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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. JAMAL BRIAN HICKLEN, Defendant and Appellant.	B288294 (Los Angeles County Super. Ct. No. BA460911)

APPEAL from a judgment of the Superior Court of Los Angeles County, Terry A. Bork, Judge. Affirmed.

Jack T. Weedin, 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, Assistant Attorney General, Stephanie A. Miyoshi and Kristen J. Inberg, Deputy Attorneys General, for Plaintiff and Respondent.

Jamal Brian Hicklen appeals from a judgment of conviction entered after the jury found him guilty of vandalism.[1] He contends on appeal the trial court erred in denying his request for a jury instruction on accident, and the error was prejudicial. We affirm.

FACTUAL AND PROCEDURAL HISTORY

A. *The Information*

The information charged Hicklen with one count of felony vandalism in violation of Penal Code section 594, subdivision (a).[2] The information alleged Hicklen suffered two prior convictions of a violent or serious felony under the three strikes law (§§ 667, subds. (b)-(j), 1170.12) and one prior felony conviction for which he served a separate prison term within the meaning of section 667.5, subdivision (b).

Hicklen pleaded not guilty and denied the special allegations.

B. *Evidence at Trial*

On September 7, 2017 Hicklen visited a hookah lounge in Hollywood. Hicklen bought a hookah and left the lounge. He returned the same night to ask for a refund, but the co-owner and manager of the lounge, Malkoon Nashjyan, initially would not return his money because the lounge had a "no refund" policy. Hicklen was drunk and became aggressive, raising his hands as

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1 The information uses the first name Jahal, but Hicklen stated at the preliminary hearing his true name was Jamal.

2 All statutory references are to the Penal Code.

he yelled at Nashjyan. Because of Hicklen's aggressive behavior, Nashjyan agreed to the refund, but called security guards, who escorted Hicklen from the lounge.

On September 9 Hicklen returned to the hookah lounge. Hicklen was advised of the lounge's policy that customers must order as soon as they enter, but he refused to pay. He was drunk and wandered around the lounge, bothering customers until security guards removed him.

About 8:00 a.m. on September 10 Hicklen returned to the hookah lounge. The lounge was closed, but the security gate was raised, and an employee was upstairs. Dr. Raymond Turenne was parked on the street as Hicklen walked by.[3] Hicklen entered the doorway of the lounge, wearing a latex glove on one hand and carrying a paper grocery bag and square bottle that looked like a whiskey bottle in his right hand. Hicklen exited the doorway, reentered, then emerged again and put down his items. Turenne heard a loud crash that caught his attention and saw glass "spilling out from the doorway onto the sidewalk." As the glass shattered, Turenne observed Hicklen exit from the doorway and walk slowly down the street away from the lounge.

Turenne called 911 and followed Hicklen for several blocks, until the police arrived and detained Hicklen. On cross-examination, Turenne acknowledged he did not observe Hicklen acting aggressively, running away, or trying to discard any items after leaving the lounge.

Los Angeles Police Officer Tamica Cheatham and her partner responded to Turenne's 911 call, arriving at the scene to

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[3] Turenne described Hicklen's actions as the jury watched surveillance camera footage of Hicklen outside the hookah lounge.

find Hicklen with a cut on his wrist and bloodstains on his pants "consistent with the breaking of the glass." Hicklen was wearing clothes that matched the description given by Turenne, with latex surgical gloves on his hands.[4] When Officer Cheatham's partner asked Hicklen how he hurt himself, he responded he fell and "bust[ed] [his] head." When asked whether, in her experience, a person falling and "bust[ing]" his head can be consistent with an accident, Officer Cheatham responded, "It can be an accident, yes."[5]

Later that morning, after receiving a call about the broken glass window, Nashjyan went to the hookah lounge to view the damage. Nothing was missing from the lounge, and he did not find any items left behind by customers. On cross-examination, Nashjyan testified if a customer leaves something at the lounge, the policy is to hold the item behind the counter until the customer picks it up during regular business hours.

C. *Jury Instructions and Closing Arguments*

The trial court instructed the jury with CALCRIM No. 2900, which stated, as given, for the jury to find Hicklen guilty of vandalism, the People must prove "[t]he defendant maliciously destroyed real or personal property." The court also instructed the jury that "someone acts maliciously when he or she

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[4] As discussed, Turenne had earlier observed only one latex glove on the hand of the person he saw enter the hookah lounge. This difference in testimony does not affect our analysis because Hicklen does not dispute he is the person who broke the glass door.

[5] Hicklen recalled Officer Cheatham as his only defense witness.

intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else." Hicklen requested the court instruct the jury with CALCRIM No. 3404 on the defense of accident, citing the lack of direct evidence of intent.[6] The court denied the request, explaining the court "look[ed] in vain to find the evidence that this was an accident."

During his closing argument, the prosecutor focused on the intent element of vandalism, stressing the jury need not find Hicklen "intended to break the law or he intended to cause a vandalism," only that he intended the act that caused the glass to break. The prosecutor then reviewed the evidence showing Hicklen intended to break the glass door.

Hicklen argued he "fell into" the glass door and "it was an accident." He also pointed out he told the police officers he fell. He argued he fell as he was knocking on the door to get the attention of an employee so he could retrieve property he had left there.[7] He added he did not intend to damage the glass door.

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[6] CALCRIM No. 3404 states: "The defendant is not guilty of [the underlying offense] if [he or she] acted . . . without the intent required for that crime, but acted instead accidentally. You may not find the defendant guilty of [the underlying offense] unless you are convinced beyond a reasonable doubt that [he or she] acted with the required intent."

[7] The trial court sustained the prosecutor's objection to Hicklen's earlier argument he was knocking on the door to get the employee to help him retrieve keys Hicklen left there the night before, on the basis there was no evidence in the record to support the argument. However, the prosecutor did not object to Hicklen's second reference to knocking on the door to get the attention of the employee. Instead, in his rebuttal the prosecutor

D. *Jury Verdict and Sentencing*

The jury found Hicklen guilty of vandalism (§ 594, subd. (a)). In a bifurcated proceeding, Hicklen admitted the allegations he suffered two prior convictions, including one for robbery and one for making criminal threats.

The trial court exercised its discretion to strike the two prior strike allegations (§§ 667, subds. (b)-(j), 1170.12) and the prior prison term allegation (§ 667.5, subd. (b)).[8] The court imposed the upper term of three years and ordered Hicklen to pay restitution to the hookah lounge.

Hicklen timely appealed.

DISCUSSION

A. *Applicable Law and Standard of Review*

Under section 594, subdivision (a), "[e]very person who maliciously commits any of the following acts with respect to any real or personal property not his or her own, in cases other than those specified by state law, is guilty of vandalism: [¶] (1) Defaces with graffiti or other inscribed material. [¶] (2) Damages. [¶] (3) Destroys." Vandalism is a general intent crime, requiring only "intent to do the proscribed acts." (*People v. Moore* (2018) 19 Cal.App.5th 889, 895-896 [the term "maliciously"

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reminded the jury there was no evidence of Hicklen leaving his keys at the hookah lounge.

[8] Hicklen did not admit he served a prior prison term within the meaning of section 667.5, subdivision (b), but the court admitted the prison packet that would have reflected the sentence he served.

in the vandalism statute does not carry the historical connotation of "wrongfulness" or "import any further specific intent or mental state"].)

Section 26 provides a statutory defense for acts that would otherwise be criminal, but are committed accidentally: "All persons are capable of committing crimes except those belonging to the following classes: [¶] . . . [¶] Five—Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence." (Accord, *People v. Anderson* (2011) 51 Cal.4th 989, 996 (*Anderson*).) Accident is not an affirmative defense; "[i]nstead, it is a request for an instruction that negates the intent element of [a crime]." (*People v. Gonzalez* (2018) 5 Cal.5th 186, 199, fn. 3; accord, *People v. Jennings* (2010) 50 Cal.4th 616, 674 [claim of accident is not an affirmative defense, and instead "'amounts to a claim that the defendant acted without forming the mental state necessary to make his or her actions a crime'"].)

CALCRIM No. 3404 provides an instruction on the defense of accident, explaining a defendant is not guilty of a charged crime if he or she acted "without the intent required for that crime, but acted instead accidentally." (Accord, *Anderson, supra*, 51 Cal.4th at p. 996.) An instruction on the defense of accident is a pinpoint instruction, which "'relate[s] particular facts to a legal issue in the case or "pinpoint[s]" the crux of a defendant's case, such as mistaken identification or alibi.'" (*People v. Jennings*, *supra*, 50 Cal.4th at p. 675.) The trial court does not have a sua sponte obligation to give a pinpoint instruction on the defense of accident. (*Anderson*, at pp. 996-997; *Jennings*, at p. 675.) However, an instruction on accident is "'required to be given upon

request when there is evidence supportive of the theory.'" (*Jennings*, at p. 675; accord, *Anderson*, at pp. 996-997 [""'when a defendant presents evidence to attempt to negate or rebut the prosecution's proof of an element of the offense, [a pinpoint instruction] must be given only upon request'""]; *People v. Gonzalez*, *supra*, 5 Cal.5th at p. 199, fn. 3 ["[A] trial court must provide a requested pinpoint instruction on such issues [as accident] where '"there is evidence supportive of the theory."'"].)

The court must "'give a requested instruction concerning a defense only if there is substantial evidence to support the defense.' [Citations.] '[A] trial judge . . . has the authority to refuse requested instructions on a defense theory for which there is no supporting evidence.'" (*People v. Larsen* (2012) 205 Cal.App.4th 810, 823 (*Larsen*) [trial court erred by not giving instruction on mental disorder where testimony of defendant and expert was "substantial" as to whether defendant formed required mental state for offense]; accord, *People v. Ramirez* (1990) 50 Cal.3d 1158, 1180 [""'[T]he court should instruct the jury on every theory of the case, but only to the extent each is supported by substantial evidence.'"'].) "Substantial evidence in this context "'is 'evidence sufficient "to deserve consideration by the jury," not "whenever *any* evidence is presented, no matter how weak."'"'" (*Larsen*, at p. 823.) "'Instead, the jury must be instructed when there is evidence that "deserve[s] consideration by the jury, i.e., 'evidence from which a jury composed of reasonable [people] could have concluded'" that the specific facts supporting the instruction existed.'" (*Id.* at p. 824.) "'[I]f the evidence is minimal and insubstantial the court need not instruct on its effects.'" (*Ibid.*) However, doubts as to the sufficiency of the evidence to warrant an instruction should be

resolved in favor of the defendant. (*Ramirez*, at p. 1180; *Larson*, at p. 824.)

We review de novo whether a court committed instructional error. (*People v. Waidla* (2000) 22 Cal.4th 690, 733; *People v. Hernandez* (2013) 217 Cal.App.4th 559, 568; *Larsen, supra*, 205 Cal.App.4th at p. 824.)

B. *Any Error in Not Giving an Accident Instruction Was Harmless*

Hicklen contends circumstantial evidence presented at trial, including his statement to the police officers that he fell, required the court to give his requested jury instruction on accident. It is a close call whether the minimal evidence presented by Hicklen required the trial court to give an accident instruction. But we need not decide this question because any error in failing to give the instruction was harmless.

As a threshold matter, we note this case stands in contrast to those in which the courts concluded substantial evidence supported an accident instruction. For example, in *People v. Acosta* (1955) 45 Cal.2d 538, 539, footnote 1 (*Acosta*), the defendant appealed a conviction of driving and taking a vehicle with the intent to deprive the owner of title to and possession of the vehicle. The defendant argued he only drove the car because, following an argument with his taxi driver, the driver rolled out of the vehicle and the defendant "'found himself, suddenly and with no criminal intent, the sole occupant of a vehicle in motion.'" (*Id*. at p. 543.) Thus, he argued, his driving of the vehicle was accidental because it was only "'the natural reaction of one unfamiliar with the operating technique of the vehicle.'" (*Ibid*.) The Supreme Court concluded the defendant was entitled to an

instruction on accident because the jury could have believed the defendant's "'driving'" of the vehicle "was the mere unintended, confused result of the peculiar situation in which defendant found himself." (*Id*. at pp. 543-544.)

Similarly, in *People v. Gonzales*, the Court of Appeal concluded the testimony of the victim and other defense witnesses that the victim was injured when she was struck by a door as she was leaving the bathroom and the defendant was entering constituted substantial evidence her injuries were caused by an accident, not the defendant's intent to strike her with the door. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 385, 390 (*Gonzales*), disapproved on another ground in *Anderson, supra*, 51 Cal.4th at p. 998, fn. 3; see *People v. Jones* (1991) 234 Cal.App.3d 1303, 1314 (*Jones*) [reasonable juror could have concluded defendant did not intend to shoot gun where evidence showed defendant pointed shotgun at police officer, but the gun fired as the officer attempted to knock the gun's barrel away], disapproved on another ground in *Anderson*, at p. 998, fn. 3.)[9]

Even if the trial court erred in failing to instruct on accident, any error was harmless. In noncapital cases, we review instructional error for prejudice under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*People v. Beltran* (2013) 56 Cal.4th 935, 955 ["'"[M]isdirection of the jury, including incorrect, ambiguous, conflicting, or wrongly omitted instructions that do

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[9] The Supreme Court in *Anderson, supra*, 51 Cal.4th at pages 997-998, and footnote 3, cited *Gonzales* and *Jones* approvingly with respect to the trial court's obligation to give an instruction on accident upon request, but disapproved them to the extent they held the trial court had a sua sponte duty to instruct on accident.

not amount to federal constitutional error are reviewed under the harmless error standard articulated" in *Watson*.'"]; *Larsen, supra*, 205 Cal.App.4th at p. 830 [failure to give pinpoint instruction that jury may consider evidence of defendant's mental disorder in deciding whether defendant had required intent or mental state was harmless error under *Watson*]; *People v. Villanueva* (2008) 169 Cal.App.4th 41, 52 [applying *Watson* standard of prejudice in reviewing trial court's failure to instruct on self-defense]; see *People v. Chism* (2014) 58 Cal.4th 1266, 1299 [trial court's instruction of jury on adoptive admission without sufficient evidence of predicate facts for instruction was harmless error under *Watson*].)

Under *Watson*, a defendant must show "it is reasonably probable that he would have obtained a more favorable result absent the error." (*People v. Masters* (2016) 62 Cal.4th 1019, 1046; accord, *People v. Mena* (2012) 54 Cal.4th 146, 162.) "In applying the *Watson* standard, we may look to the other instructions given, as well as whether the evidence supporting the existing judgment is so relatively strong, and the evidence supporting a different outcome is so comparatively weak, that there is no reasonable probability that the error affected the result." (*People v. Watt* (2014) 229 Cal.App.4th 1215, 1220; accord, *Larsen, supra*, 205 Cal.App.4th at p. 831.)

The failure to give an instruction is harmless where "'the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. In such cases the issue should not be deemed to have been removed from the jury's consideration since it has been resolved in another context, and there can be no prejudice to the defendant . . . .'" (*People v. Wright* (2006) 40 Cal.4th 81, 98; see

id. at pp. 99-100 [omission of an instruction on compassionate use of marijuana defense was harmless error because the jury rejected factual predicate of omitted instruction when it found, following other instructions, defendant possessed the drug with the specific intent to sell it]; *People v. Lujano* (2017) 15 Cal.App.5th 187, 195-196 ["[o]mission of an instruction is harmless beyond a reasonable doubt if "'the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions'"']; *People v. Gana* (2015) 236 Cal.App.4th 598, 611 ["By its verdicts and findings the jury clearly 'rejected defendant's [mental state] defense' [citation] in another context and thus the refusal to instruct on unconsciousness was harmless error."].)

Here, the jury was instructed that to prove the crime of vandalism, the People had to prove the defendant maliciously destroyed real or personal property, and that "someone acts maliciously when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else." "We presume that the jury understood and followed the trial court's instructions . . . ." (*People v. Gonzalez* (2018) 5 Cal.5th 186, 202; accord, *People v. Chism, supra*, 58 Cal.4th at p. 1299.) Therefore, by finding beyond a reasonable doubt Hicklen intentionally did a wrongful act or acted with the unlawful intent to annoy or injure someone else, the jury necessarily found Hicklen did not fall and break the glass door by accident.

In addition, the evidence was strong that Hicklen broke the glass door because he was angry at the hookah lounge's treatment of him on two prior nights. On September 7 the

hookah lounge refused to provide a refund for a hookah Hicklen purchased earlier in the evening, and the lounge only agreed to provide a refund after Hicklen acted aggressively toward Nashjyan. The security guards then removed Hicklen from the lounge. The night before the incident, Hicklen returned to the hookah lounge, and was again removed by security guards after he refused to purchase anything and bothered the customers.

By contrast, the evidence the breaking of the glass door was an accident was weak. Hicklen argued in his closing argument he returned to the hookah lounge to retrieve his property and broke the glass as he was knocking on the door to get the employee's attention. But there was no evidence he left any property at the hookah lounge or knocked on the door. On appeal, Hicklen points to the absence of direct evidence of his intent, noting no one saw him break the glass door, nor did the video show this. Further, Hicklen notes he did not act aggressively or run away from the scene, and he was not seen with any tools he could have used to break the glass. Hicklen also points to his statement to the officers that he fell and "bust[ed] [his] head," and Officer Cheatham's testimony at trial that a fall can be an accident. But Officer Cheatham's testimony only showed it was possible Hicklen's conduct was an accident, not that Hicklen's conduct was actually accidental.

As to Hicklen's "state of sobriety surrounding the events," argued by Hicklen to support his accident theory, the only evidence before the jury was that Hicklen was drunk the night before the incident, then returned to the hookah lounge on September 10 carrying a square bottle that looked like a whiskey bottle. There was no evidence that on the morning of the incident Hicklen walked in an unstable manner or otherwise appeared

intoxicated. To the contrary, Turenne described Hicklen as walking calmly away from the hookah lounge for several blocks to where he was detained. Neither did Officer Cheatham in his testimony describe Hicklen as being intoxicated during the officers' interview of him following the incident.

In light of the strength of the evidence Hicklen intended to cause harm to the hookah lounge by breaking the glass door, the weak evidence it was an accident, and the instructions given to the jury that they could find Hicklen guilty only if he intended to commit a wrongful act or injure someone, "there is no reasonable probability that the error affected the result." (*People v. Watt, supra*, 229 Cal.App.4th at p. 1220.)[10]

DISPOSITION

The judgment is affirmed.

FEUER, J.

WE CONCUR:

PERLUSS, P. J. SEGAL, J.

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[10] Hicklen also argues the trial court improperly applied the standard applicable to a section 1118.1 motion to dismiss in analyzing whether it should instruct on the defense of accident. The trial court's reasoning is immaterial because we independently review the record.