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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL ANGEL BARRON, Defendant and Appellant.	B263983 (Los Angeles County Super. Ct. No. MA060059)

Appeal from a judgment of the Superior Court of Los Angeles County, Charles A. Chung, Judge. Affirmed as modified with directions.

Allen G. Weinberg, 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, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and Michael C. Keller, Deputy Attorney General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Miguel Angel Barron, was convicted by a jury of: second degree murder (Pen. Code, § 187, subd. (a))[1]; attempted murder (§§ 664, 187, subd. (a)); being a felon in possession of a firearm (§ 29800, subd. (a)(1)); and felony unlawful firearm activity (§ 29815, subd. (a)). The jury further found defendant personally used a firearm and proximately thereby caused great bodily injury to a person other than an accomplice. (§ 12022.53, subd. (d).) Defendant was sentenced to 65 years to life plus 9 years in state prison. We affirm the judgment with minor modifications.

II. THE EVIDENCE

Defendant and his wife lived in a Littlerock, California home. Also living in the residence were: defendant's sister, Guadalupe Chavez; Ms. Chavez's five grandchildren; defendant's niece, Maria Maldonado; and Ms. Maldonado's boyfriend, Cesar Nande. Multiple domestic disagreements had arisen between defendant, Ms. Maldonado and Mr. Nande. On June 27, 2013, just after midnight, defendant fired one gunshot, severely injuring Ms. Maldonado and killing Mr. Nande. Defendant had been drinking beer all day long prior to the shooting.

Ms. Chavez heard defendant talking on the telephone sometime in the afternoon of June 26. Defendant told someone: "[C]ome on over. I don't want that fool to think I'm alone." An 11-year-old neighbor had heard defendant and Mr. Nande angrily yelling and arguing earlier in the evening, around 6 p.m. The argument arose because defendant had taken Mr. Nande's tools. Ms. Maldonado also heard the argument. When Ms. Chavez left for work around 10 p.m., defendant was drunk and mad. Ms. Chavez told Ms. Maldonado to avoid defendant. Ms. Chavez was Ms. Maldonado's mother. Mr. Nande's cousin, Ruben Garcia, lived nearby. Defendant visited Mr. Garcia's home the evening of

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[1] Further statutory references are to the Penal Code unless otherwise noted.

the shooting. Mr. Garcia testified defendant, who was drunk, had a rifle. Defendant was attempting to load a bullet into the rifle.

Defendant's long-time friend, Rodrigo Echeverri, testified for the prosecution. Mr. Echeverri received a telephone call from defendant around 4 p.m. Defendant was having a problem with Mr. Nande. Defendant made a reference to "boxing" and, according to Mr. Echeverri, said, "He might have to . . . settle something." Mr. Echeverri caught up with defendant at Mr. Garcia's house around 10 p.m. They returned to defendant's home shortly before midnight and went into the backyard. Mr. Echeverri invited Mr. Nande to have a beer with them. Mr. Nande declined and went inside the house. Mr. Echeverri testified defendant became upset and began throwing things around. Mr. Echeverri said defendant was having a "tantrum." Defendant apparently heard Ms. Maldonado on the telephone with an emergency operator. Mr. Echeverri heard defendant ask Ms. Maldonado: "What are you doing? . . . Why? I'm your uncle." Defendant told Mr. Echeverri: "Get the hell out of here because it [is] going to get ugly. The police are coming." Mr. Echeverri jumped in his truck and began to leave.

Ms. Maldonado testified defendant had been drinking all day. Because of defendant's condition, around 3 or 4 p.m., she sent her children to stay with their father. By evening, defendant was drunk. Defendant left the home around 10 p.m. and returned just before midnight. Defendant, who had a smirk on his face and was intoxicated, walked in the front door holding a rifle. Defendant went into the backyard and began firing the rifle into the air. Just after midnight, Ms. Maldonado telephoned an emergency operator. Ms. Maldonado told the operator defendant was firing the rifle in the backyard. She confirmed that her uncle, defendant, was drunk. Defendant heard Ms. Maldonado on the telephone. In the recording of that call, defendant and Ms. Maldanado can be heard arguing. Ms. Maldonado told defendant, "You can't be shooting." At trial, Ms. Maldanado testified defendant said, "Call the cops on me, mother fucker, I'll shoot you right here." Defendant shot Ms. Maldonado. The shooting occurred while Ms. Maldonado was still on the telephone with the emergency operator. Ms. Maldonado heard Mr. Nande say, "Oh, fuck." Defendant held the rifle at his waist and faced Ms.

Maldonado. Mr. Nande was standing two or three feet away from Ms. Maldonado, to her right. A split second later, Ms. Maldonado heard and felt the gunshot. Mr. Nande said, "Oh, God, baby." The bullet entered Mr. Nande's back and exited his abdomen and also struck Ms. Maldonado in the arm.

Mr. Echeverri was attempting to back his truck out of defendant's driveway when he heard a single gunshot. Seconds later, defendant jumped into Mr. Echeverri's truck. Defendant was still holding the rifle in his hands. Defendant told Mr. Echeverri, "I had shot Cesar." Defendant did not mention Ms. Maldonado. Defendant said he wanted to be taken to San Bernardino. Mr. Echeverri testified: "He told me to take him to his . . . son's house." During the drive to San Bernardino, defendant removed his cellular telephone battery, then tossed the battery and the telephone out of the vehicle. Mr. Echeverri assumed defendant did not want to be tracked. Mr. Echeverri told a detective defendant's explanation for throwing the telephone out of the window of the truck, "Well, yeah, because he told me . . . that he didn't want to get tracked." When they arrived in San Bernardino, defendant's son told them to leave. Mr. Echeverri then drove defendant to relatives in Ventura County. Mr. Echeverri left defendant in Ventura and returned home. Three hours after arriving home, Mr. Echeverri was arrested. When interviewed by Detective Brandt House shortly thereafter, Mr. Echeverri quoted defendant as saying, "I killed him."

Defendant testified in his own defense. He admitted he had been drinking all day and that he was drunk at the time of the shooting. Defendant admitted there had been tension with Ms. Maldonado and Mr. Nande. Defendant had known Mr. Nande to use methamphetamine and cocaine. Defendant feared Mr. Nande. Defendant denied intending to shoot anyone.

Defendant described the incident as follows. After Ms. Maldonado called the emergency operator, defendant went into his room and grabbed his rifle. He did so because he was on probation. It was his custom to keep one bullet in the rifle. He fired a shot into the air outdoors in order to discharge the one bullet. Defendant admitted, however, that after discharging the bullet he cocked the gun. As a result, defendant

admitted that, if there had been another bullet in the rifle, a weapon would have been in position to fire. When defendant entered the house, he tripped and hit the wall or a table and the rifle discharged. It was possible his finger was on the trigger. Defendant testified: "I'm not sure about that. It is kind of fuzzy from drinking, being drunk."

Mr. Nande was standing up when defendant ran from the house. Defendant was unsure whether Mr. Nande had been hit. He had no idea Ms. Maldonado had been shot. Once the shooting was over, defendant was unsure whether Mr. Nande had been shot. When questioned on direct examination, defendant was asked, "At the conclusion of the gun going off, did you have at least some idea that maybe Mr. Nande was shot?" Defendant responded, "No, I didn't because he was standing up when I left."

Defendant admitted tossing the rifle out the window during the drive to San Bernardino. Defendant denied intentionally tossing his cellular telephone to avoid being tracked. He thought that when he threw the rifle, the telephone fell out with it. After defendant left San Bernardino, he intended to return to Littlerock, but he took the wrong freeway and ended up in Ventura, where he happened to have relatives. After the shooting, defendant shaved his facial hair. Defendant said he was trimming his mustache and cut it the wrong way so he just shaved off all his facial hair. Defendant took no steps to check on the welfare of Mr. Nande or Ms. Maldonado. Also, defendant took no steps to verify his wife's well-being. Defendant's wife was blind and was due to undergo dialysis treatment the next day.

III. DISCUSSION

A. Victim Intoxication Evidence

Defendant asserts the trial court erroneously excluded evidence that Mr. Nande had cocaine, methamphetamine and alcohol in his system. Defendant asserts this constitutes constitutional error. In the trial court, defendant argued this evidence would have substantiated his fears which led to the shooting. On appeal, defendant argues for

the first time that the toxicology evidence also would have undermined Ms. Maldonado's credibility. The trial court found the evidence was not relevant. The trial court ruled: "The defendant took the stand and affirmatively stated that he really didn't arm himself with a rifle so much as he took physical possession of the rifle to get it out of the house because his niece had called the police. He knew he was on probation and thought he would get in trouble, so he really wanted to get rid of the rifle and the rifle accidentally discharged. [¶] He never made a claim of self-defense or imperfect self-defense. Had that claim been there, then his fear of Mr. Nande and the victim's use of drugs . . . would have become wholly relevant. But [defendant] took a position that he in no way was defending himself and so that's why I'm excluding it."

Only relevant evidence is admissible. (*People v. Cowan* (2010) 50 Cal.4th 401, 482; *People v. Kelly* (1992) 1 Cal.4th 495, 523.) Pursuant to Evidence Code section 210, "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." And as our Supreme Court has frequently explained, "'Evidence is relevant if it tends "'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive."' (*People v. Williams* (2008) 43 Cal.4th 584, 633; see Evid. Code, § 210.)" (*People v. Lee* (2011) 51 Cal.4th 620, 642-643; accord, *People v. Cowan, supra,* 50 Cal.4th at p. 482.) A trial court has broad discretion to rule on the relevancy of evidence. (*People v. Cowan, supra,* 50 Cal.4th at p. 482; *People v. Kelly, supra,* 1 Cal.4th at p. 523.) Our review is for an abuse of that discretion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1195; *People v. Heard* (2003) 31 Cal.4th 946, 973.)

No abuse of discretion occurred. Further, because defendant's constitutional claims rest entirely on his state law evidentiary error assertion, we also find no violation of his fair trial or due process rights. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1309; *People v. Coffman* (2004) 34 Cal.4th 1, 84.) The trial court was not required to admit evidence that would merely make Mr. Nande, a crime victim, look bad. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496; *People v. Kelly, supra,* 1 Cal.4th at p. 523.) The

pivotal issue was whether defendant fired the rifle accidentally. Neither surviving witness to the shooting, Ms. Maldonado nor defendant, testified Mr. Nande was acting aggressively. Defendant shot Mr. Nande in the back from a distance. Defendant did not testify he acted in self-defense or a misperceived need to defend himself. Evidence Mr. Nande had methamphetamine, cocaine and alcohol in his system would not have made it more likely the jury would disbelieve Ms. Maldonado's testimony. Likewise, the challenged evidence would not have made it more likely for the jury to conclude defendant accidentally fired the weapon.

B. CALJIC No. 4.21.1

The jury was instructed pursuant to CALJIC No. 4.21.1: "[I]n the crimes charged in counts 1 and 2 a necessary element is the existence in the mind of the defendant of certain specific intents or mental states which is included in the definition of the crimes set forth elsewhere in these instructions. [¶] If the evidence shows that a defendant was intoxicated at the time of the alleged crime, you *should* consider that fact in deciding whether or not the defendant had the required specific intent or mental state. [¶] If from all of the evidence you have a reasonable doubt whether a defendant had the required specific intent or mental state, you *must* find the defendant did not have that specific intent or mental state." (Italics added.)

Defendant asserts instructional error insofar as CALJIC No. 4.21.1 advised the jury it "should" rather than "must" consider defendant's intoxication in relation to the requisite mental state for murder or attempted murder. Our Supreme Court has held to the contrary. In *People v. Hajek* (2014) 58 Cal.4th 1144, 1224-1225, our Supreme Court held: "Hajek contends that the use of 'should' . . . in [CALJIC No. 4.21.1] permitted the jury to disregard entirely his mental impairment defense. Not so. [¶] CALJIC No. 4.21.1, as given here, provided: 'If the evidence shows that a defendant was mentally ill, suffered from a mental disease or defect at the time of the alleged crime, you *should* consider that fact in determining whether or not such defendant had such mental state, in

other words, whether he did in fact premeditate and deliberate.' The next paragraph, however, instructed the jury that '[i]f from all the evidence you have a reasonable doubt, you *must* find that defendant did not have such mental state.' (Italics added.) [¶] The principle that jury instructions are read as a whole and in relation to one another (*People v. Burgener* [(1986)] 41 Cal.3d [505,] 538[, disapproved on another point in *People v. Reyes* (1998) 19 Cal.4th 743, 756]) applies equally to the different parts of a single instruction. When so construed, [CALJIC No. 4.21.1] was clear in requiring the jury to consider Hajek's mental impairment evidence in assessing whether he possessed the requisite mental state. This is because the jury could obviously not reach the issue of whether such evidence created a reasonable doubt without first considering it. We presume the jurors were capable of reading, understanding, and applying the instruction in this commonsense manner rather than in Hajek's hypertechnical manner. (*People v. Carey* [(2007)] 41 Cal.4th [109,] 130.)" The same is true with respect to the jury instruction as to defendant's intoxication in the present case.

C. Court Operations and Facilities Assessments

The trial court imposed a "$40 court operation fee" and a "$30 criminal conviction assessment fee." We asked the parties to brief the question whether, because defendant was convicted on four counts, the judgment must be modified to impose a $160 court operations assessment (§ 1465.8, subd. (a)(1)) and a $120 court facilities assessment (Gov. Code, § 70373, subd. (a)(1)). (*People v. Sencion* (2012) 211 Cal.App.4th 480, 484-485; *People v. Castillo* (2010) 182 Cal.App.4th 1410, 1415, fn. 3; *People v. Crittle* (2007) 154 Cal.App.4th 368, 370-371.) The judgment must be modified to so provide. Further, the abstract of judgment must be amended to so reflect.

D. Presentence Custody Credit

The trial court awarded defendant credit for 680 days in presentence custody. We asked the parties to brief the question whether defendant received excessive credit. Defendant was arrested on June 28, 2013, and sentenced on May 6, 2015. Therefore, he was in presentence custody for 678 days. The judgment must be modified and the abstract of judgment amended to award defendant credit for 678 days in presentence custody.

IV. DISPOSITION

The judgment is modified to impose a $160 court operations assessment (Pen. Code, § 1465.8, subd. (a)(1)) and a $120 court facilities assessment (Gov. Code, § 70373, subd. (a)(1)). The judgment is further modified to award defendant credit for 678 days in presentence custody. The judgment is affirmed in all other respects. Upon remittitur issuance, the clerk of the superior court is to prepare an amended abstract of judgment and deliver a copy to the Department of Corrections and Rehabilitation.

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TURNER, P.J.

We concur:

KRIEGLER, J.

BAKER, J.