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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES D. TABOR,

Defendant and Appellant.

2d Crim. No. B277994
(Super. Ct. Nos. 2014015245 & 2015011310)
(Ventura County)

James D. Tabor appeals judgment after conviction by jury for misdemeanor trespass into a church and felony vandalism of a house. (Pen. Code, §§ 602, subd. (m), 594, subd. (b)(1).)[1] He challenges only the vandalism conviction on the ground that the court responded to a jury question with an inaccurate statement of law. We affirm.

[1] Further unspecified statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL HISTORY

Tabor took shelter in a church on a cold night. He was drunk, and he continued to drink inside the church. He tried to color his long hair with blue dye he brought along. He spilled the dye on the carpet and furniture. Based on this incident, he was charged with two counts of felony vandalism and one count of misdemeanor trespass (Ventura County Superior Court Case No. 2014015245). (§§ 594, subd. (b)(1), 594.3, subd. (a), 602, subd. (m).) The jury acquitted him of all but the trespass count.

On another occasion, Tabor banged on the door of a house late at night and shouted that he needed scissors. He broke a window, entered the house, took scissors from a kitchen drawer, and began cutting his hair. The woman who lived there was terrified. She escaped when he went down a hallway looking for a razor. A deputy sheriff saw Tabor trying to get out a sliding glass door by repeatedly throwing himself at it. Tabor broke a barstool against the door before sliding the door open and running away. Tabor was charged with felony false imprisonment with violence and felony vandalism (Ventura County Superior Court Case No. 2015011310). (§§ 236, 594, subd. (b)(1).) The jury acquitted him of all but the vandalism count.

The two cases were tried together before a single jury. Tabor testified that he did not intend to spill the dye in the church; it was an accident. He said the cap came off suddenly, he got dye in his eyes, and dye spilled all around as he flung his hair and tried to clean the dye away. He broke into the house through the window to get scissors because he believed his hair was on fire and God was punishing him, among other things. He said, "I wasn't in my right mind, obviously."

During deliberations, the jury asked: "(Charge 5, Vandalism) [¶] If we believe Tabor intentionally broke [the] window, can we consider his motivation as a mitigating factor?" Over defense objection, the court answered, "No. To the extent that you are concerned with motive, you're referred to page 19 of the jury instructions." Page 19 of the instructions stated: "The People are not required to prove that the defendant had a motive to commit any of the crimes charged. In reaching your verdict you may, however, consider whether the defendant had a motive. [¶] Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty." (CALCRIM 370.)

Defense counsel asked the court to amend its response to say, "[Y]es . . . [y]ou may consider motivation as consistent with the other instructions given by the [c]ourt." She argued the jury could properly consider motivation "when considering the instruction about joint operation of act and intent," among other things. The trial court denied this request.

DISCUSSION

Tabor contends the court's directive not to consider "motivation as a mitigating factor" was legally incorrect and the pinpoint reference to CALCRIM 370 erroneously suggested evidence of motive can point only to guilt. We disagree.

We review for abuse of discretion the trial court's decision to instruct, or not instruct, in its exercise of supervision over a deliberating jury. (*People v. Waidla* (2000) 22 Cal.4th 690, 745-746.) We review the correctness of an instruction de novo. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

The trial court characterized the jury's inquiry about "motivation as a mitigating factor" as a question about a

"sentencing factor." Sentencing factors are outside the jury's province, as Tabor acknowledges. But Tabor argues the question was ambiguous, and the jury may have wanted to consider motivation for a proper purpose, such as whether Tabor had the requisite union of act and wrongful intent to be guilty of vandalism.

The charged crime required proof of a union of act and wrongful intent, i.e., that Tabor intentionally broke the window before entering the house. (*People v. Kurtenbach* (2012) 204 Cal.App.4th 1264, 1281; see CALCRIM 2900.) But the jury's question suggests it had already decided that Tabor intentionally broke the window. They asked "*If we believe Tabor intentionally broke [the] window*, can we consider his motivation as a mitigating factor?" (Italics added.) Tabor's appellate counsel emphasizes that he is "*not* arguing . . . an affirmative defense going to mistake of fact or diminished responsibility." The trial court's response was correct.

In any event, Tabor admitted that he intentionally broke the window and tried to put the barstool through the glass door. To the extent there was any unresolved issue for which the jury might properly have considered evidence of motive, it is not reasonably probable the outcome would have been more favorable to Tabor without the directive or the pinpoint reference to CALCRIM 370. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Tabor testified he "picked up a table," "threw it through the window," and "jump[ed] through pretty much right after the table went through." He said he ran at the glass door several times and tried to put the barstool through it.

Tabor argues the jury may have concluded he did not know the window belonged to someone else because he testified

he "wasn't thinking about it at all" about who lived there. But he knew it wasn't his window, or his barstool. He testified he did not know anything "about that house before that night," and was living in a friend's van at the time.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Charles W. Campbell, Jr., Judge

Superior Court County of Ventura

John Derrick, 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, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, David F. Glassman, Deputy Attorney General, for Plaintiff and Respondent.