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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. PATRICK OREN WOLLETT, Defendant and Appellant.	2d Crim. No. B224204 (Super. Ct. No. F411505) (San Luis Obispo County)

Patrick Oren Wollett appeals the judgment following his conviction for willful, deliberate and premeditated murder or murder by means of lying in wait (Pen. Code, §§ 187/189),[1] and for assault with a deadly weapon (§ 245, subd. (a)(1)). The jury found allegations to be true that Wollett personally used a deadly weapon in the murder (§ 12022, subd. (b)), and personally inflicted great bodily injury in the assault (§ 12022.7, subd. (a)). The jury also found an allegation to be true that a principal was armed with a firearm in the murder. (§ 12022, subd. (a)(1).) Wollett was sentenced to a total term of 32 years to life in state prison.

Wollett contends the trial court committed instructional error concerning the natural and probable consequence doctrine, aider and abettor liability, and voluntary intoxication as it relates to the assault offense. We conclude that the trial court erred in

[1] All statutory references are to the Penal Code unless otherwise stated.

failing to instruct the jury that to convict him of first degree premeditated murder under the natural and probable consequences rule, the jury must find that *first degree premeditated murder, not simply murder*, was a natural and probable consequence of the assault. Accordingly, we reverse the first degree murder conviction and remand for further proceedings consistent with this opinion. Otherwise, we affirm.

FACTS

Wollett, codefendant Chad Westbrook, Sarah Lonsinger-Rey (Rey), and Hope Tanore, lived together in Wollett's trailer. Rey had been engaged to Wollett's brother. Tanore was Westbrook's sister. The murder victim, Joshua Houlgate, was a friend of Westbrook. For several days prior to the shooting, they all consumed considerable amounts of methamphetamine.

On the evening of December 5, 2007, Wollett, Westbrook, Rey and Tanore went to a bar where they were later joined by Houlgate. Houlgate left the bar alone. The others drove back to their trailer in Tanore's car. Rey fell asleep on a couch. Westbrook, Wollett and Tanore went into a bedroom. Wollett brought a shotgun to the trailer for no apparent reason.

Wollett's friend Brad McCormick came over to visit. After a while, Wollett asked McCormick to leave, stating to McCormick that "something's going to happen. I want you to leave." As McCormick walked away from the trailer, Wollett said something to the effect that he "may be going to jail for the rest of my life."

Tanore received a telephone call from Houlgate at approximately 1:30 a.m. He said he would like to come to the trailer if Tanore would give him a ride home. Tanore agreed and told Wollett and Westbrook that Houlgate was coming over. Houlgate arrived at the trailer 20 minutes later and began socializing with Westbrook, Wollett and Tanore. Houlgate brought some methamphetamine with him. At approximately 3:00 a.m., Houlgate went into the living room where Rey was sleeping. He woke her up and they engaged in sexual intercourse. Afterwards, they fell asleep on a mattress on the floor. Wollett was upset at Rey and Houlgate for having sex because she had been engaged to Wollett's brother.

Tanore left the trailer at approximately 4:00 a.m. She drove her car to the street and was picked up by a friend. Shortly thereafter, a witness saw Wollett sitting in Tanore's car with the motor idling. At about the same time, Wollett sent a text message to friend Susan Meszaros stating that he "may need help soon. Be there for me."

At approximately 5:00 a.m. on December 6, the sleeping Houlgate and Rey were awakened when Westbrook and Wollett began hitting them with a baseball bat and a metal object. They protected themselves as best they could and, although injured, were able to stand up. At this time, Westbrook was standing near Houlgate holding a shotgun he had obtained from somewhere in the trailer. Wollett was standing near Rey. Houlgate ran for the sliding door and Westbrook shot him. Westbrook reloaded and pointed the shotgun at Rey who begged him not to shoot her. Westbrook dropped the shotgun without firing and ran out the back door of the trailer. Wollett ran out the front door.

Neighbors heard a bang, came to investigate, and found Houlgate lying in the parking lot in front of the trailer. Houlgate died at the scene from a shotgun wound to his chest. Rey suffered two broken bones in her foot and other injuries. Houlgate also had injuries from blunt force trauma. One injury was consistent with being hit with a baseball bat. Houlgate's blood was found on the pillow case and on Wollett's jeans. There was a trail of blood from the trailer door to where Houlgate fell.

Within minutes after the shooting, Wollett called his friend Tyler Strohl, and left messages saying he needed help and was on the run. Strohl had a Remington shotgun which had been taken from his home a day or two earlier. Wollett had visited Strohl during that period and knew he had a shotgun. When Wollett and Strohl talked later in the day, Wollett told Strohl that "shit happened; shit went down." Wollett told Strohl that the shotgun had been taken care of. Wollett also called friends Susan Meszaros and Chelsea Gordon asking for help. At 8:00 a.m., Wollett and Westbrook went to the home of Chelsea Gordon's mother to wait for Chelsea. Westbrook also called a friend to ask for a ride.

Recordings of two conversations between Wollett and Westbrook after their arrest were admitted at trial. During the first conversation, Wollett stated, "I wasn't

the shooter. I'm not gonna say who anyone was, I don't know, dude." Westbrook stated, "The gun went off. Where it come from, I don't know. He had it?" During the second conversation, Wollett stated, "I told them, you know, what happened, you know, there was a struggle and you brought the shotgun and say, you know, [unintelligible] because you know, my brother's fiancé - you know, they were doin' it in here, grabbed me [unintelligible], the shotgun [unintelligible] . . . you're a goner, and I grabbed the closest thing I had to me, a bat, and, you know, and then there was a struggle, with the shotgun, it all happened real fast."

During the investigation, a Remington shotgun shell was found in Westbrook's residence, and a 25-inch metal pipe was found in Tanore's car. In September 2008, a Remington shotgun and a baseball bat were found a few hundred yards from the trailer.

DISCUSSION

Prejudicial Error in Natural and Probable Consequence Instruction

Wollett contends the trial court incorrectly instructed the jury on the natural and probable consequences doctrine of aider and abettor liability. We agree, and conclude that the trial court had a sua sponte duty to instruct the jury that it must determine whether *premeditated* murder was a natural and probable consequence of the assault in order to convict Wollett of premeditated murder.

A defendant is liable as a principal in the commission of a criminal offense when, with knowledge of the unlawful purpose of the perpetrator, her or she aids and abets its commission and has the specific subjective intent to commit the offense or encourage or facilitate its commission. (*People v. Prettyman* (1996) 14 Cal.4th 248, 259.) In addition to liability for an intended offense (target offense), an aider and abettor may be liable for an unintended offense that is a natural and probable consequence of the target offense. (*Id.* at p. 261.) An offense is a natural and probable consequence of the target offense if a reasonable person in the defendant's position would or should have known that offense was reasonably foreseeable as a consequence of the target offense. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 535.)

The test for natural and probable consequence liability is an objective one. The standard "'. . . is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable. . . .'" (*People v. Medina* (2009) 46 Cal.4th 913, 920.) This determination is a factual question to be resolved by the jury in light of all of the circumstances. (*People v. Nguyen, supra,* 21 Cal.App.4th at p. 531.)

Here, the prosecution did not argue that Wollett was liable for the murder because of his *subjective* intent to commit, facilitate, or encourage the murder. The prosecution argued that Wollett aided and abetted the assault and the murder was a natural and probable consequence of the assault, and the jury was instructed only on that theory. The instruction stated that, to find Wollett guilty of premeditated murder, the jury must find that he committed assault with a deadly weapon, a co-participant in the assault committed the offense of murder, and a reasonable person in Wollett's position would have known that *murder* was a natural and probable consequence of the assault. (See CALCRIM No. 402.)[2]

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2 The complete version of CALCRIM No. 402 given by the court stated: "The defendants are charged in Count 1 with Murder. [¶] In determining if a defendant is guilty of the crime of Murder on an Aiding and Abetting theory you must first decide whether the defendant is guilty of Assault with a Deadly Weapon or Firearm. If you find the defendant is guilty of this crime, you must then decide whether he is guilty of Murder. [¶] Under certain circumstances, a person who is guilty of one crime also may be guilty of other crimes that were committed at the same time. [¶] To prove that the defendant is guilty of Murder, the People must prove that: [¶] 1. The defendant is guilty of Assault With A Deadly Weapon or Firearm; [¶] 2. During the commission of The Assault With A Deadly Weapon or Firearm a coparticipant in that Assault With a Deadly Weapon or Firearm committed the crime of Murder; AND [¶] 3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of Murder was a natural and probable consequence of the commission of the Assault With a Deadly Weapon or Firearm. [¶] A coparticipant in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander. [¶] A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the Murder was committed for a reason independent of the common plan to commit the Assault With a Deadly Weapon or Firearm, then the commission of Murder was not a natural and probable consequence of Assault With a Deadly Weapon or Firearm. [¶] To decide whether the crime of Murder was committed, please refer to the separate instructions that I will give you on that crime."

Wollett contends that the natural and probable consequence instruction was incomplete because the trial court failed to instruct the jury that to convict him of first degree premeditated murder, the jury must find that *first degree premeditated murder, not simply murder*, was a natural and probable consequence of the assault. Wollett relies on *People v. Hart* (2009) 176 Cal.App.4th 662 (*Hart*), which concluded that a conviction for premeditated attempted murder under the natural and probable consequence doctrine requires an express jury finding that premeditated attempted murder, not simply attempted murder, was a natural and probable consequence. *People v. Cummins* (2005) 127 Cal.App.4th 667, and *People v. Favor* (2010) 190 Cal.App.4th 770, however, concluded that the finding was not required. Our Supreme Court granted review in *Favor* (review granted Mar. 16, 2011, S189317), and the issue is pending before that court.

We agree with the reasoning of *Hart.* In *Hart*, a codefendant shot a store owner during an attempted robbery. His accomplice in the attempted robbery was convicted of premeditated attempted murder under the natural and probable consequence doctrine. (*Hart, supra,* 176 Cal.App.4th at p. 665.) The jury had been instructed that it could find the accomplice guilty of premeditated attempted murder if it found that *attempted murder*, not *attempted premeditated murder*, was a natural and probable consequence of attempted robbery.

Hart concluded that the instruction was deficient because it did not relate "premeditation and deliberation to the natural and probable consequences instruction." (*Hart, supra,* 176 Cal.App.4th at p. 670.) *Hart* noted that other instructions defined premeditation and deliberation as elements of the offense of attempted premeditated murder, but stated that these instructions were insufficient. (*Ibid*.)

Here, too, the jury was instructed on the elements of first and second degree murder and the required subjective mental states for each of those offenses. (See CALCRIM Nos. 520, 521, and 875.) In determining whether premeditated and deliberate murder was a natural and probable consequence of the assault, however, the jury does not look at the aider and abettor's subjective state of mind. The jury must determine the objective state of mind of a reasonable person in the aider and abettor's situation. (*Hart,*

supra, 176 Cal.App.4th at p. 673.) The question is whether, at the time the assault began, a reasonable person would have foreseen not only that the victim would be killed but also that the killer would premeditate and deliberate the killing. The instructional issue arises because there are different degrees of murder.[3] The jury must be instructed on how to apply the objective standard of the natural and probable consequences doctrine when different degrees of murder are involved.

The trial court failed to inform or provide any guidance to the jury that it could convict Wollett of a lesser offense than Westbrook under the natural and probable consequences doctrine. Under the instructions given, the jury may have found Wollett guilty of murder using the natural and probable consequences doctrine, an objective test, and then found him guilty of premeditated and deliberate murder based on his subjective mental state as described in the jury instruction setting forth the elements of the offense.

Based on the evidence, a reasonable jury could have concluded that shooter Westbrook was guilty of premeditated first degree murder but aider and abettor Wollett was guilty of no more than unpremeditated second degree murder. Although Wollett was an active participant in the planning and execution of the assault, the jury could have found that a reasonable person in Wollett's position would not have foreseen that Westbrook would shoot Houlgate with premeditation and deliberation. Stated differently, the jury may have found Wollett guilty because a reasonable person would have foreseen a killing as a natural and probable consequence of the assault, but without considering whether a reasonable person would have foreseen that the killing would be committed with premeditation and deliberation.

Therefore, Wollett's premeditated murder conviction must be reversed and the case remanded to the trial court. Because reversal is based on instructional error, Wollett may be retried on the charge of premeditated murder if the People so choose.

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[3] *Hart,* of course, concerned attempted murder. Although attempted murder is not formally divided into degrees, *Hart* characterizes attempted premeditated and unpremeditated attempted murder as the functional equivalents of first and second degree murder. (*Hart, supra,* 176 Cal.App.4th at p. 672.)

(*People v. Edwards* (1985) 39 Cal.3d 107, 118 [retrial permitted after instructional error]; *Hart, supra,* 176 Cal.App.4th at p. 674.)

No Prejudicial Error in "Equally Guilty" Instruction

Wollett contends the trial court erred by instructing the jury that a person is "equally guilty" whether he or she committed a crime personally or aided and abetted its commission. (Former CALCRIM No. 400.) We conclude that the claim has been forfeited and that any error was harmless.

An aider and abettor may be convicted of a greater or lesser crime than the direct perpetrator if the aider and abettor does not act with the same mental state as the direct perpetrator. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1114–1122; *People v. Woods* (1992) 8 Cal.App.4th 1570, 1577–1578.) Except under the natural and probable consequence doctrine, an aider and abettor must know the full extent of the criminal purpose of the direct perpetrator, and act with the intent or purpose of facilitating the perpetrator's commission of the crime. (*McCoy,* at p. 1118; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1164.)

In *People v. Samaniego, supra,* 172 Cal.App.4th at page 1165, the court concluded that the version of CALCRIM No. 400 used in the instant case may be misleading because it did not expressly state that an aider and abettor cannot be convicted of first degree murder without having the mental state required for first degree murder. In April 2010, CALCRIM No. 400 was revised to eliminate the word "equally." The Bench Notes to revised CALCRIM No. 400 (2011) page 167 state: "An aider and abettor may be found guilty of a different crime or degree of crime than the perpetrator if the aider and abettor and the perpetrator do not have the same mental state. [Citations.]"

We agree that the instruction given in the instant case was misleading but, because the instruction is correct under most circumstances, Wollett was obligated to request a modification. Failure to do so forfeits his claim. (*People v. Lang* (1989) 49 Cal.3d 991, 1024; *People v. Samaniego, supra,* 172 Cal.App.4th at pp. 1163–1165.) Even if the claim were preserved for appeal, the error was harmless. Apart from the previously-discussed error in the natural and probable consequence jury instruction, the

verdict would have been the same without the error beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Wollett's reliance on *People v. Nero* (2010) 181 Cal.App.4th 504, is unavailing. During deliberations in *Nero*, the jury asked whether an aider and abettor must be found guilty of the same degree of homicide as the perpetrator, or could be found guilty of a lower level of homicide. Without consulting counsel, the trial court reinstructed the jury pursuant to CALJIC No. 3.00 which included the "equally guilty" language challenged in the instant case. The appellate court concluded that the trial court's failure to correctly instruct the jury in the face of an express question by the jury was not harmless error. (*Id*. at p. 518.) Here, the jury asked no questions on the subject and there is no indication that the jury was confused or uncertain.

No Prejudicial Error in Voluntary Intoxication Instruction

Wollett contends the trial court erred by failing to instruct the jury that it could consider voluntary intoxication in determining whether he had the mental state necessary to aid and abet the assault with a deadly weapon. We conclude that any error was harmless.

Generally, evidence of voluntary intoxication is not admissible to negate the intent required for general intent crimes such as assault. (*People v. Atkins* (2001) 25 Cal.4th 76, 81.) As we have stated, however, aider and abettor liability requires the person to act with knowledge of the direct perpetrator's criminal purpose and intend to commit, encourage or facilitate the commission of the offense. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1123.) Accordingly, evidence of voluntary intoxication is admissible to establish whether an aider and abettor acted with that required mental state even if the target crime is a general intent crime. (*Id.* at pp. 1131-1134.)

The trial court instructed the jury that, in order to find Wollett guilty of murder, the jury must find that Wollett aided and abetted Westbrook in the commission of the assault and that murder was a natural and probable consequence of the assault. The court also instructed that the jury could consider voluntary intoxication in deciding the murder charge. (CALCRIM No. 625.) But, the trial court failed to instruct the jury

that voluntary intoxication could also be considered in deciding whether Wollett intended to assist, encourage or facilitate the commission of the assault. (See CALCRIM No. 404.)

A trial court has no sua sponte duty to instruct on voluntary intoxication but when it does so, as in this case, the instructions must be correct. (*People v. Mendoza, supra,* 18 Cal.4th at p. 1134; *People v. Castillo* (1997) 16 Cal.4th 1009, 1015.) Here, the instructions were incomplete but there is prejudicial error only if, based on the instructions as a whole, it is reasonably likely the jury misconstrued the instructions as precluding it from considering the intoxication evidence in deciding aiding and abetting liability. (*Mendoza,* at p. 1134; *Castillo,* at p. 1017.) In addition, "'the court must reverse only if it also finds a reasonable probability the error affected the verdict adversely to defendant.'" (*Mendoza,* at pp. 1134-1135.) Here, there was no prejudicial error.

First, we conclude that the evidence of voluntary intoxication presented by Wollett was insufficient to trigger any duty to instruct on voluntary intoxication. A defendant is entitled to instruction on voluntary intoxication if there was substantial evidence of intoxication that affected the existence of a required mental state. (*People v. Williams* (1997) 16 Cal.4th 635, 677.) "Substantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive." (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.)

Here, there is evidence that Wollett and others consumed a considerable amount of methamphetamine during a multi-day period before the murder, but there is no substantial evidence that Wollett was unable to form the intent to aid and abet the assault. Based on the evidence, the trial court properly could have refused to instruct on voluntary intoxication. (*People v. Williams, supra,* 16 Cal.4th at p. 677; *People v. Marshall* (1996) 13 Cal.4th 799, 848.)

Second, even if the trial court was required to instruct the jury that voluntary intoxication could be considered in determining Wollett's mental state for purposes of the assault, the jury necessarily decided the voluntary intoxication issue adversely to Wollett in connection with the murder count. (*People v. Haley* (2004) 34

Cal.4th 283, 314; *People v. Heard* (2003) 31 Cal.4th 946, 982.) The trial court instructed the jury it could consider evidence of voluntary intoxication in deciding intent to kill and premeditation. Despite the instructional error regarding the natural and probable consequences doctrine, the jury found the evidence sufficient to convict Wollett of premeditated murder. Therefore, the jury necessarily rejected the notion he lacked the ability to form the specific intent to aid and abet the assault.

DISPOSITION

The judgment that Wollett committed premeditated and deliberate murder is reversed. If, after the filing of the remittitur in the trial court, the People decide not to retry Wollett for first degree premeditated and deliberate murder within the statutory time limit, the trial court shall proceed as if the remittitur constituted a modification of the judgment to reflect a conviction of second degree murder and shall resentence Wollett accordingly. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.*

* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Dodie A. Harman, Judge

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