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THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS ESTUARDO LIMA,

Defendant and Appellant.

2d Crim. No. B228496
(Super. Ct. No. 2009023589
(Ventura County)

Luis Estuardo Lima appeals a judgment following his conviction of first degree murder. (Pen. Code, §§ 187, subd. (a), 189.)¹ We affirm.

FACTS AND PROCEDURAL HISTORY

On the eve of his 21st birthday, Juan Nabte suffered a fatal gunshot wound as he walked outside his residence. Luis Ortega fired the gunshot, using a .22 caliber rifle, from a distance on a foggy night. Lima provided the rifle, ammunition, and gloves, and he and Fernando Chaclan served as "lookouts." Nabte was an associate of the "Tocas" criminal street gang, and Ortega, Lima, and Chaclan were members of the rival "Mala Salvatrucha (MS)" criminal street gang.

Las Casitas, a condominium complex in Newbury Park, was home to Tocas and MS criminal street gang members, among others. Nabte lived there with the N.

¹ All further statutory references are to the Penal Code.

family, including 14-year-old Sofia N. Ortega, Lima, and Jenny Patino, also a longtime member of MS, lived elsewhere within the complex.

Several days prior to the shooting, Lima ran to Patino's residence and complained that Nabte and his friends had assaulted him with baseball bats and had damaged his automobile. Patino testified that for many months, Lima and Nabte "had already done so many things to each other," and that Lima "hated" Nabte.

Lima and other MS gang members had purchased a .22 rifle that they would "pass . . . around" to "stay in different places." Several weeks prior to the shooting, another MS gang member "pass[ed]" the rifle to Lima.

On the evening of November 3, 2007, Nabte had a party to celebrate his 21st birthday. That same evening, there was an unrelated party in the neighborhood that Lima, Ortega, Chaclan, Patino, and others attended. Patino saw Lima and others using alcohol and illegal drugs - "lines" of "white powder" - at the party. Later that evening, Ortega walked his girlfriend Sofia home to the condominium where Nabte also lived.

Shortly before the shooting, Ortega telephoned Sofia and recommended that she stay in her upstairs bedroom and "not be downstairs with people that are drunk." During the conversation, Sofia informed Ortega that Nabte was standing outside with his girlfriend.

Around midnight, Nabte and another roommate went outside. The roommate heard a gunshot and Nabte fell to the ground with a massive head wound. The roommate performed cardiopulmonary resuscitation until emergency medical assistance arrived. Nabte died the following day without regaining consciousness.

Following the shooting, Lima, Ortega, and Chaclan ran back to the party that they had attended. Lima carried the rifle, and he and Ortega stated that "[t]hey shot someone." Thereafter, Lima telephoned Patino and Robert Castillo and asked them to pick him up so that he could remove the rifle from the area. Patino and Castillo met Lima at a nearby shopping center, placed the rifle in the trunk of Castillo's vehicle, and then hid it temporarily at another residence. At Chaclan's request, Patino also removed a backpack containing ammunition from the Las Casitas landscaping. She abandoned the

backpack in a trash dumpster, and later retrieved the rifle and threw it down a hillside near Malibu Canyon.

Patino was convicted of helping Lima dispose of the murder weapon. In exchange for relocation assistance and not serving a prison sentence in an unrelated criminal matter, she agreed to testify against Lima and the others.

Jailhouse Conversations

Following Lima's arrest, jail officials placed a confidential informant in the cell next to Lima and recorded the conversations between the two men. Lima stated that he was "from the big Mala Salvatrucha" and that he had a partial MS tattoo. He stated that Ortega shot Nabte "right in the head so that he would learn." Lima also stated that he "was going to do the hit if none of them had the courage to." Lima admitted that he and the others were "hunting" for Nabte that evening. The recordings and the corresponding English language transcripts were admitted into evidence at trial.

Police Interview

On December 6, 2007, Ventura sheriff's deputies interviewed Lima. Following advisement and waiver of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, Lima stated that Tocas gang members had struck him and his automobile with baseball bats several days prior to the shooting. Lima admitted that at approximately 11:00 p.m. in the evening of November 4, 2007, Chaclan telephoned him and requested that he bring the rifle from his residence because Tocas gang members were present and they were "going to go to fight." In response, Lima brought the rifle, ammunition, and disposable gloves. The three men walked behind the swimming pool, stood approximately 40 to 50 feet from Nabte's residence, and discussed killing "one of them." Ortega and Chaclan had used methamphetamine, were angry, and stated that "now is when we kill one of them." Ortega took the rifle, knelt on one knee, and fired it at Nabte. Lima and Chaclan acted as lookouts and kept a cellular telephone line open for that purpose. Afterward, Ortega stated that the bullet struck Nabte in the head. Ortega then handed Lima the rifle and the three men fled. Lima informed the deputies that he "thought that [Ortega] was just gonna scare [Nabte]" and that he "never thought that

[Ortega] was gonna shoot at one of them." The recorded interview and the corresponding English language transcript were admitted into evidence at trial.

At trial, Lima testified and described prior incidents with Tocas gang members striking him and his automobile with baseball bats and rocks. He stated that MS gang members gave him the rifle and advised him to use it to frighten Tocas gang members. Lima also stated that he did not think that Ortega or Chaclan intended to shoot Nabte that evening, only to frighten him by "fir[ing] into the air." He also denied attending a party and using illegal drugs the night of the shooting.

The jury convicted Lima of first degree murder but it could not agree upon criminal street gang and weapon use allegations, or the special circumstances of lying in wait and participation in a criminal street gang. (§§ 187 subd. (a), 189, 186.22, subd. (b)(1), 12022.53, subd. (e)(1), 190.2, subd. (a)(15), (22).) The trial court sentenced Lima to a prison term of 25 years to life. It also imposed a \$5,000 restitution fine and a \$5,000 parole revocation restitution fine, ordered victim restitution, and awarded Lima 860 days of presentence custody credit. (§§ 1202.4, subd. (b), 1202.45.)

Lima appeals and challenges the jury instructions, supporting his arguments with jury notes written during deliberations. Specifically, he contends that the trial court erred by: 1) instructing with a superseded version of CALCRIM No. 400, regarding aiding and abetting; 2) not instructing sua sponte concerning involuntary and voluntary manslaughter; and 3) instructing with asserted inadequate instructions regarding second degree murder. Lima asserts that the errors deprived him of his constitutional rights to due process of law and to a fair trial pursuant to the federal and California Constitutions.

DISCUSSION

I.

Lima argues that the trial court erred by instructing with former CALCRIM No. 400 ("Aiding and Abetting: General Principles") because its "equally guilty" language eliminated the prosecutor's burden to establish the required mental states for aiding and abetting a murder. He relies upon *People v. McCoy* (2001) 25 Cal.4th 1111, 1118, holding that the guilt of an aider and abettor is determined by his own mental state.

(*Id.* at p. 1114 ["[A]n aider and abettor may be guilty of greater homicide-related offenses than those the actual perpetrator committed"].)

Former CALCRIM No. 400 provides in part: "A person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator." Generally, a person who is found to have aided another person to commit a crime is "equally guilty." Under certain circumstances, however, an aider and abettor may be convicted of a greater or lesser crime than the perpetrator. (*People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118 [concluding that "equally guilty" language of former CALCRIM No. 400 caused defendant no prejudice].)

Lima has forfeited this contention on appeal because he did not object and request a modification to former CALCRIM No. 400 in the trial court. (*People v. Lopez, supra*, 198 Cal.App.4th 1106, 1118-1119.) A party may not claim an instruction that is generally correct is incomplete or misleading unless he has first requested clarifying instructions in the trial court. (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 849; *Lopez*, at pp. 1118-1119.)

Forfeiture aside, Lima suffered no prejudice. The trial court properly instructed with CALJIC Nos. 400 (former) [Aiding and Abetting: General Principles]; 401 [Aiding and Abetting: Intended Crimes]; 403 [Natural and Probable Consequences]; and 875 [Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury]. These instructions elaborated on the required intent. The People persuasively argue that Lima's guilt as an aider and abettor stems from the theory that the acts of Ortega were reasonably foreseeable. (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1577.) We presume that jurors understand, correlate, and follow the court's instructions. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1321; *People v. Lopez, supra*, 198 Cal.App.4th at p. 1119.)

II.

Lima contends that the trial court erred prejudicially by not instructing sua sponte regarding the lesser-included offenses of involuntary and voluntary manslaughter. (§ 192, subd. (a) [manslaughter is an unlawful killing without malice].) He asserts that

substantial evidence exists that he believed that Ortega intended only to brandish the rifle and that Ortega had personal reasons – rumors that Nabte and Sofia were romantically involved – to frighten Nabte. Lima asserts that this evidence supports an instruction regarding involuntary manslaughter based upon misdemeanor brandishing of a firearm. (§ 417; *People v. Lee* (1999) 20 Cal.4th 47, 60-61 [trial court erred by not instructing regarding misdemeanor manslaughter – an unlawful killing without malice during the brandishing of a firearm].)

In criminal cases, the trial court must instruct on general principles of law relevant to the issues raised by the evidence and necessary to the jury's understanding of the case. (*People v. Enraca* (2012) 53 Cal.4th 735, 758.) The evidence necessary to support a lesser-included offense instruction must be substantial evidence from which reasonable jurors could conclude that the facts underlying the instruction exist. (*Ibid.*; *People v. Moon* (2005) 37 Cal.4th 1, 30 [trial court may properly refuse instruction that is not supported by substantial evidence].) We independently review whether the trial court should have instructed concerning a lesser-included offense. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.) "Whether or not to give any particular instruction in any particular case entails the resolution of a mixed question of law and fact that . . . is however predominantly legal. As such it should be examined without deference." (*Ibid.*) Doubts regarding the sufficiency of evidence to warrant a lesser-included offense instruction, however, must be resolved in favor of the defendant. (*People v. Tufunga* (1999) 21 Cal.4th 935, 944.)

The trial court was not required to instruct regarding involuntary or voluntary manslaughter because there is insufficient evidence of misdemeanor brandishing, a heat of passion killing, or provocation sufficient to cause a reasonable man to act rashly or without due deliberation and reflection. (§ 417, subd. (a)(2); *People v. Manriquez* (2005) 37 Cal.4th 547, 583-584.) The crime of brandishing a firearm requires drawing or displaying a firearm "in a rude, angry, or threatening manner." (§ 417, subd. (a)(2).) The evidence reflects that Ortega took the rifle from Lima, knelt on one knee, waited for Nabte to step outside his residence, and fatally shot him by firing the rifle

once. The hour was late, the evening was cold and foggy, and Ortega fired the rifle from a distance. There is no evidence that Ortega displayed the rifle "in a rude, angry, or threatening manner" to anyone. (*Ibid.*)

The trial court properly instructed regarding first and second degree murder as well as murder as a natural and probable consequence of the commission of assault with a deadly weapon. (CALCRIM Nos. 500, 520, 521, 403.) The court did not err because there was insufficient evidence to support involuntary or voluntary manslaughter instructions.

III.

Lima argues that the trial court did not sufficiently define second degree murder, thereby precluding the jury from considering it as a lesser offense. He points out that CALCRIM No. 521 defines two types of first degree murder and then states, "All other murders are of the second degree." Lima adds that during deliberations, the jury requested that the court "explain the difference between 1st and 2nd degree murder." He asserts the instructional error is not harmless beyond a reasonable doubt.

The trial court instructed with CALCRIM Nos. 500 ("Homicide: General Principles"), 520 ("Murder With Malice Aforethought"), and 521 ("Murder: Degrees"). In response to the jury inquiry regarding second degree murder, the court and counsel conferred. Defense counsel stated: "We conferred – and we agree it is fully explained, not only in the instructions, but actually [the prosecutor] did a pretty darned good explanation in her closing." With counsel's agreement, the court then referred the jury to CALCRIM No. 521.

Lima has forfeited his claim by not objecting to the trial court's instructions and not requesting modification or amplification. (*People v. Lee* (2011) 51 Cal.4th 620, 638.) "A trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation], and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal." (*Ibid.*) If Lima believed the instruction required modification or amplification, he was obliged to so request in the trial court. (*Ibid.*)

Forfeiture aside, CALCRIM No. 521 follows section 189 in its definition of first degree murder and statement that "[a]ll other kinds of murders are of the second degree." (§ 189.) CALCRIM No. 520 also correctly instructs regarding express and implied malice. We presume the jurors are intelligent persons capable of understanding and correlating all jury instructions given. (*People v. Castaneda* , *supra*, 51 Cal.4th 1292, 1321.) Following the trial court's advice that the jury reread CALCRIM No. 521, the jury did not request further instruction regarding second degree murder.

Although the trial court erred by not instructing with CALCRIM No. 640, concerning completing verdict forms when more than one degree of murder is possible, the error cannot have contributed to any jury misunderstanding regarding the definition of second degree murder. That instruction states in part that the court "can accept a verdict of guilty or not guilty of second degree murder only if all of you have found the defendant not guilty of first degree murder."

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Charles W. Campbell, Jr., Judge

Superior Court County of Ventura

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