 Cal.App.4th 801, 805.)

DISPOSITION

The judgment is modified by striking one of the two one-year enhancements for prior prison terms (§ 667.5, subd. (b)). The judgment is affirmed as modified. The superior court is ordered to prepare a corrected abstract of judgment reflecting this modification and forward a copy to the Department of Corrections and Rehabilitation.

SMALL, J.*

We concur:

PERLUSS, P. J. ZELON, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.