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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JIMMY HERNANDEZ, Defendant and Appellant.	B229543 (Los Angeles County Super. Ct. No. BA357318)

APPEAL from a judgment of the Superior Court of Los Angeles County. George G. Lomeli, Judge. Affirmed.

A. William Bartz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, and Susan Sullivan Pithey and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jimmy Hernandez appeals his convictions of two counts of assault with a firearm in violation of Penal Code section 245, subdivision (a)(2), and one count of discharge of a firearm with gross negligence in violation of section 246.3, subdivision (a).[1] Hernandez's sole contention on appeal is that the trial court committed prejudicial error in instructing the jury on aider and abettor liability with former CALJIC No. 3.00 because the language in the instruction that "[e]ach principal, regardless of the extent or manner of participation is equally guilty" is an incorrect statement of law. Based on the evidence presented at trial, we conclude that any alleged instructional error was harmless beyond a reasonable doubt. Accordingly, we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The Charges

In connection with an alleged assault that occurred on June 1, 2009, the Los Angeles County District Attorney charged Hernandez with three counts of assault with a firearm (§ 245, subd. (a)(2), counts 1 through 3), one count of possession of a firearm by a felon (former § 12021, subd. (a)(1), count 4), and one count of possession of ammunition by a felon (former § 12316, subd. (b)(1), count 5). In connection with a separate alleged assault occurring on that same date, the District Attorney charged Hernandez with two counts of assault with a firearm (§ 245, subd. (a)(2), counts 6 through 7), one count of discharge of a firearm with gross negligence (§ 246.3, subd. (a), count 8), two counts of shooting from a motor vehicle at a person (former § 12034, subd. (c), counts 9 through 10), one count of shooting from a motor vehicle (former § 12034, subd. (d)) (count 11), and one count of permitting another to shoot from a vehicle (former § 12034, subd. (b), count 12). Firearm enhancements were alleged as to counts 1 through 3 (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a)), and gang enhancements

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1 All further statutory references are to the Penal Code.

were alleged as to all 12 counts (§ 186.22, subd. (b)). Hernandez pleaded not guilty to the charges and denied the special allegations.[2]

II. Prosecution Evidence

A. First Incident (counts 1 through 5)

On June 1, 2009, at 12:55 a.m., Luis Alas was in his car near the intersection of Pico and Norton in Los Angeles. His younger sister, Jennie V., age 13, and his nephew, Jose M., age 15, were with him. As Alas was searching for parking, both he and Jose noticed a person spray-painting graffiti on a nearby wall. The person turned in their direction, and then ran to a Honda and got into the front passenger seat.

After Alas parked his car, he and the children walked to the corner of the intersection and waited for the signal to cross. A dark Honda reversed quickly and stopped at the corner about two to three feet from them. A Lakers flag was affixed to the left side of the Honda. There were two people seated in the front of the car, and the driver was closest to Avila and the children. The driver was a bald Hispanic man and the front passenger was a Black man.

The driver exited the Honda and aggressively asked, "Where are you from?" He also said, "Fuck M.S., it's all about the Crazy Riders." The driver angrily took off his shirt as he claimed his gang, displaying a large tattoo on his left shoulder. The driver then told the passenger in the Honda to hand him the gun. He said, "I'm about to shoot this bitch." After taking a gun from the passenger, the driver pointed it at Alas and again said "Fuck M.S." He also continued to shout "C.R.S." or "Crazy Riders." Alas was shocked and unable to say anything; he simply put his hands up. The driver pulled the gun away, got back into the car, and took off down the street. Alas immediately called "911" to report the crime.

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[2] In the same information, the District Attorney charged Hernandez's codefendant, Alphonso Lorenzio Berment, with counts 1 through 3 and counts 6 through 11, along with firearm and gang enhancements. Hernandez and Berment were jointly tried before separate juries.

The following night, Alas and Jose were taken to a field show-up. At that time, Alas identified Hernandez and Berment as the individuals involved in the assault. Jose identified Hernandez as the driver, but could not identify the passenger. At trial, Alas made in-court identifications of Hernandez as the driver and Berment as the passenger. Alas also testified that Hernandez looked totally different than he did the night of the incident in that Hernandez now had hair and was much thinner. During his trial testimony, Jose identified Hernandez as the driver from a booking photograph, but stated that he did not see the driver or the passenger in court.

B. Second Incident (counts 6 through 12)

On June 1, 2009, at 10:25 p.m., Juventino Barrios and his friend, Jason R., were walking near the intersection of Pico and Norton on their way to a market. A black Honda began following Barrios and Jason and then pulled up beside them. Inside the Honda were two men -- the driver and a person in the rear passenger seat. The driver was a bald Hispanic man, and the passenger appeared to be African-American.

From inside the vehicle, the driver asked, "Where are you from?" Barrios answered, "I don't bang," meaning that he was not affiliated with any gangs. Jason similarly said, "We're not from nowhere." The driver identified himself as belonging to "C.R.S." and "Crazy Riders." Barrios and Jason then saw the rear passenger window roll down. The person in the passenger seat pulled out a gun and pointed it at Barrios and Jason from a distance of about 22 feet. Both Barrios and Jason began to run away, and as they fled, they heard three to five gunshots. Barrios turned back and saw the Honda following them. He and Jason jumped into a backyard to hide and stayed there until the police arrived.

At a pre-trial court proceeding held four months after the assault, the investigating officer showed Barrios and Jason individual photographs of Hernandez and Berment while the victims were waiting outside the courtroom. At that time, Barrios identified Berment as the shooter, while Jason indicated that he was unable to identify anyone. At trial, Barrios made an in-court identification of Berment as the shooter. Barrios also identified Hernandez as the driver from his booking photograph, but testified that he did

not see the driver in court. Jason was unable to identify either the driver or the shooter at trial.

C. Police Investigation of Hernandez and Berment

On June 1, 2009, following the second assault, Los Angeles Police Officers Amanda Morrow and Kai Joseph responded to the scene where they were responsible for collecting evidence and conducting interviews. During their initial interviews with the police, neither Barrios nor Jason was very cooperative, but they did provide a description of the suspects and the vehicle at that time. According to Officer Morrow's police report, Barrios described one suspect as a Hispanic man with a shaved head, and Jason described both suspects as Hispanic men with shaved heads. During a subsequent interview, Jason told Officer Morrow that two male suspects drove up next to him and one of them asked what neighborhood he was from. Jason also reported that the driver of the car said "Crazy Riders" and that the person in the rear passenger seat produced a handgun.

Shortly after the second assault, Los Angeles Police Officer Marco Guajardo and his partner conducted a search for the suspect vehicle. After 10 to 15 minutes, they located a dark green four-door Honda Accord in a covered parking area of an apartment building about a block from the crime scene. The motor was still hot. The officers observed a Lakers flag lying on the rear passenger seat, along with two live rounds and one shell casing. Officer Guajardo ran the license plate, which showed that the vehicle was registered to Hernandez at an address in the apartment building. Officers proceeded to that address where they found both Hernandez and Berment. At trial, Officer Guajardo testified that Hernandez's appearance had changed since the time of his detention in that he had lost a lot of weight.

After speaking with the police, Hernandez consented to a search of his apartment and his car. In Hernandez's car, officers recovered the two live rounds, one shell casing, and an envelope addressed to Hernandez with the writing "WS C.R.S. 13 Arlington Gangsters." Officers did not find any firearms, bullets, or spray paint in the search of Hernandez's apartment. Following his arrest, Hernandez was transported to the police station where he admitted to the booking officer that he used to be in a gang.

Los Angeles Police Detective John Jamison was the investigating officer in the case. The day after the first assault, Detective Jamison went to the scene where he observed gang graffiti depicting "C.R.S.," "Crazy Riders," "13," and "Arlington Gangsters" spray-painted on a nearby wall. During his investigation, Detective Jamison also obtained search warrants for Berment's residence, Hernandez's residence, and Hernandez's car. In Berment's bedroom, officers recovered ammunition of the same make and caliber as that recovered from Hernandez's car. They also found a gun holster and a photograph of gang graffiti containing the initials "C.R.S." and the number "13." Officers did not find any weapons, bullets, or gang photographs in the subsequent search of Hernandez's residence. At trial, Detective Jamison testified that he never conducted a field show-up or a "six-pack" photographic lineup with Barrios or Jason because they both had been uncooperative with the police.

Los Angeles Police Officer Joseph McDowell testified as a gang expert for the prosecution. As described by Officer McDowell, in gang culture, the letters "C.R.S." stood for the "Crazy Riders" criminal street gang and the number "13" signified an affiliation with the Mexican Mafia prison gang. The Arlington Gangsters were a clique of the Crazy Riders gang, and one of the Crazy Riders' main rivals was the M.S. gang. Officer McDowell testified about two predicate offenses committed by self-admitted members of the Crazy Riders in 2006 and 2007. He also testified that the gang's primary activities included murders, robberies, narcotics sales, firearms possession, drive-by shootings, and assaults with a deadly weapon. Officer McDowell did not personally know Hernandez, but opined that Hernandez was a member of the Crazy Riders based on his tattoos, the gang graffiti found in his car, and the facts of the instant case. In response to hypothetical questions rooted in the evidence presented at trial, Officer McDowell further opined that each of the assaults was committed for the benefit of the Crazy Riders gang.

III. Defense Evidence

Berment's mother, Carol Berment, testified on her son's behalf. She stated that her family had lived across the street from Hernandez for about 15 years and that her son

began spending a lot of time with Hernandez within the last two years. The family's residence was about a block from the Pico and Norton intersection. According to Berment's mother, on June 1, 2009, at approximately 10:00 p.m., she was standing at her front door when she saw Hernandez pull up in a black car, point a gun toward her driveway, and fire two shots. At that time, Berment was standing about six feet from the car by a nearby tree.

Berment's counsel called Officer Morrow and fellow Officer Elpiro Orozco to testify about their witness interviews following the second assault. According to Officer Morrow, both Barrios and Jason identified the driver of the car as the shooter in their initial interviews with other officers, and then identified the passenger as the shooter in their subsequent interviews with Officer Morrow. According to Officer Orozco, he conducted an initial interview with Jason at the scene. Jason was uncooperative, but ultimately identified the suspects as two male Hispanics with shaved heads, one of whom pointed a gun.

Hernandez testified on his own behalf. He stated that, on the evening of June 1, 2009, he was at his apartment with his seven-year-old son. Berment was visiting. At about 9:30 p.m., shortly after Berment left, Hernandez and his son went out to get some food and then returned to the apartment where they ate and watched television. Berment came back at about 10:00 p.m. and Hernandez agreed to let Berment borrow his car to go to the liquor store. Berment returned 15 to 25 minutes later. Hernandez and Berment were watching television when the police knocked on the door. Hernandez consented to a search of his apartment and his car at that time. He denied driving to the corner of Norton and Pico, yelling any gang slogans, pointing a gun at anyone, or shooting a gun at anyone. He also denied ever having a gun in his possession, allowing anyone else to have a gun or bullets in his car, or being a member of any gang. Hernandez testified that he had been spending a lot of time with Berment because he was tutoring Berment in school.[3]

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3 The parties stipulated at trial that Hernandez had a prior felony conviction.

IV. Verdict and Sentencing

At the conclusion of trial, the jury found Hernandez not guilty of the two counts of shooting from a motor vehicle at a person (counts 9 and 10). The jury found Hernandez guilty of the seven remaining counts (counts 1 through 8, 11, and 12), with true findings on the firearm and gang enhancements on those counts. The trial court sentenced Hernandez to a total term of 21 years and 8 months in state prison. Hernandez filed a timely notice of appeal.

DISCUSSION

Hernandez argues that the trial court erroneously instructed the jury, pursuant to former CALJIC No. 3.00, that an aider and abettor is "equally guilty" of the crime committed by the actual perpetrator. Hernandez further asserts that such instructional error requires reversal of his convictions in counts 6, 7, and 8 because a properly instructed jury could have found him guilty of the lesser offense of simple assault as to each of those counts. The Attorney General counters that Hernandez's instructional error claim has been forfeited on appeal by the lack of a timely objection, fails on its merits because the instruction is a correct statement of law in a non-homicide case, and does not compel reversal because the purported error was not prejudicial. Based on the record before us, we conclude that reversal of Hernandez's convictions is not required because any alleged instructional error was harmless beyond a reasonable doubt.

I. Instructions on Aider and Abettor Liability

The trial court instructed the jury with former CALJIC No. 3.00, which defines the principals to a crime as follows: "Persons who are involved in committing a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation, is equally guilty. [¶] Principals include: [¶] 1. Those who directly and

actively commit the act constituting the crime, or [¶] 2. Those who aid and abet the commission of the crime."[4]

The trial court further instructed the jury with CALJIC No. 3.01, which defines aiding and abetting as follows: "A person aids and abets the commission of a crime when he: [¶] (1) With knowledge of the unlawful purpose of the perpetrator, and [¶] (2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and [¶] (3) By act or advice aids, promotes, encourages, or instigates the commission of the crime. [¶] A person who aids and abets the commission of a crime need not be present at the scene of the crime. [¶] Mere presence at the scene of the crime which does not by itself assist the commission of the crime does not amount to aiding and abetting. [¶] Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting."

II. Forfeiture

It is undisputed that Hernandez's counsel did not raise any objection to the use of former CALJIC No. 3.00 at trial, nor did his counsel request that the instruction be modified or clarified by the trial court. The Attorney General asserts that Hernandez's failure to object to the instruction in the trial court forfeited his claim of error on appeal, and requests that we expressly rule on the forfeiture argument to preclude future federal habeas review of the claimed error. However, as Hernandez correctly notes, we may review any claim of instructional error that affects a defendant's substantial rights irrespective of whether there was an objection in the trial court. (§ 1259 ["The appellate

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[4] The current version of CALJIC No. 3.00 provides the trial court with the option of replacing the phrase "equally guilty" with "guilty of a crime." The Use Notes to CALJIC No. 3.00 state that the "guilty of a crime" language should be used by the trial court in a "murder or attempted murder prosecution, not involving felony-murder or the natural and probable consequences doctrine, [where] the guilt of an aider and abettor may be equal to, greater or less than that of the actual perpetrator depending upon the mens rea of the aider and abettor." The Use Notes also state that the trial court may use the "guilty of a crime" language in other cases where "this principle is applicable to a crime other than murder or attempted murder." (CALJIC No. 3.00, Spring 2010 Revision.)

court may also review any instruction given . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."]; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7 [defendant did not waive right to object to instruction alleged to be incorrect statement of law and given in violation of right to due process of law].) We determine whether Hernandez's substantial rights were adversely affected by deciding whether his claim of instructional error has merit. If Hernandez's claim has merit, it has not been forfeited. Therefore, we review the merits of Hernandez's contention that there was prejudicial instructional error.

III. Merits

Relying principally on *People v. McCoy* (2001) 25 Cal.4th 1111 (*McCoy*) and *People v. Nero* (2010) 181 Cal.App.4th 504 (*Nero*), Hernandez contends that the trial court's use of the "equally guilty" language of former CALJIC No. 3.00 was prejudicial error because it precluded the jury from finding Hernandez guilty as an aider and abettor of a lesser crime in counts 6, 7, and 8 than the actual perpetrator. The Attorney General argues that the reasoning of *McCoy* and *Nero* is inapplicable to the assault offenses at issue here because the "equally guilty" language has been found to be an erroneous statement of law only when the charged crimes were homicide-related.

In *McCoy*, the California Supreme Court held that a jury may convict an aider and abettor of a greater homicide-related offense than the actual perpetrator. (*McCoy, supra,* 25 Cal.4th at p. 1114.) As the Supreme Court reasoned, "[a]ider and abettor liability is premised on the combined acts of all the principals, but on the aider and abettor's own mens rea. If the mens rea of the aider and abettor is more culpable than the actual perpetrator's, the aider and abettor may be guilty of a more serious crime than the actual perpetrator." (*Id*. at p. 1120.) The Court in *McCoy* explicitly limited its holding to cases of homicide, "express[ing] no view on whether or how these principles apply outside the homicide context." (*Id*. at p. 1122, fn. 3.)

In *Nero,* our colleagues in Division Three extended the reasoning in *McCoy* to conclude that "an aider and abettor may be found guilty of *lesser* homicide-related offenses than those the actual perpetrator committed." (*Nero, supra,* 181 Cal.App.4th at

p. 507.) The jury in *Nero* specifically inquired during deliberations whether an aider and abettor could be found guilty of a lesser homicide offense than the actual perpetrator; but rather than answer in the affirmative, the trial court re-read former CALJIC No. 3.00. (*Id*. at p. 512.) Under such circumstances, the Court of Appeal held that the "equally guilty" language of the instruction was misleading and should have been modified. (*Id.* at p. 518.) The Court further held that the error was prejudicial because it was clear that the jury was considering whether to impose a lesser offense on the aider and abettor, but the trial court's instruction effectively precluded the jury from doing so. (*Id*. at pp. 519-520; see also *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1165 (*Samaniego*) [applying *McCoy* in a multi-defendant homicide case to conclude that "CALCRIM No. 400's direction that '[a] person is *equally guilty* of the crime . . . whether he or she committed it personally or aided and abetted the perpetrator who committed it'. . . , while generally correct in all but the most exceptional circumstances, is misleading here"].)

The parties dispute whether, based on the above-cited authorities, the "equally guilty" language of former CALJIC No. 3.00 is legally erroneous when applied to a non-homicide assault case like this one. We need not decide, however, whether former CALJIC No. 3.00 was properly given here because even if we assume that the "equally guilty" language was an incorrect statement of law as applied to the facts of this case, Hernandez cannot show any prejudice. When an instruction misdescribes an element of a charged offense, the applicable test for assessing prejudice is the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24. (*Samaniego, supra,* 172 Cal.App.4th at p. 1165; *Nero*, *supra*, 181 Cal.App.4th at pp. 518-519.) "Under that test, an appellate court may find the error harmless only if it determines beyond a reasonable doubt that the jury verdict would have been the same absent the error. [Citation.]" (*Samaniego, supra*, at p. 1165.) After reviewing the entirety of the record, we are convinced that the "equally guilty" language of former CALJIC No. 3.00 did not contribute to the jury's guilty verdicts on the challenged counts.

In counts 6, 7, and 8, Hernandez was found guilty of the charged offense of assault with a firearm against Juventino Barrios (§ 245, subd. (a)(2), (count 6), assault with a

firearm against Jason R. (§ 245, subd. (a)(2), count 7), and discharge of a firearm with gross negligence (§ 246.3, subd. (a), count 8). The prosecution's theory with respect to each of these counts was that Hernandez aided and abetted a drive-by shooting committed by his codefendant, Berment, when he stopped his vehicle beside the two victims and asked them for their gang affiliation. Hernandez asserts that, as the alleged driver, his participation in the shooting was minimal, and hence, a properly instructed jury could have found him guilty of the lesser offense of simple assault or not guilty of the charges at all. However, Hernandez's defense at trial was not that he merely intended to aid and abet a simple assault, or that his involvement in the shooting was minimal. Rather, Hernandez's defense was that he was nowhere near his car at the time of the shooting and was instead at home with his son. At trial, Hernandez denied any knowledge of his codefendant's intent to commit any crime, and maintained that he merely loaned his car to Berment so that Berment could go to the liquor store. Thus, there were no facts under which the jury could have found Hernandez not guilty of the charged offense of assault with a firearm or grossly negligent discharge of a firearm, but guilty of a lesser offense of simple assault. Based on the evidence at trial, Hernandez either aided and abetted an assault with a firearm, or he did not aid and abet any crime at all. (*People v. Lopez* (2011) 198 Cal.App.4th 1106, 1119 [trial court did not commit prejudicial error in instructing jury with "equally guilty" language of former CALCRIM No. 400 where there was no evidence that aider and abettor intended to commit any crime other than the charged offense].)

In support of his argument that there was prejudicial instructional error, Hernandez points out that the jury specifically inquired whether aiding and abetting applied to the count of discharge of a firearm with gross negligence (count 8). However, there is nothing in the jury's question that suggests that it was considering convicting Hernandez of a lesser offense than the crime charged. (Cf. *Nero, supra*, at pp. 518-519 [prejudicial error for trial court to instruct jury that aider and abettor was equally guilty of crime committed by actual perpetrator when jury specifically inquired whether it could convict aider and abettor of lesser offense].) Moreover, as the Attorney General notes, simple

assault was provided as a lesser-included offense only on the assault with a firearm counts (counts 6 and 7), and not on the grossly negligent discharge of a firearm count (count 8). Therefore, Hernandez's argument that the jury could have found him guilty of a lesser offense absent the alleged instructional error is inapplicable to count 8.

The jury's verdicts on counts 11 and 12, which Hernandez does not challenge on appeal, further demonstrate the absence of any prejudice in this case. In connection with the assault against Barrios and Jason, the jury also found Hernandez guilty of the charged offense of shooting from a motor vehicle (former § 12034, subd. (d), count 11), and guilty of the charged offense of permitting another to shoot from a vehicle (former § 12034, subd. (b), count 12). In reaching these verdicts, the jury necessarily rejected Hernandez's defense that he was at home during the commission of the crimes and had no knowledge of his codefendant's intent. The convictions show that the jury instead found that Hernandez allowed Berment to shoot a firearm from his car while aiding and abetting the commission of such shooting. Based on this record, we conclude that no rational jury could have convicted Hernandez of the lesser offense of simple assault on counts 6, 7, and 8. Accordingly, any alleged error in instructing with former CALJIC 3.00 was harmless beyond a reasonable doubt.

DISPOSITION

The judgment is affirmed.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.