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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JASON LEE BANGLE et al., Defendants and Appellants.	B270218 (Los Angeles County Super. Ct. No. BA436866)

APPEALS from judgments of the Superior Court of Los Angeles County, Jose I. Sandoval, Judge. Affirmed.

Mark R. Yanis, under appointment by the Court of Appeal, for Defendant and Appellant Jason Lee Bangle.

Andrea I. Keith, under appointment by the Court of Appeal, for Defendant and Appellant Craig A. Curry.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants Jason Lee Bangle and Craig Alton Curry (collectively, defendants) appeal from the respective judgments against them following a joint trial. The jury convicted Bangle of assault with a firearm (Pen. Code, § 245, subd. (a)(2); count 2)[1] and found true the personal firearm use allegation (§ 12022.5, subd. (a)) and the allegations that he had served two prior prison terms (§ 667.5, subd. (b)). The same jury convicted Curry of making criminal threats (§ 422, subd. (a); count 3), and Curry admitted he had suffered a prior serious felony conviction (§ 667, subd. (a)(1)) that qualified as a strike under the Three Strikes law (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)). The jury acquitted defendants of the attempted carjacking charge (§§ 215, subd. (a), 664; count 1).

The trial court sentenced Bangle to prison for a total of seven years, consisting of the four-year upper term, plus the three-year firearm enhancement. The court struck the two prior prison term enhancements. As to Curry, the court sentenced him to prison for a total of 11 years, consisting of a six-year term, or double the three-year upper term based on his strike, plus the five-year prior serious felony enhancement.[2]

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[1] All further section references are to the Penal Code unless otherwise indicated.

[2] The People assert that the "abstract of judgment as to appellant Curry does not appear to correctly reflect the basis of his sentence." Abstracts of judgment are not part of the judgment they purport to summarize. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185–186.) Nonetheless, where the abstracts diverge from the judgment, they should be corrected to reflect the judgment. (*Ibid.*) The People note that "the abstract of judgment indicates that a term of three years was imposed pursuant to

Bangle contends the trial court committed prejudicial error by failing to instruct the jury that it must find the prosecution proved " 'each element' " of the charged offenses beyond a reasonable doubt, because the omission of this instruction allowed the jury to find him guilty if the jury found some, but not all, the elements had been proven beyond a reasonable doubt, i.e., a lower standard of proof in violation of his constitutional right to due process. He contends the court also committed prejudicial error by refusing to instruct the jury on brandishing as a lesser related offense of assault with a firearm, in violation of his right to due process and his "right to present a defense pursuant to a valid legal theory."

We affirm the judgment as to Bangle. As we shall discuss, his contentions are meritless. The instructions on the beyond a reasonable doubt standard of proof were both valid and proper and did not lower the prosecution's burden of proof as to the charged offenses. In addition, no instruction on brandishing, a lesser related offense, was appropriate.

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section 1170, subdivision (h)(2), rather than section 1170.12, subdivision (c)(1), i.e., double the base term for a prior strike." However, this contention is of no significance in light of subsequent events. On January 4, 2017, the trial court issued an order that corrected nunc pro tunc the minute order reflecting the sentence imposed on Curry by deleting the language "The court imposes an additional 3 years pursuant to . . . section 1170(h)(2)" and substituting the language "The court imposes an additional 3 years pursuant to . . . section 1170.12." An amended abstract of judgment reflecting this nunc pro tunc order was filed the same date.

We appointed appellate counsel to represent Curry. Appointed counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) in which no issues were raised. The brief included a declaration from counsel that she reviewed the record and sent a letter to defendant explaining her evaluation of the record. Counsel further declared that she advised defendant of his right, under *Wende*, to submit a supplemental brief. Curry did not file any supplemental brief with this court.

We have examined the entire record, consisting of one volume each of a clerk's transcript and a supplemental clerk's transcript and three volumes of a reporter's transcript. We are satisfied appointed counsel fully complied with her responsibilities and that no arguable appellate issues exist. (*People v. Kelly* (2006) 40 Cal.4th 106; *Wende*, *supra*, 25 Cal.3d 436.) We therefore affirm the judgment as to Curry.

BACKGROUND

We recount the evidence pursuant to the usual standard of review. (*People v. Elliott* (2012) 53 Cal.4th 535, 585.)

On May 26, 2015, at about 10:00 p.m., Reza Bakhtiari, who worked at a laundromat near the intersection of 6th and Coronado Streets in Los Angeles, was taking a break in his car parked nearby with Zhozef Eivazyan, his friend, when he observed Bangle enter the laundromat and remove a laundry cart. Bangle was joined outside the laundromat by Curry. Exiting his car, Bakhtiari approached Bangle and told him he could not remove the cart from the laundromat. Without comment, Bangle gave the cart to Bakhtiari.

From about five to six feet away, an upset Curry yelled at Bakhtiari that he was going to "fuck [him] up" and "break [his] nose, motherfucker." Eivazyan exited the car and interjected

himself between Bakhtiari and Curry. Curry then stated he intended to take Bakhtiari's car and walked toward the driver's side. When Bakhtiari said something to Curry, the latter turned and approached him.

While standing about three to four feet in front of Bakhtiari and Eivazyan, Bangle pulled out a small gun with "two holes" from a pocket and pointed the "two holes" at their heads. Meanwhile, Curry, who was standing behind Bangle, continued to yell at Bakhtiari that he was going to "break his nose" and "fuck [him] up."

Defendants fled after a police car shined a spotlight on the group. Before being apprehended, Bangle ran toward a building on Coronado Street and threw something. Sometime after midnight, the police recovered from under a vehicle on Coronado Street a derringer firearm that had two barrels. The gun had one discharged cartridge case and one live round. Its safety was in the "off" position, and "the action of the firearm was open." Both barrels were operational, and it was possible that the derringer discharged upon hitting the ground. During a recorded police interview, Bangle admitted he had a "two shot" gun that he threw under a car and that the gun discharged after he threw it.

Defendants did not present any evidence.

DISCUSSION

1. *Reasonable Doubt Instructions Were Valid and Proper*

Bangle contends the trial court's instructions on reasonable doubt were constitutionally infirm because the jury was not instructed that the prosecution bore the burden to establish

beyond a reasonable doubt "every element" of the charged crimes.[3] We are not persuaded.

In *Victor v. Nebraska* (1994) 511 U.S. 1, the United States Supreme Court admonished: "The government must prove beyond a reasonable doubt every element of a charged offense." (*Id.* at p. 5.) The court then explained: "The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. [Citation.] Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, [citation], the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. [Citation.] Rather, 'taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury.' [Citation.]" (*Ibid.*)

In *People v. Vann* (1974) 12 Cal.3d 220, our Supreme Court acknowledged that "[t]he reasonable-doubt standard of proof in criminal proceedings is now recognized as rooted in the federal Constitution." (*Id.* at p. 227.) In *People v. Aranda* (2012) 55 Cal.4th 342 (*Aranda*), the court addressed this standard of

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[3] As authority, Bangle relies on various non-California and lower federal court cases: *Commonwealth v. Bishop* (1977) 472 Pa. 485, 372 A.2d 794; *Commonwealth v. Shoats* (1982) 443 A.2d 814; *People v. Newman* (1978) 385 N.E.2d 598 [46 N.Y.2d 126]; *State v. McHenry* (Wash. Ct.App. 1975) 535 P.2d 843; *Flores v. State* (Okla. Crim. App. 1995) 896 P.2d 558; *State v. Castle* (1997) 86 Wash.App.48, 935 P.2d 656; *Guam v. Perr* (Guam Terr. 2009) 2009 WL 1109829, *7, 2009 Guam 4; *Everett v. Beard* (3d Cir. 2002) 290 F.3d 500; and *U.S. v. Ali* (8th Cir. 1995) 63 F.3d 710.

proof in relation to state law. "California law imposes a duty on the trial court to instruct the jury in a criminal case on the presumption of innocence in favor of the defendant and the prosecution's burden of proving guilt beyond reasonable doubt. Specifically, Evidence Code section 502 requires a trial court to instruct the jury concerning which party bears the burden of proof on each issue, and the applicable standard of proof. The prosecution's burden of proof in a criminal case is controlled by section 1096 of the Penal Code, the substance of which has, in turn, been incorporated into the standard reasonable doubt instructions, CALJIC No. 2.90 and CALCRIM No. 220. Tracking the language of section 1096, the standard instructions describe the presumption of innocence and the requirement of proof beyond a reasonable doubt, and provide the legislatively approved definition of reasonable doubt. A court satisfies its statutory obligation to instruct on these principles by giving CALJIC No. 2.90 or CALCRIM No. 220." (*Id.* at pp. 352–353, fns. omitted.)

Aranda thus holds that, as a matter of law, the giving of a standard reasonable doubt instruction pursuant to CALJIC No. 2.90 or CALCRIM No. 220 suffices. (*Aranda*, *supra*, 55 Cal.4th at pp. 353–354.) "The independent or de novo standard of review is applicable in assessing whether instructions correctly state the law [citations]." (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

In this instance, the trial court's two standard instructions on the requisite beyond a reasonable doubt standard were not only valid and proper but also went beyond what was constitutionally mandated. The court began by giving CALCRIM "103 Reasonable Doubt," which explained to the jury the concepts

of presumption of innocence and the prosecution's burden of proof. The court later gave CALCRIM "220 Reasonable Doubt." In pertinent part, both of these instructions read: "A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. *Whenever* [*the trial court*] *tell*[*s*] *you the People must prove something,* [*the court*] *mean*[*s*] *they must prove it beyond a reasonable doubt."* (Italics added.)

As to the count 2 assault with a firearm offense of which Bangle was convicted, the jury was instructed specifically: "*To prove* [*Bangle*] *is guilty of this crime, the People must prove that*: [¶] 1. [Bangle] did an act with a firearm that by its nature would directly and probably result in the application of force to a person; [¶] 2. [Bangle] did that act willfully; [¶] 3. When [Bangle] acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; [¶] AND [¶] 4. When [Bangle] acted, he had the present ability to apply force with a firearm to a person." (Italics added.)

Further, the jury was instructed specifically: "If you find [Bangle] guilty of the crimes charged in Counts 1 and/or 2, *you must then decide whether the People have proved the additional allegation* that Bangle personally used a firearm during the commission of those crimes. . . . [¶] Someone personally uses a firearm if he or she intentionally does any of the following: [¶] 1. Displays the weapon in a menacing manner; 2. Hits someone with the weapon; OR 3. Fires the weapon. *The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved*." (Italics added.)

Although Bangle is technically correct that the words "every element" do not appear in the standard reasonable doubt instructions that were given (CALCRIM No. 103 and CALCRIM No. 220), viewing the instructions *as a whole*, the court "correctly informed the jury that the prosecutor was obliged to prove each element of the crimes beyond a reasonable doubt." (*People v. Wyatt* (2008) 165 Cal.App.4th 1592, 1601.) To reiterate, the jury repeatedly was advised that when "the People must prove something, [the court] mean[s] they must prove it beyond a reasonable doubt."

2. *The Trial Court Properly Declined to Instruct on the Lesser Related Offense of Brandishing*

The trial court denied Bangle's request to instruct on the crime of brandishing a firearm as a lesser related offense of assault with a firearm.

Acknowledging the conclusive authority of *People v. Birks* (1998) 19 Cal.4th 108 (*Birks*), Bangle concedes that a criminal defendant has "no unilateral right to instructions on lesser related offenses[.]"[4] He contends, however, such instruction is

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[4] Under California law, "a lesser [*included*] offense" is one in which "the statutory elements of the greater offense [that has been charged], or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*Birks*, *supra*, 19 Cal.4th at p. 117, italics added.) The trial court must instruct on a lesser included offense "if there is substantial evidence the defendant is guilty only of the lesser." (*Id.* at p. 118.) In contrast, a lesser *related* offense is an uncharged lesser offense that is not necessarily included in the charged offense but "merely bear[s] some relationship thereto." (*Id.* at p. 119.) In *Birks*, the court held defendant's request for

mandated "where, as here, the record shows strong evidentiary support for the lesser offense, and explicit defense reliance upon such evidence as a primary defense theory," because "the defendant's right to due process and fair trial is violated if he is denied the right to present the defense theory to the jury." We disagree.

In *People v. Geiger* (1984) 35 Cal.3d 510 (*Geiger*), our Supreme Court held, in certain situations, a defendant was entitled to have the court instruct the jury on offenses that were related to the charged greater offense. (*Id.* at pp. 531–532.) In *Birks*, the Supreme Court *overruled Geiger*, holding that a defendant does *not* have a unilateral entitlement to instructions on lesser related offenses. (*Birks*, *supra*, 19 Cal.4th at p. 136.) The rule now is, *absent stipulation by the parties, or a party's failure to object to such instruction*, the trial court is not authorized to instruct on lesser related offenses. (*Ibid.*, & fn. 19.)

At trial, Bangle filed a motion for the addition of brandishing as count 4 and for instruction on brandishing on the theory that brandishing is a lesser related offense of the assault with a firearm offense charged in count 2. During the various discussions on the propriety of such instruction, the prosecutor objected vigorously that the evidence demonstrated the offense committed was assault with a loaded firearm, not misdemeanor brandishing. The trial court denied Bangle's motion and also refused to instruct on brandishing as a lesser related offense to the charged offense.

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instructions on trespass as a lesser *related* offense to the charged offense of burglary was properly refused. (*Id.* at p. 137.)

We are bound by *Birks*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) There was no stipulation by the parties to an instruction on the lesser related offense of brandishing; to the contrary, the prosecutor objected to the giving of such an instruction. (*Birks*, *supra*, 19 Cal.4th at p. 136, fn. 19.) And thus we conclude the trial court did not err in refusing to instruct the jury on brandishing as a lesser related offense of the assault with a firearm charged in count 2 and that Bangle was not denied an opportunity to present a defense.

DISPOSITION

The respective judgments against Bangle and Curry are affirmed.

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EDMON, P. J.

We concur:

LAVIN, J.

STONE, J.*

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