Filed 11/29/17 P. v. Davis CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CURTIS DAVIS, Defendant and Appellant.	B267045 (Los Angeles County Super. Ct. No. TA135891)

APPEAL from a judgment of the Superior Court of Los Angeles County. Allen J. Webster, Jr. Affirmed, as modified.

Roberta Simon, 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, Shawn McGahey Webb, Supervising Deputy Attorney General, and Ilana Herscovitz and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

A jury convicted Curtis Davis (defendant) of attempted premeditated murder and assault with a deadly weapon, and found that he personally used a deadly weapon and inflicted great bodily injury. On appeal, he argues that his convictions and enhancements are invalid because the trial court erred in giving an aiding and abetting instruction that was not supported by the evidence and not charged; because the court never instructed the jury on the two enhancements; and because the jury's premeditation finding was not supported by sufficient evidence. Defendant also contends that his custody credits were miscalculated. We agree that he is entitled to additional custody credits, but conclude that his remaining arguments lack merit. Accordingly, we affirm his convictions and sentence with instructions to modify his custody credits.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Defendant and his wife lived across the street from Joseph Foster (Foster). On a Tuesday night in late October 2014, defendant's wife invited Foster and his girlfriend over to their place for a game of cards. As they were playing, defendant invited his adult son (or stepson) "Tony" and his adult daughter to come over and join the game. Everyone was drinking.

Foster started losing at cards and became angry. He went outside to smoke a cigarette. Foster repeatedly called his girlfriend's phone, but Tony kept answering her phone. Foster returned to the home to retrieve his girlfriend and to leave.

As Foster and his girlfriend were leaving, Tony told Foster, "Nobody called you a bitch, but you act like a bitch." Tony then threw a punch at Foster, and Tony and Foster tumbled to the ground, fistfighting "like pitbulls." After "maybe a minute,"

defendant joined the melee, putting Foster in a chokehold from behind, and telling him, "You fucked up now. Now you done fucked up." Foster felt himself get repeatedly kicked in the face and punched several times in the chest and legs.

Foster eventually got up and staggered across the street to his home, leaving pools of blood in his wake. Blood oozed from his chest when he coughed. Someone called 911. Emergency medical personnel arrived, and determined that Foster had been stabbed several times in the chest and legs; he also suffered a punctured lung and ended up spending seven days in a trauma unit. Although Foster recovered, some of his injuries had been life threatening.

Foster initially told police that (1) he was not sure who had stabbed him and that it could have been "any of them," and (2) "Red" (Tony's gang moniker) had done it. Foster later told police that defendant had stabbed him.

II. Procedural Background

The People charged defendant with (1) attempted premeditated murder (Pen. Code, §§ 187, subd. (a) & 664),[1] and (2) assault with a deadly weapon (§ 245, subd. (a)(1)). The People further alleged that defendant "personally used a deadly and dangerous weapon" in conjunction with the attempted murder (§ 12022, subd. (b)(1)), and personally inflicted great bodily injury (§ 12022.7, subd. (a)) as to both counts.

In her opening statement, the prosecutor argued that defendant had personally stabbed Foster.

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1 All further statutory references are to the Penal Code unless otherwise indicated.

Foster took the stand. He testified that he did not see defendant stab him with the knife, but he knew defendant punched him in the chest and legs and that is where he had puncture wounds from a knife. He also testified that, minutes after the stabbing, defendant followed Foster across the street and told a seven-year-old boy who stopped to talk to Foster that he better leave, "or I'll stab you, too." Foster lastly testified that defendant had carried a knife in the past. During cross-examination, Foster acknowledged that he had initially told police that he did not know who stabbed him, but had mentioned "Red" (Tony's gang moniker) by name and not defendant.

Foster's girlfriend also testified. Although she had previously told the police she saw defendant stab Foster "numerous times," she testified at trial that all she saw was defendant put Foster in a chokehold. Foster's girlfriend was nevertheless overheard in the courthouse hallway telling someone that defendant had Foster in a chokehold until defendant stabbed him.

After the People rested, defendant called as a witness a police officer who testified that Foster told him, immediately after the incident, that "Red" had stabbed him.

Before the defense rested, the trial court held a charging conference to discuss jury instructions. The People asked the court to instruct the jury on an aiding and abetting theory. Although the court initially indicated it would not give such an instruction, the court ultimately ruled that an aiding and abetting instruction was warranted if the jury could reasonably find that "Red had the knife and [defendant] held him in a chokehold" while knowing Red's "intention was to stab" Foster.

The court overruled defendant's further objection that defendant "was never charged" on an aiding and abetting theory.

The trial court instructed the jury on (1) the charged crimes of attempted premeditated murder and assault with a deadly weapon, (2) the lesser included crime of attempted voluntary manslaughter due to provocation and due to imperfect self-defense, (3) self-defense as to both charged crimes, and (4) aiding and abetting as to both charged crimes. The court did not provide any instructions on either the personal use of a deadly weapon or personal infliction of great bodily harm enhancements.

In her initial closing argument, the prosecutor argued that defendant was the perpetrator, but noted in passing that defendant would still be guilty if "Tony had the knife [and] . . . defendant had [Foster] in a chokehold while Tony was stabbing him." In his closing, defendant accused the People of changing their theory mid-trial to say that Tony had done the stabbing. In her final rebuttal, the prosecutor reaffirmed her central position that defendant "was the one who stabbed . . . Foster," and responded to defendant's argument by telling the jury that it was "entitled to the law that applies" even if it "doesn't fit into" the "view of the People's case" she was espousing.

The jury found defendant guilty of both crimes, including that the attempted murder was premeditated, and found true both enhancements.

The trial court sentenced defendant to prison for 11 years to life. The court imposed 11 years to life on the attempted murder count (comprised of a base sentence of seven years to life, plus one year for personal use of a deadly weapon, plus three years for personal infliction of great bodily injury). The court

imposed a four-year sentence for the assault with a deadly weapon count, but stayed it under section 654.

Defendant filed an untimely notice of appeal, but we granted him relief from the untimeliness.

DISCUSSION

I. Instructional Error

Defendant argues that his convictions must be overturned because the trial court committed two instructional errors: (1) the court gave an aiding and abetting instruction (a) when substantial evidence did not support that instruction, and (b) when the People "ambushed" him with that theory; and (2) the court failed to instruct the jury *at all* on the personal use of a deadly weapon and personal infliction of great bodily injury enhancements. We review claims of instructional error de novo. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581, 584.)

A. Aiding and abetting instruction

1. Substantial evidence

A person is liable for a crime if he commits the crime himself or if he aids and abets another in its commission. (§ 31.) A person is liable as an aider and abettor if (1) he knows of the actual perpetrator's unlawful purpose, (2) he, by his act or advice, aids, promotes, encourages, or instigates the actual perpetrator's commission of the crime, and (3) he acts with the intent or purpose to commit, encourage, or facilitate the actual perpetrator's commission of the crime. (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1054; *People v. McCoy* (2001) 25 Cal.4th 1111, 1118; *People v. Prettyman* (1996) 14 Cal.4th 248, 259.) When the crime is attempted murder, the first and third elements mean that the aider and abettor must know of and share the perpetrator's intent to kill. (*Nguyen*, at p. 1054.)

A trial court must instruct on a theory if it is supported by substantial evidence. (*People v. Delgado* (2013) 56 Cal.4th 480, 488.) "Substantial evidence" is ""'evidence that is credible and of solid value[] from which a rational trier of fact could [find] the defendant guilty beyond a reasonable doubt."'" (*People v. Hill* (1998) 17 Cal.4th 800, 848-849.)

Substantial evidence supported the trial court's decision to give an aiding and abetting instruction. At trial, defendant elicited Foster's initial statements to police that *Tony* had stabbed him while defendant held Foster in a chokehold. Combined with the further evidence that defendant told Foster, "You fucked up now. Now you done fucked up," as he was immobilizing him and as Tony was stabbing him, a rational jury could infer that defendant was aware of and shared Tony's intent to kill and was holding Foster still to "aid" Tony.

Defendant essentially raises three arguments in response. First, he argues that there was no *direct* evidence of Tony's intent to kill or that defendant shared that intent. This argument overlooks that intent is "'usually . . . proven circumstantially.' [Citation.]" (*Hudson v. Superior Court* (2017) 7 Cal.App.5th 1165, 1171); the absence of direct evidence is of no moment. More to the point, as explained above, there was ample *circumstantial* evidence from which to infer Tony's and defendant's intent.

Second, defendant contends that he could not have intended to kill Foster because, at most, he joined in to help Tony with a fistfight and could not have foreseen—let alone intended—a knife fight. This contention overlooks that fistfights do, in fact, often escalate into knife fights and shootings, particularly where a gang member is involved, and there was evidence Tony belonged to a gang. (*People v. Medina* (2009) 46 Cal.4th 913, 922

["a rational trier of fact could have found that the shooting of the victim was a reasonably foreseeable consequence of the gang assault in this case"].) It also ignores that a jury could reasonably infer that defendant's acts and words evinced an awareness of what was about to happen to Foster.

Lastly, defendant analogizes the facts of his case to the facts in *Juan H. v. Allen* (9th Cir. 2005) 408 F.3d 1262, where the court overturned an attempted murder conviction based on an aiding and abetting theory for insufficient evidence. In *Juan H.*, the defendant was a bystander to a shooting who knew the shooting victim and had been punched by him in the past; who had made gang gestures at the victim months before; who stood "somewhat behind" the perpetrator as the perpetrator shot the victim; and who fled after the shooting. (*Id.* at pp. 1276-1277.) *Juan H.* is consistent with the general maxim that a person's "mere 'presence'" at the scene of a crime is not "'sufficient to establish aiding and abetting.'" (*People v. Richardson* (2008) 43 Cal.4th 959, 1024.) Defendant was not "merely present" and played a far greater role than the defendant in *Juan H.*

2. Insufficient notice

A criminal defendant has a "federal constitutional right to "'be informed of the nature and cause of the accusation'"" against him. (*People v. Quiroz* (2013) 215 Cal.App.4th 65, 70, quoting *Gray v. Raines* (9th Cir. 1981) 662 F.2d 569, 571.) Although California law provides that a person charged as a principal of a crime is automatically deemed to be charged as an aider and abettor as well (§ 971; *People v. Garrison* (1989) 47 Cal.3d 746, 776, fn. 12), the California courts are divided over whether the notice imparted by this "short-form pleading" rule provides adequate notice *under the federal constitution*. (Compare *People*

v. Scott (1991) 229 Cal.App.3d 707, 716-717 [short-form pleading provides adequate notice] with *People v. Lucas* (1997) 55 Cal.App.4th 721, 737-738 [it may not].) However, a defendant receives constitutionally sufficient notice if he is "further alerted" to the aiding and abetting theory before or during trial—that is, as long as the people do not "affirmatively mislead[] or ambush[] the defense with their theory." (*Quiroz*, at pp. 70-71; cf. *Sheppard v. Rees* (9th Cir. 1990) 909 F.2d 1234, 1236-1237 [due process violation where the prosecution conceded that switch from premeditated murder to felony-murder theory "ambushed" the defense]; *People v. Marzett* (1985) 174 Cal.App.3d 610, 615-617 [due process violated when law regarding aiding and abetting changed mid-trial in a way that would have prompted defendant to defend the case differently].)

In this case, the People did not mislead or ambush defendant as to whether he was the perpetrator or an aider and abettor. The People charged and, in opening statements, told the jury that defendant had stabbed Foster. It was *defendant* who during trial elicited evidence on cross-examination and who called witnesses establishing that *Tony* had stabbed Foster. Nor was this evidence a surprise to defendant because he had tried to elicit the same evidence at the preliminary hearing. At the People's urging, the trial court considered the evidence elicited at trial and concluded that it could support a jury finding that Tony stabbed Foster with defendant's assistance; yet the People continued to argue in closing that defendant was the one with the knife, while conceding that he would be equally guilty if Tony had the knife and defendant had helped him. On these facts, defendant had ample notice of the aiding and abetting theory because he was the one who elicited the facts underlying that

theory and because the aiding and abetting theory came up at the charging conference—which was before defendant had rested his case; while defendant could have, but did not, put on more evidence; and while defendant could still respond to the aiding and abetting theory in closing argument. (See *People v. Kipp* (2001) 26 Cal.4th 1100, 1131-1132 [due process objection to inadequate notice waived by failure to move to reopen evidence].) Indeed, defendant capitalized on the new instruction, arguing that it was proof of the People's desperation.[2]

B. Instructions for enhancements

As a general rule, a trial court has a "'sua sponte duty'" to instruct the jury on all charged crimes and sentencing enhancements. (*People v. Camino* (2010) 188 Cal.App.4th 1359, 1380.) The trial court violated this duty by not instructing the jury *at all* with respect to (1) the personal use of a dangerous or deadly weapon enhancement, and (2) the personal infliction of great bodily harm enhancement. Contrary to what defendant suggests, however, this violation is not reversible per se. Instead, as long as the court's instructional omissions do not """vitiat[e] *all* the jury's findings,""" our task is to assess whether the omission was harmless beyond a reasonable doubt. (*People v. Merritt* (2017) 2 Cal.5th 819, 822, 828-829 (*Merritt*).) In such cases, we ask whether the evidence regarding the omitted elements was "overwhelming" and "undisputed." (*Id.* at pp. 827-828, 830.)

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[2] In light of our conclusion that the aiding and abetting instruction was properly given, we have no occasion to consider defendant's further argument that the jury's verdict was invalid because it rested on an invalid theory (aiding and abetting) and a valid theory (personal commission of the crime).

In examining whether the court has omitted *all* elements of a crime or enhancement, we may look to what happened at trial, including the totality of all jury instructions as well as what the parties argued in closing. (*Merritt*, *supra*, 2 Cal.5th at pp. 821-822.) We also bear in mind that a court's duty to instruct reaches "'statutory definitions of an offense that have a technical or specialized meaning,'" not "'words in common usage.'" (*People v. Friend* (2009) 47 Cal.4th 1, 70-71.)

The personal use enhancement applies when "[a] person . . . [1] personally uses [2] a deadly or dangerous weapon [3] in the commission of a felony or attempted felony." (§ 12022, subd. (b)(1); see also CALCRIM No. 3145.) The personal infliction enhancement applies when a "person . . . [1] personally inflicts [2] great bodily injury on any person other than an accomplice [3] in the commission of a felony or attempted felony." (§ 12022.7, subd. (a); see also CALCRIM No. 3160.)

Here, the jury was made aware of many of the elements of the two enhancements. The verdict form for attempted murder in this case required the jury to decide whether "defendant[] personally used a dangerous weapon[], to wit, [a] knife," and the verdict form for both crimes required the jury to decide whether "defendant[] personally inflicted great bodily injury upon . . . Foster, not an accomplice to the above offense." The instructions elsewhere defined the term "great bodily injury." The word "personal" has no specialized meaning, as even the standard jury instructions for these enhancements do not define this word. (CALCRIM Nos. 3145 [defining "personal use," but not "personal"], 3160 [not defining "personal"].) Thus, the only missing elements were (1) the element that defendant personally used the dangerous weapon and personally inflicted great bodily

injury *during the felony*, and (2) the definition of "dangerous weapon." However, there was only one act underlying both felonies, and the evidence was undisputed that the stabbing occurred during that act. And it is undisputed that plunging the knife in Foster's chest and leg meant that the knife was used in "such a way that it is capable of causing and likely to cause death or great bodily injury," which is the definition of "dangerous weapon." (CALCRIM No. 3145.) Defendant also offered no argument against either enhancement in closing. On these facts, the trial court's error in not formally instructing the jury on the two enhancements was harmless beyond a reasonable doubt.

II. Sufficiency of the Evidence

Defendant next asserts that there was insufficient evidence to support the jury's finding that the attempted murder was willful, premeditated, and deliberate. We review this claim by asking whether substantial evidence supports the jury's finding.

The crime of attempted premeditated murder requires proof that the defendant acted with deliberation and premeditation. (§§ 189 & 664, subd. (a).) "'[D]eliberation means a "'careful weighing of considerations in forming a course of action"'" (*People v. Salazar* (2016) 63 Cal.4th 214, 245), and "'"premeditation" means thought over in advance'" (*People v. Sandoval* (2015) 62 Cal.4th 394, 424). "'"The process of premeditation and deliberation does not require any extended period of time,"'" what matters "'is the extent of the reflection, not the length of time.'" (*Salazar*, at p. 245; *People v. Mayfield* (1997) 14 Cal.4th 668, 767, overruled in part on other grounds by *People v. Scott* (2015) 61 Cal.4th 363.) We look to three factors to determine whether a defendant has acted with deliberation and premeditation: (1) defendant's motive; (2) prior planning; and

(3) the manner of killing. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27; *People v. Streeter* (2012) 54 Cal.4th 205, 242.)

Substantial evidence supports the jury's finding that defendant's act in stabbing Foster was done with deliberation and premeditation. He watched the fistfight between Tony and Foster for "maybe a minute" before joining in, immediately putting Foster in a chokehold, and telling him, "Now you done fucked up," while stabbing him repeatedly in the chest and leg, areas where vital organs or arteries are located. (Accord, *People v. Perez* (1992) 2 Cal.4th 1117, 1127 [violent and bloody death from multiple stab wounds can demonstrate premeditation].) A jury could reasonably view this course of conduct as evincing an intentionality consistent with deliberation and premeditation. Defendant argues that the stabbing was the product of an "explosion of violence" by a person with no motive to kill because Foster had been playing cards with Tony. A jury could have reasonably seen the evidence differently, given that defendant deliberately waited to join in, had the knife with him when he joined in, and immediately put that knife to use by stabbing Foster in vital parts of his body. It is not for us to reweigh the evidence.

III. Custody Credits

Defendant lastly asserts that the trial court miscalculated his presentence custody credits. The trial court awarded defendant 155 days of actual custody credit, but did not award any conduct credit. This was error. Given the charges, defendant was entitled to 15 percent presentence custody credits. (§ 2933.1, subd. (a).) This comes to 23 days conduct credit. Because this issue may be raised for the first time on appeal along with other properly preserved claims (*People v. Mendez* (1999) 19 Cal.4th

1084, 1100-1101), we order that the abstract of judgment be amended to reflect a total of 178 days of custody credit.

DISPOSITION

The judgment is modified to provide for 155 actual days of presentence custody credit, plus 23 days of conduct credit, for a total of 178 days. The superior court is directed to prepare an amended abstract of judgment reflecting the modified presentence custody credit, and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.*
GOODMAN

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