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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. CHARLES JOSEPH ALLEN, Defendant and Appellant.	2d Crim. No. B270724 (Super. Ct. No. BA381310) (Los Angeles County)

Charles Joseph Allen appeals judgment after conviction by jury of first degree premeditated murder of Darnell Jackson (Pen. Code, §§ 187, subd. (a), 189)[1] and attempted premeditated murder of Jeremy Owens (§§ 664/187, subd. (a)). The jury found Allen committed both crimes for the benefit of a street gang. (§ 186.22, subd. (b)(1)(C).) It did not find true allegations that a principal used a firearm. (§ 12022.53, subds.

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[1] Further unspecified statutory references are to the Penal Code, unless otherwise stated.

(b), (c) & (e)(1).) The trial court sentenced Allen to 40 years to life in prison.

Allen was not the shooter. He drove the car for fellow members, Antonio Burton, Brandon Maxwell, and Ashia Ali (aka BK Barbie). Allen contends his convictions should be reversed because (1) the court did not instruct the jury that an aider and abettor may be convicted of a lesser offense than the perpetrator; (2) the trial court did not adequately respond to the jury's questions during deliberations; and (3) the court admitted unduly prejudicial evidence of another crime when it allowed the prosecution to play a recorded telephone call from jail to prove that Allen authorized Maxwell to kill Ali after his arrest.

The claims are all forfeited because Allen did not raise them in the trial court. His claim that his counsel rendered ineffective assistance does not succeed because Allen does not demonstrate prejudice. We affirm.

BACKGROUND

The Rolling 30's Harlem Crips (Rolling 30's) is a subgroup of the Crips criminal street gang. Allen, Burton, Maxwell, and Ali are members of the Rolling 30's.

The Black P Stones (BPS) is a subgroup of the Bloods criminal street gang. BPS members wear red clothing and use the St. Louis Cardinals logo to identify themselves as members of BPS.

One night in 2010, Allen, Burton, Maxwell, and Ali went to a Crips party. Around 3:00 a.m., a BPS member came to the party and shot a Rolling 30's member. In response, Allen, Burton, Maxwell, and Ali got into a Chevy Traverse SUV and drove through Bloods' territory, armed, looking for people to

shoot. Allen's probation-issued global positioning system (GPS) anklet tracked their course.

A little before 4:30 a.m., they saw Jackson and Owens walking through a part of Bloods territory that belonged to the BPS subgroup. A gang expert testified Jackson and Owens were not gang members, but Jackson was dressed like a BPS member, with red clothing and shoes and a red St. Louis Cardinals hat. Owens testified he thought Jackson had been a Blood. As Jackson and Owens walked over an overpass they saw an SUV coming the opposite direction, according to Owens. Someone in it said, "What's up? Where you all from?" They "threw up" gang signs. The SUV passed Jackson and Owens, "cut" into an alley, and "disappeared." Allen's tracking device placed him on the SUV's course.

Jackson and Owens continued walking into a deadend street, and Owens felt they were in danger. Two men and a woman who fit the descriptions of Burton, Maxwell, and Ali, "popped out of nowhere." They seemed to walk from Cimarron Street. At 4:30 a.m., Allen's device was on that section of Cimarron Street.

Owens testified the three people "hit[] [Jackson] up" saying, "where are you from?" He testified it was "self-explanatory" that these people thought Jackson was "part of [a] Blood . . . gang" because "he had on red clothing."

Jackson showed "his tats, like 'I don't bang . . . nah nah, I don't bang.'" The three people turned around and talked among themselves for a "hot minute." Jackson turned away from them. Owens testified, "they mumbled some stuff or came to a conclusion because they demons, so they have special ability. So I guess one of them, they said, 'Okay, let's do it,' spinned around

and popped [Jackson] in the back of his head. And boom, he dropped down dead."

It was one of the men who shot Jackson. When Owens ran, they "all" shot at him. A bullet went through Owens's forehead, but he lived.

Jean Palacios testified against Allen at trial in exchange for leniency in an unrelated case. He said that sometime after 11:00 o'clock that morning, Allen went to Palacios's home. Allen arrived in the Chevy Traverse. He told Palacios that some Bloods snuck into the party the night before and shot Li'l Shady Boy. Allen, Burton, Maxwell, and Ali "went to go do their stuff" in the "BPS hood." Allen said, "[t]hey rounded up and got ready to retaliate." "[T]hey were looking for people to shoot at." He told Palacios, "[t]hey caught somebody walking in [a] Blood neighborhood." "[T]hey found two people . . . crossing the 10 Freeway walking over . . . the bridge. And they followed them. [¶] One of the guys had on red chucks. [¶] So they watched to where they were going." The street was a "deadend," so "[t]hey went around the back street and parked at the corner across the street." Burton, Maxwell, and Ali "jumped out the car and . . . approached the guys." All three had guns.

After Allen was arrested, he waived his *Miranda*[2] rights. He told police detectives he was not at the party and knew nothing about the incident. They confronted him with GPS tracking information that placed him at the party and near the shooting, and told him someone was talking to them about the shooting. They showed him a picture of Ali. Allen said he was just driving around that night, heading to the beach.

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

In a recorded call from jail that afternoon, Allen told a woman, "They know everything." In a recorded call that evening, Allen authorized Maxwell to "do what [he does]" to Ali (aka Barbie). A gang expert interpreted their coded exchange:

"[Allen:] Hello? Hello?

"[Maxwell:] Hey, Nasty?

"[Allen:] What up?

"[Maxwell:] I can do what I do on the Barbie?

"[Allen:] Hey cuz. All day, cuz, it's on my lead, cuz.

"[Maxwell:] Say no more.

"[Allen:] It's on your hand nigger. Do what you do.

"[Maxwell:] No. Yeah, I know."

The expert opined that Allen, an older and well-respected member of the gang, was authorizing Maxwell to kill Ali, who is known in the Rolling 30's as BK Barbie.

Allen filed a motion in limine to exclude any recorded calls from jail, but he never obtained a ruling. The prosecution played the second recording in opening statement, during the gang expert's testimony, and in closing arguments, without objection. Allen's counsel objected once to the expert's interpretation of the call on the ground that it was an "ultimate fact." The court overruled that objection.

In closing, the prosecutor used the call as proof of consciousness of guilt. He argued, "the man who apparently killed [Jackson] [is] asking Allen if he needs to tidy up, which is, I mean, pretty chilling, right?" "[T]his . . . show[s] you what [Allen's] conscientious [*sic*] is saying to him, his conscientious [*sic*] of guilt. [¶] He knows his involvement in this case . . . [a]nd it's . . . a little bit scary." The prosecutor also used the call to argue that Allen had authority over the shooters: "Maxwell

actually looked to Allen as the authority figure in this, as someone who could sign off on this. The guy who . . . rounded everyone up, the guy who drove them around, the guy whose house they went back to a couple [of] times as they were hunting . . . . [¶] This is the defendant."

The trial court gave standard instructions on murder, attempted murder, premeditation, voluntary manslaughter, conspiracy, and aider and abettor liability.

During deliberations, the jury (1) asked the trial court to define the terms "premeditation," and "rashly, impulsively"; and (2) it asked whether Allen could be "charged with First Degree Murder for aiding and abetting [if he did] not personally and intentionally discharge[e] a firearm?"

In response to the first question, the trial court told the jury that "[CALCRIM] 400 and 401 define[] aiding and abetting. So you would have to be convinced, beyond a reasonable doubt that the People have established all that's required in those instructions for that theory."

In response to the second question, the trial court directed the jury to the "premeditation" definition in CALCRIM 521. And it explained that "rashly" and "impulsively" are not defined in the instructions "which means that you are to use their ordinary, everyday meanings in defining and understanding that instruction," as explained in CALCRIM 200. Counsel did not object when the court asked counsel if its proposed responses were "okay."

DISCUSSION

Instructions – Aider and Abettor Liability for Premeditated Murder

Allen contends the instructions, especially CALCRIM 400, improperly allowed the jury to convict him of first degree murder based on the shooter's state of mind alone. He contends the instructions should have clarified that Allen's liability could be less than the shooter's or that he could be found guilty of a lesser offense. He contends the absence of this instruction was prejudicial because the jury could have believed he intended only to kill an actual Bloods member and that he did not participate in the shooters's decision, after they saw Jackson lacked gang tattoos, to kill him anyway.

Allen forfeited the claim when he did not request the amplifying language. But even if we consider the merits, the instructions correctly stated the law, and Allen has not demonstrated that his counsel rendered ineffective assistance.

A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language. (*People v. Hart* (1999) 20 Cal.4th 546, 622.) For example, in *People v Lopez* (2011) 198 Cal.App.4th 1106, 1118-1119 (*Lopez*), disapproved on other grounds in *People v. Banks* (2015) 61 Cal.4th 788, 809, footnote 8, the defendant forfeited any challenge to a former version of CALCRIM 400 when he did not request modification in the trial court.

Allen contends the forfeiture rule does not apply because the instructions given were not correct. We disagree. An aider and abettor may be guilty of a greater or lesser crime than

the perpetrator, depending on his personal mens rea. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1114-1115 (*McCoy*) [greater]; *People v. Nero* (2010) 181 Cal.App.4th 504, 507 (*Nero*) [lesser].) To be guilty of a particular crime, the aider and abettor must know the full extent of the criminal purpose of the direct perpetrator, and act with the personal intent or purpose of facilitating the perpetrator's commission of the crime when facilitating its commission. (*McCoy*, at p. 1118.) Thus, the aider and abettor's mens rea "float[s] free" of the perpetrator's. (*Id*. at p. 1121.) The instructions correctly stated this law. The trial court instructed the jury that "A person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator" (CALCRIM 400), but that a person is only guilty as an aider and abettor if the People prove both (1) the aider and abettor knew the perpetrator's unlawful purpose and (2) the aider and abettor personally intended to commit, facilitate, or encourage commission of the crime (CALCRIM 401).

The jury thus knew it could not convict Allen of premeditated murder unless Allen personally had the required mental state. The trial court used CALCRIM 520 and 521 to explain the required mental state. And the court instructed the jury to consider the instructions together, not in isolation. CALCRIM 520 referred to the "defendant['s]" mental state, and Allen was the only defendant. The prosecutor emphasized that Allen's personal mens rea controlled when the prosecutor argued to the jury, "Your focus today is only on the defendant. What was his level of reflection?"

The court did not use the former version of CALCRIM 400 which stated a person is "equally guilty" of a crime whether they perpetrate it or aid and abet it. Thus, the cases describing

its potential to mislead are inapposite. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1164-1165 [former CALCRIM 400's "equally guilty" language misleading in circumstances of the case and should have been modified, but the error was harmless]; *Lopez*, *supra*, 198 Cal.App.4th at pp. 1119-1120 [defendant forfeited her challenge to former CALCRIM 400's "equally guilty" language, and any error was harmless because the court gave CALCRIM 401 which clarifies that the aider and abettor's liability depends on their personal mental state]; see also *People v. Mejia* (2012) 211 Cal.App.4th 586, 624 [defendant forfeited a challenge to CALJIC 3.00's similar instruction that a person is "equally guilty" of the crime whether they commit it personally or aid and abet the perpetrator, because the defendant did not request modification and the instruction is a generally correct statement of the law].)

The court gave the current version of CALCRIM 400 (from which "equally" is deleted), and it gave CALCRIM 401 which required the jury to examine Allen's mental state before determining his liability. We assume the jury followed the instruction. (*Lopez*, *supra*, 198 Cal.App.4th at p. 1119.)

Viewing the challenged instructions as a whole, we conclude there is no reasonable likelihood the jury applied the instruction in an impermissible manner. (*People v. Houston* (2012) 54 Cal.4th 1186, 1229.) The instructions clearly instructed the jury they could not convict Allen of premeditated murder unless he personally intended to commit, encourage, or facilitate commission of premeditated murder. (CALCRIM 401.)

This case is unlike *Nero*, in which the court reversed an aider and abettor's conviction for second degree murder because the trial court did not answer the jury's direct question

"whether it could find the aider and abettor . . . less culpable than the direct perpetrator." (*Nero*, *supra*, 181 Cal.App.4th at pp. 509, 511.) In *Nero*, codefendants were tried together: one stabbed the victim and the other supplied the knife. (*Id.* at p. 510.) The prosecutor argued that a perpetrator and an aider and abettor are "equally liable," (*ibid.*) and the court used the same language in its instructions (*id.* at p. 512). During deliberations, the foreperson told the trial court the jury had reached agreement about the perpetrator's liability, but asked regarding the codefendant's liability: "if . . . we decide they're guilty in the second degree, just for an example, would the person that we have decided guilty of aiding and abetting, would they also be guilty on the second degree, or could they be held to the level of the manslaughter, or completely innocent?" (*Id.* at p. 511.) Another juror asked, "could they be at [the] lower level?" (*Id.* at p. 512, italics omitted.) Instead of answering the questions, the trial court reiterated that aiders and abettors are "equally guilty." (*Id.* at pp. 509-510, 512.)[3] The jury convicted both defendants of second degree murder. (*Id.* at p. 513.) Allen's jury did not ask whether they could find him less culpable than the shooter, and the court did not tell Allen's jury that aiders and abettors are "equally" guilty without reference to their personal mental state.

Allen's counsel did not request an amplifying instruction, but his performance was not deficient and Allen was not prejudiced by the instruction's absence. (*Strickland v.*

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[3] The *Nero* court used CALJIC 3.00 which states in part: "Each principal, regardless of the extent or manner of participation, is equally guilty. Principals include those: [¶] 2. . . . who aid and abet . . . ."

Washington (1984) 466 U.S. 668, 687, 691 (*Strickland*).) Allen could have argued under the instruction given that he did not personally form intent to kill a nongang member, even if he did intend to kill a Blood. But his counsel pursued another theory of defense (i.e., that he was not present) for tactical reasons. And Allen does not demonstrate prejudice. The instructions required the jury to consider his personal state of mind. Their verdict reflects their belief that Allen and the shooters acted according to a preconceived plan to kill the first person they could find walking in Bloods' territory, looking like a Blood. The evidence overwhelmingly supports their conclusion. Whether the victim turned out to be a Bloods member was immaterial to Allen's liability. (*People v. Bland* (2002) 28 Cal.4th 313, 320-321 [under the doctrine of transferred intent a defendant who intends to shoot a certain person but by mistake shoots another is as culpable as if the shot reached the person for whom it was intended].) As the prosecutor argued, "whether or not they actually killed a Blood . . . or they killed [Jackson] walking home from a club, the law doesn't -- obviously doesn't care."

This case is unlike *In re Brigham* (2016) 3 Cal.App.5th 318, 324, 327-328, in which the doctrine of transferred intent would not apply if the jury believed the statement of the defendant (a hit man) that he agreed only to kill "Chuckie"; he saw that the intended victim was not Chuckie; he urged his accomplice not to shoot; and he tried unsuccessfully to wrestle the gun from his accomplice's hands. Here, there was no evidence that Allen intended to kill, or assist in killing, a particular victim. Overwhelming evidence suggests he intended to kill the first person he could find looking like a Blood in Bloods' territory.

Jury Instructions – Aider and Abettor Liability for Attempted Premeditated Murder

Allen's instructional claims about the aider and abettor's personal mental state do not apply to his conviction for attempted murder because section 664 does not "require that an attempted murderer *personally* acted willfully and with deliberation and premeditation" to be guilty as an aider and abettor, as long as the perpetrator premeditated. (*People v. Lee* (2003) 31 Cal.4th 613, 616.) Allen raises the claim only to preserve his disagreement with the holding of *Lee* in the event the California Supreme Court repudiates it in *People v. Mateo* (Feb. 10, 2016, B258333) [nonpub. opn.], review granted May 11, 2016, S232674 (*Mateo*), which is presently pending.[4] We reject his claim. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Response to Jury Questions

Allen contends the court abused its discretion because it did not sufficiently respond to the two jury questions during their deliberations. (§ 1138.) He forfeited this claim when he did not object at trial. (*People v. Roldan* (2005) 35 Cal.4th 646, 729 [when a trial court decides to respond to a jury question,

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[4] The issue pending in *Mateo* is: "In order to convict an aider and abettor of attempted willful, deliberate and premeditated murder under the natural and probable consequences doctrine, must a premeditated attempt to murder have been a natural and probable consequence of the target offense? In other words, should *People v. Favor* (2012) 54 Cal.4th 868 be reconsidered in light of *Alleyne v. United States* (2013) __ U.S. __ [113 S.Ct. 2151] and *People v. Chiu* (2014) 59 Cal.4th 155?"

counsel's silence forfeits any objection under section 1138], overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421.) And counsel did not render ineffective assistance by failing to object, because the court's responses complied with section 1138.

If deliberating jurors "desire to be informed on any point of law arising in the case . . . the information required must be given." (§ 1138.) But the trial court need not elaborate in response to every question. (*People v. Moore* (1996) 44 Cal.App.4th 1323, 1331.) When, as here, the original instructions are themselves full and complete, the trial court may, in its discretion, merely reiterate the original instructions. (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) Its primary duty is to help the jury understand the legal principles it must apply. (*Ibid*.) The trial court could have reasonably concluded that the original instructions gave adequate guidance on the subject of the jury questions, and that further comments diverging from the standard instructions would have introduced unwarranted risks. (See *ibid*. ["comments diverging from the standard are often risky"].) The court did not "figuratively throw up its hands and tell the jury it [could not] help." (*Ibid*.) The court's reference to the instructions that define premeditation and explain how to use undefined terms properly focused the jury on the relevant instructions.

Evidence of Another Crime

Allen contends the trial court abused its discretion when it allowed the prosecutor to play a recording of the jail call between Allen and Maxwell, and when it allowed the prosecution's expert to opine that Allen authorized Maxwell to kill Ali. (Evid. Code, §§ 1101, subd. (a), 352.) Allen forfeited this

contention when he did not press for a ruling on his motion in limine or otherwise object to the evidence. (*People v. Lewis* (2008) 43 Cal.4th 415, 481-482, overruled in part on other grounds in *People v. Black* (2014) 58 Cal.4th 912, 919.)

Even if we consider the merits, Allen does not demonstrate prejudice. To prevail on his claim for ineffective assistance, he must establish both deficient performance and prejudice. (*Strickland*, *supra*, 466 U.S. at p. 687.)

Counsel's performance is deficient if it falls below an objective standard of reasonableness under prevailing professional norms. (*Strickland*, *supra*, 466 U.S. at p. 688.) We exercise deferential scrutiny of counsel's performance. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216 (*Ledesma*).) Whether to object to inadmissible evidence is a tactical decision to which we accord substantial deference, and "failure to object seldom establishes counsel's incompetence." (*People v. Hayes* (1990) 52 Cal.3d 577, 621.)

Prejudice must be affirmatively proved. (*Strickland*, *supra*, 466 U.S. at p. 693.) "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." (*Ibid*.) "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id*. at p. 694.) "'When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.' [Citation.]" (*Ledesma*, *supra*, 43 Cal.3d at p. 218.)

The evidence was admissible under Evidence Code section 1101, subdivision (b) and it is highly unlikely the trial court would have excluded it under Evidence Code section 352 because it was extremely probative on the issue of Allen's consciousness of guilt, the purpose for which the prosecution used it. It was also admissible to prove his leadership relationship with the shooters. Nor was the evidence unduly prejudicial. Solicitation for murder is a serious offense, but Maxwell never carried out the plan and it was no more cold blooded or egregious than the charged crimes. And we are confident that the result would have been the same even if counsel had objected and the court had excluded the call. The GPS evidence corroborated both Owens's and Palacios's testimony and supplied overwhelming evidence of Allen's guilt. For all these reasons, Allen cannot demonstrate prejudice.

DISPOSTION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Kathleen Kennedy, Judge

Superior Court County of Los Angeles

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