Filed 10/13/17 P. v. Silas CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. THOMAS RICHARD SILAS, Defendant and Appellant.	B275760 (Los Angeles County Super. Ct. No. MA064997)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Blanchard, Judge. Affirmed with directions.

Christine C. Shaver, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Stephanie A. Miyoshi and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Thomas Richard Silas shot his wife, Alana Silas (Alana), three times in the stomach on Christmas Day 2014 after a domestic quarrel, blowing off one of her fingers. The jury found him guilty of one count of attempted voluntary manslaughter and one count of mayhem. The court imposed and stayed an 18-year sentence for attempted manslaughter, and sentenced appellant to 29 years to life for mayhem. The original information charged appellant with attempted premeditated murder, and the sole contested issue on appeal is whether the trial court abused its discretion in permitting the prosecution to amend the information in the middle of trial to add the mayhem count.[1]

In seeking to amend the information, the prosecutor contended the testimony of the witnesses at trial substantially diverged from statements they had given to the police immediately after the shooting, undermining the prosecution's theory that appellant intended to kill Alana and had acted with premeditation. Appellant disputes the prosecutor's version of events and contends the court based its decision on inaccurate and unsupported facts. Appellant further contends the court erroneously believed that permitting the amendment would benefit appellant, as it would give the jury an option to convict on a charge lesser than attempted premeditated murder. Appellant points out

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[1] The parties agree that the abstract of judgment must be amended as it erroneously states appellant was convicted of attempted murder.

that no amendment was required to offer the jury the option of attempted voluntary manslaughter.

Our review of the record discloses nothing to suggest the court mistakenly relied on comments of the prosecutor which were, in any event, accurate in summarizing the divergence between the witnesses' initial statements and their testimony at trial. Nor does the record disclose that the trial court's decision to permit the amendment to conform to proof was based on an erroneous understanding of the law. Finally, the record amply supports the trial court's determination that the evidence presented at the preliminary hearing placed appellant on sufficient notice that he could be charged with mayhem. Accordingly, we affirm the judgment, remanding solely for correction of the abstract of judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Preliminary Hearing and Original Information*

At the preliminary hearing, appellant's wife Alana testified that appellant shot her multiple times on December 25, 2014. The couple had argued the previous evening, and when appellant returned home from work that night, the couple resumed arguing. Appellant brought out a gun and shot Alana in the stomach three times. One bullet blew off the middle finger of her left hand. Alana was in the hospital for two weeks.

The information filed at the time of the preliminary hearing contained one count charging appellant with

attempted willful, deliberate, and premeditated murder in violation of Penal Code section 664/187, subdivision (a).[2] The information further alleged that appellant personally inflicted great bodily injury upon Alana under circumstances involving domestic violence within the meaning of section 12022.7, subdivision (e), that he personally and intentionally discharged a firearm causing great bodily injury to Alana within the meaning of section 12022.53, subdivision (d), that he personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c), and that he personally used a firearm within the meaning of section 12022.53, subdivision (b).

B. *Trial*

1. *Witness Testimony*

At the time of the shooting, the residents of the house included appellant and Alana, Alana's daughter Elaine, Alana's mother Marlene, and Alana's sister Josett. Appellant's counsel did not dispute that appellant shot Alana multiple times, but contended he did not intend to kill her, and that he had acted emotionally and without thinking. The percipient witnesses testified that when appellant returned home from work just before midnight on Christmas Eve, he and Alana resumed an argument -- primarily about finances -- that had begun earlier that evening. Several of the witnesses also testified that prior to

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[2] Undesignated statutory references are to the Penal Code.

the shooting, appellant laid the gun down and told Alana to "'shoot me.'" He then picked up the gun and fired three times, hitting her in the stomach and hand.

After his arrest, appellant agreed to be interviewed.[3] He told detectives that it was a "domestic issue," that he and Alana were both "very angry," and that he had "lost control." He said that after Alana "provoked" him, he got the gun from a closet upstairs. He claimed he had not intended to shoot his wife when he got the gun, but also said that when he got home from work that night, he "had the feeling" something was going to happen "to cause [him] to react . . . [¶] . . . [¶] [v]iolent[ly]." Appellant said that when he pulled the trigger, he was angry and intended to "hurt her [and] . . . do bodily harm."

At trial, Alana's sister Josett testified that when appellant returned from work, he appeared calm. He came downstairs after changing his clothes to apologize to Josett for arguing in front of her earlier. Alana, who was nearby, told appellant to go upstairs and brought up the financial issues that had caused the earlier disagreement. Josett described Alana as "sarcastic" and "pretty irritated," and said she was "getting on [appellant's] case," "fussing at him," and "poking at him." Josett said appellant initially tried to not respond. In an interview shortly after the shooting, Josett told detectives that appellant did not usually come

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[3] The video of appellant's interview was played to the jury. Appellant did not testify at trial.

downstairs after returning from work, and that prior to the shooting, he had been sitting in the living room "acting kinda funny eyed."[4] When the prosecutor asked Josett about her interview statement, Josett said she had simply meant appellant was sitting quietly. In the interview, Josett had said that prior to the shooting, appellant called Alana "stupid," threatened to slap her, and told her he was going to get his gun. At trial, Josett did not recall hearing appellant say he was going to get a gun. She testified that his insults had been a reaction to Alana's demand that he go upstairs, and that Alana had responded by threatening to "beat [his] ass." In the interview, Josett said she ran upstairs "to protect [her] kids because [appellant] still had the gun in his hand . . . ." At trial, she denied being afraid of appellant.

Alana's daughter Elaine testified that appellant was not the type to argue, and that Alana was "the . . . loud, aggressive, bossy one," who "ma[de] threats" and "provok[ed]" him. Elaine said that when the couple returned from shopping, Alana told appellant to "take his old self upstairs before she choked him." When appellant returned from work, Elaine was upstairs. She heard Alana's raised voice, but did not hear appellant. Like Josett, Elaine had been interviewed by detectives shortly after the shooting.[5] She told them that appellant was "already snappy" when he and Alana had argued the night before, that appellant called

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[4] Josett's video interview was played to the jury.

[5] Elaine's video interview was played to the jury.

Alana "dumbass" and "stupid," and that appellant "got violent," throwing things around the kitchen. She also had said appellant "had a little attitude" when he returned home from work the night of the shooting, continuing to call Alana names and making "little negative comments." In the interview, Elaine did not claim to have been upstairs prior to the shooting, but described the shooting and surrounding events as if she had witnessed them. She also told detectives that after the initial shots were fired, she stood between appellant and Alana "because he [was] looking like he was trying to shoot again . . . ." Asked about the interview at trial, Elaine testified that the information she gave detectives about the events immediately surrounding the shooting was based on what others told her, and that she had not come downstairs until after hearing the shots.

At trial, Alana's mother Marlene recalled very little of what happened that day. She had told detectives in an interview that appellant looked "mean and evil" after shooting Alana.[6] At trial, she initially described appellant as "just staring."

Alana testified that after appellant returned from work, he grew angry and frustrated as they argued about family and finances. She claimed to have started the argument. After he brought out the gun, appellant put it on a table and told Alana to shoot him. In addition, he held the

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[6] Marlene's video interview was played to the jury.

gun to his own head. After the shooting, Elaine helped Alana outside and called 911. As a result of the shooting, Alana lost her middle finger. In an interview with detectives shortly after the shooting, Alana had said that appellant was angry from the moment he came home from work, and that he immediately picked a fight.[7] She also had said that the third shot had come as Elaine was helping her out of the house, and that Elaine had said, "he's aiming at your head" and "he's trying to kill you."

2. *Motion to Amend Information*

After Josett, Elaine and Marlene testified, the prosecutor moved under section 1009 to amend the information "to conform to proof" to add a violation of section 203, mayhem.[8] The prosecutor explained that the witnesses had unexpectedly "plac[ed] much of the animosity of the

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[7] Alana's video interview was played to the jury.

[8] Section 1009 provides: "An indictment, accusation or information may be amended by the district attorney, and an amended complaint may be filed by the prosecuting attorney, without leave of court at any time before the defendant pleads or a demurrer to the original pleading in sustained. The court in which an action is pending may order or permit an amendment of an indictment, accusation or information, or the filing of an amended complaint, for any defect or insufficiency, at any stage of the proceedings . . . . An indictment or accusation cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary hearing."

argument between [appellant] and [Alana] on the victim" and created "an enormous amount of sympathy for [appellant]." Defense counsel argued appellant would be prejudiced because mayhem was a general intent crime that carried a 25-year-to-life sentence when a firearm was involved, and said that she would have "approach[ed] this case strategically differently" had such a charge been included in the original information. She claimed to have "prepar[ed] the case," "giv[en] [her] opening," and "approach[ed] every witness" anticipating a specific intent crime, and asserted that the defense had "basically already conceded in a large way a general intent crime" and could not "unring the bell."

The court granted the motion to amend "to conform to proof." Preliminarily, it acknowledged that a conviction for mayhem would likely include a weapon enhancement that required a sentence of "25 to life." The court further acknowledged, however, that legal authority permitted the prosecution to amend "all the way up through deliberations . . . ." In reaching its ruling, the court stressed the lack of prejudice, observing that the case before it was "the kind . . . where everyone was on notice about the facts . . . from the beginning," and that "in term[s] of the prejudice of the late amendment, quite frankly, I don't see it. It's not as if [the defense] could approach this any other way." The court rejected defense counsel's argument that her trial strategy had been based on the single crime charged in the original information, stating: "[I]t's not as if the defense could have

defended any other way. This isn't a situation . . . where it's about who did it, whether anybody was shot. [¶] . . . [I]n terms of your making an opening statement basically conceding that he shot his wife, . . . anyone would have made it if they chose to make an opening statement because that part is undisputed."

The court also stated its belief that allowing the amendment in the case before it could "protect [appellant's] rights"; absent such an instruction, the court observed, "it's not likely that a jury is going to come back not guilty and let a criminal defendant walk out the door when the undisputed facts are that from close range he shot his wife three times in the stomach."[9] The court later reiterated: "I think that it actually protects your client's rights so that they don't feel that they have to convict him of one of the greater crimes or walk him out the door."[10]

The information was amended to include a count of mayhem (§ 203), alleging that appellant "unlawfully and maliciously deprive[d] Alana . . . of a member of [her] body . . . ."[11] Noting that the witnesses remained on call, the court

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9 The court's comments made clear that it contemplated instructing the jury on voluntary manslaughter as well as attempted murder.

10 The greater crimes included attempted premeditated murder and attempted murder.

11 The new count included allegations that appellant personally and intentionally discharged a firearm which caused great bodily injury within the meaning of section 12022.53,
(*Fn. is continued on the next page.*)

made clear that defense counsel would be permitted to recall any witness to ask questions "you would have asked had you known of the [mayhem] charge." No witness was recalled.

C. *Verdict and Sentence*

Having been instructed on attempted premeditated murder, attempted murder, attempted voluntary manslaughter and mayhem, the jury found appellant guilty of attempted voluntary manslaughter and mayhem. The court imposed a sentence of 29 years to life for mayhem, consisting of the midterm of four years and 25 years to life under section 12022.53, subdivision (d). The court imposed and stayed an 18-year sentence for attempted voluntary manslaughter. This appeal followed.

DISCUSSION

A. *Amendment to Information*

Under section 1009, the trial court may permit an amendment of an information at any stage of the proceedings, up to and including the close of trial "so long as there is no prejudice to the defendant" and the amendment does not "'charge an offense not shown by the evidence taken at the preliminary examination.'" (*People v. Arevalo-Iraheta*

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subdivision (d), personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c), and personally used a firearm within the meaning of section 12022.53, subdivision (b).

(2011) 193 Cal.App.4th 1574, 1580, quoting § 1009; accord, *People v. Hamernik* (2016) 1 Cal.App.5th 412, 424.) The trial court's decision will not be disturbed on appeal absent a clear abuse of discretion. (*People v. Hamernik*, *supra*, at p. 424.) "The test for determining whether the trial court abused its discretion . . . is whether the amendment prejudiced the substantial rights of the defendant, and attempted to change the offense to one not shown by the evidence taken at the preliminary examination." (*People v. Brown* (1973) 35 Cal.App.3d 317, 322.)

Appellant contends the court abused its discretion by relying "in large part" on the prosecutor's "inaccurate" contention that the witnesses had been unexpectedly sympathetic to appellant in their testimony in the prosecution's case-in-chief. Appellant cites nothing in the record to support the assertion that the court's decision to permit the amendment was based on the prosecutor's characterization of the record. In any event, the prosecutor's account was accurate. The witnesses, the victim and appellant gave statements shortly after the shooting that strongly suggested appellant's actions were deliberate and premeditated. Josett described appellant as brooding in the living room after he returned from work, calling Alana names and threatening to hit her before going to get a gun. Alana described a pause between the second and third shots, and said the third came as she was being helped to safety. Elaine said she had to place herself in front of Alana to stop appellant from shooting her again. None of the witnesses

suggested Alana had driven appellant to anger or was in any way responsible for his conduct. Appellant himself admitted retrieving the gun from an upstairs closet and shooting his wife, intending to "hurt her [and] . . . do bodily harm."

The testimony at trial was markedly different. All the witnesses, including Alana herself, indicated Alana had provoked appellant to violence by restarting the earlier argument, and by ridiculing, taunting or threatening him. In addition, Alana said for the first time that appellant had threatened to shoot himself, supporting the inference that he was not in a rational state of mind. The prosecutor did not mischaracterize the record.

Appellant further contends the court's decision to amend was based on a misunderstanding that such amendment would be beneficial to him. We are not persuaded. On the record before it, the court could reasonably have concluded that the evidence of provocation was weak, and that the addition of a charge of mayhem would provide the jury with an alternative to convicting appellant of attempted premeditated murder or attempted murder. That the jury ultimately returned a verdict of voluntary manslaughter does not alter the analysis or make the trial court's reasoning erroneous.

Finally, as respondent notes, the fact that evidence supporting the charge of mayhem was amply and indisputably presented in the preliminary hearing supports the court's finding that amending the information to add that charge was not prejudicial. The decision to allow the

amendment to "conform to proof" was supported by Alana's own testimony during the preliminary hearing that appellant shot her three times in the stomach, and that her middle finger was "shot halfway off, and they couldn't save it, so they removed it." In short, the addition of the mayhem charge did not "change the offense to one not shown by the evidence taken at the preliminary hearing." (*People v. Brown*, *supra*, 35 Cal.App.3d at p. 322.) Accordingly, appellant has failed to show the court abused its discretion in permitting the amendment.

B. *Abstract of Judgment*

As discussed, appellant was found not guilty of attempted murder and guilty of attempted voluntary manslaughter. Citing the statutory provisions governing attempted voluntary manslaughter (§§ 664/192, subdivision (a)), the abstract of judgment incorrectly states that appellant was found guilty of "attempted murder." The parties agree it should be corrected.

DISPOSITION

The judgment is affirmed. The matter is remanded with directions to the trial court to prepare an amended abstract of judgment reflecting that appellant was convicted of attempted voluntary manslaughter rather than attempted murder and to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.