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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

H029806

Plaintiff and Respondent,

(Santa Clara County
Superior Court
No. CC467010)

v.

ERIC ROBERT MCCLAIN,

Defendant and Appellant.

Defendant was convicted by jury trial of attempted murder (Pen. Code, §§ 187, 664), assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)) and first degree robbery in concert (Pen. Code, § 213, subd. (a)(1)(A)). The jury also found true allegations that defendant had personally inflicted great bodily injury (Pen. Code, § 12022.7, subd. (a)), personally used a deadly or dangerous weapon (Pen. Code, § 12022, subd. (b)(1)) and had been armed with a firearm (Pen. Code, § 12022, subd. (a)(1)) in the commission of these crimes. The trial court imposed a state prison sentence of 13 years, which included an aggravated term for the attempted murder count. On appeal, defendant claims that the trial court prejudicially erred in allowing the prosecutor to introduce evidence that defendant had a knife strapped to his leg at the time of his arrest, and he claims that the admission of this evidence violated his

right to due process. Defendant also claims that the trial court's imposition of an aggravated term violated his constitutional rights because it was not based on facts found true by the jury. We find merit in his challenge to the imposition of the aggravated term, and we reverse and remand for resentencing.

I. Factual Background

Defendant and Carlos Harris were good friends, and defendant had been staying at Harris's residence, with Harris and Harris's girlfriend Jocelyn Jasper, for a couple of weeks prior to September 6, 2004. On September 6, 2004, Jocelyn Jasper's brother, Kenneth Jasper brought his friend Crystal N. and a man named either Ben or Anthony to Harris's residence. Harris's friend Niiakwei Allotey was also visiting Harris. Crystal told everyone that a man named Robert Carr had tried to rape her, and she wanted revenge. She described Carr as a bookie and a drug dealer who had a nice car, \$15,000 or \$20,000, drugs and firearms. The group, led by Harris, came up with a plan to lure Carr to San Jose and rob him.

The plan was for Crystal to bring Carr to a particular location at the Oakwood Apartments, where the men would be waiting. One of the men was supposed to hold the dull side of a knife to Crystal's throat, and a second man was supposed to hold a gun on Carr. A third man was supposed to "tape up" Carr with duct tape. The plan became rather sketchy after that, but they seemed to expect to take Carr's car and money.

Defendant was given a loaded pistol and told that he would be the man holding the gun on Carr. However, after defendant said "I can't use a gun," the gunman role was given to Allotey, and defendant was assigned to hold the knife to Crystal's throat. Ben/Anthony was expected to "tape Robert Carr up" with duct tape.

Crystal telephoned Carr, invited him to San Jose and suggested that she would have sex with him. Jocelyn Jasper got on the phone, pretended to be Crystal's aunt,

and told Carr that he could spend the night at her place. After spending a number of hours at Harris's residence, the group went to the Oakwood Apartments (where none of them, except possibly Allotey, were living) in the early evening and spent the evening partying in the various common areas at this large apartment complex.

During this time period, defendant was drinking hard alcohol and smoking marijuana.¹

Carr arrived around 12:45 a.m. Crystal took Carr to a laundry room where the five men were waiting. Allotey pointed the gun at Carr. Carr knocked the gun out of Allotey's hand and tried to escape from the laundry room. Defendant, Harris and Kenneth Jasper tried to stop Carr, while Allotey tried to retrieve the gun. During this struggle, virtually all of Carr's clothing was torn off of his body, leaving him wearing just socks and one shoe. A piece of duct tape was stuck to Carr's arm. Allotey retrieved the gun. Harris took Carr's pants.

Although he lost his clothing, Carr managed to escape from the laundry room and began screaming for help. Defendant encountered Carr just outside the laundry room, and defendant stabbed Carr in the upper back and arm several times with a very large butcher knife with an eight-inch blade.² Carr continued to scream for help, and defendant ran away and threw the bloody knife in a garbage can.

Jocelyn Jasper was waiting in a car outside the apartment complex to drive them away. When defendant arrived at the car, he seemed intoxicated and "kind of excited," but not "scared." Defendant said "I stuck him" and "[s]tabbed him in the

¹ Jocelyn Jasper testified at trial that, during the evening, a kitchen knife with a large blade fell out of defendant's back pocket onto the ground. Defendant appeared to be drunk, and he did not seem to notice that the knife had fallen. Defendant denied that this had occurred.

² Defendant's trial counsel described this knife in his closing argument as "a god awful knife that looked like it came right out of Psycho, the movie" and "a knife which is so big it's bound to possibly kill somebody if it goes in."

ribs.”³ He described how “blood squirted out, and a little drop got on my hand.”

Defendant said he had disposed of the knife in the garbage.

A citizen encountered Carr and called 911 at 1:06 a.m.⁴ When Carr arrived at the hospital about half an hour later, he was “near death,” and had lost about half the blood in his body. He had multiple stab wounds to his chest and left arm. There was a stab wound to his upper right shoulder and another just below his left shoulder blade, which had punctured his left lung. The stab wounds to Carr’s back had been caused by “a direct blow” with “quite a bit of force.” A deep stab wound to his left arm had caused “significant bleeding.” Carr was hospitalized for six days and would not have survived “without extraordinary medical intervention.”

Defendant was arrested ten days later. At the time of his arrest, he had a knife wrapped in an American flag strapped to his leg and covered by the leg of his pants. When defendant was interviewed by the police, he initially denied involvement but eventually admitted that he had stabbed Carr. “I hit, I hit him with the knife.” Defendant described the sequence of events that immediately preceded the stabbing. “[Carr] was screaming, ‘Help, help, help’ running out, running out, and I was froze, and, and . . . [Harris] runs out and grabs [the] dude; boom, like that, snap, and he’s like ‘E,’⁵ he’s all, ‘E, get him, E, get him.’ And he was like, ‘Don’t let him get away; don’t let that motherfucker get away.’ I fuckin’, I fuckin’ chase after him, fuckin’ stab him.” He claimed that he “did not wanna kill him.” He stabbed Carr “[c]ause I have no choice, ‘cause [Harris] told me to. And if I didn’t do it, . . . I didn’t wanna find out the consequences from [Harris].” Defendant said that “the blood squirted” out when

³ Harris responded: “Why did you do it? You shouldn’t have did that.” There was no evidence that defendant responded to Harris.

⁴ The entire incident lasted no more than ten to fifteen minutes, from the time Carr arrived to the time that the men reached the getaway car.

⁵ Defendant’s nickname was “E.”

he pulled the knife out of Carr, and some blood got on his hands. He threw the knife away in a garbage can as he ran away.

II. Procedural Background

Defendant and Harris were jointly charged with attempted murder (Pen. Code, §§ 187, 664), assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)) and first degree robbery in concert (Pen. Code, § 213, subd. (a)(1)(A)). The information further alleged that defendant had personally inflicted great bodily injury (Pen. Code, § 12022.7, subd. (a)), personally used a deadly or dangerous weapon (Pen. Code, § 12022, subd. (b)(1)) and had been armed with a firearm (Pen. Code, § 12022, subd. (a)(1)).

Defendant's solitary challenge to the prosecution's case at trial was his claim that he "did not intend to kill anybody." He conceded that he was guilty of the assault and robbery counts. Harris contended at trial that he had not been involved in any of the offenses.

Defendant testified at trial on his own behalf. He said he was a daily user of methamphetamine, marijuana and alcohol. Defendant denied that they had initially planned to rob Carr; he claimed they had only planned "to scare him" and "frighten him" as revenge on behalf of Crystal. However, the plan changed to a robbery before they encountered Carr. Defendant claimed that he was not carrying the knife on his person, and he only received it shortly before they attacked Carr. Defendant was holding the knife at Crystal's neck when Carr knocked the gun from Allotey's hand and tried to get away. Defendant immediately left the laundry room with Crystal.

Defendant provided this description of the subsequent events. Carr freed himself from Harris, and "[h]e runs directly towards me." Defendant claimed his "judgment" was "alter[ed]" because he had consumed alcohol, marijuana and methamphetamine, and he did not notice that Carr was naked. Carr "tried to get

through me, and I react[ed]” by blocking Carr’s way. When Carr tried to push past him, defendant stabbed Carr.

Defendant testified that he “believe[d] I only stabbed him once, but from what the pictures show it had to be more than that.” Defendant expressed incomprehension about his reasons for stabbing Carr. “I couldn’t tell you. It wasn’t to kill him, you know, ‘cause if I was going to kill him, he would have probably been dead if I was going to kill him.” “I could have killed him.” “I wasn’t thinking; that’s the whole thing, I wasn’t thinking because if I was thinking, I wouldn’t have done it.” “I meant to stop him from attacking me for me not to get hurt.” Defendant claimed he stabbed Carr because he thought Carr was “aggressive” towards him.⁶ “I don’t know what my frame of mind was when that actually took place or whenever I made the move to do that.” “I didn’t mean to stab him, period.” When Carr screamed for help, defendant ran away and disposed of the bloody knife in a garbage can.

Harris testified at trial that he was unaware of any plan to rob Carr and had not participated in the robbery, assault or stabbing. Harris claimed he met up with the others in the car after the stabbing.

The prosecutor argued to the jury that defendant had had the intent to kill when he stabbed Carr. The prosecutor conceded that defendant had been drinking and using drugs before the stabbing, but “[h]e wasn’t so drunk and high” that he could not hold the knife to Crystal’s neck, run away and “think to get rid of the knife.” Therefore, he was not so intoxicated that he lacked the intent to kill. Defendant’s trial counsel argued that defendant’s mind was not “working clearly” due to his intoxication, and he had not acted with the intent to kill.

⁶ It was not defendant’s contention at trial that he had acted in self defense.

The jury found defendant guilty of all three counts and found all of the special allegations true.⁷ The court imposed a 13-year prison sentence, which included an aggravated term for the attempted murder count. Defendant filed a timely notice of appeal.

III. Discussion

A. Knife Evidence

Defendant maintains that the trial court prejudicially erred in ruling admissible evidence that he had a knife strapped to his leg at the time of his arrest, and he claims that the admission of this evidence violated his right to due process.

1. Background

In the midst of the prosecution's case-in-chief, defendant's trial counsel sought a ruling by the court on the admissibility of evidence that a knife that had been found strapped to defendant's leg at the time of his arrest, ten days after the stabbing. It was stipulated that this knife had no biological material on it. Defendant's trial counsel asked the court to exclude evidence of the knife on relevance and Evidence Code section 352 grounds. "I think it's simply an attempt to smear his character indirectly." He argued that carrying a knife ten days after the stabbing did not show defendant's intent at the time of the stabbing.

The prosecutor conceded that this knife had not been used in the stabbing, but he claimed that the knife was admissible to rebut defendant's claim that he lacked the intent to kill. "[Defendant] is the type of person who is not all that moved negatively by what happened to Robert Carr after he stabbed him. And in fact arms himself with a knife for whatever future needs he may have. [¶] Counsel would argue that that's propensity evidence. I argue that it simply shows a mindset of Mr. McClain that if

⁷ Harris was also found guilty of all of the charges.

necessary he will arm himself with a deadly weapon and use it. And when he uses it, by inference, that could have the specific intent to kill.”

The prosecutor claimed that evidence of defendant’s possession of the knife would show that defendant “has access to knives and carries them around. That’s something he does.” “[D]efendant is the type of person that even after this event of stabbing Robert Carr is willing and capable of harboring the specific intent to kill in such away [*sic*] that after he does this, all he does is he ditches the knife and rearms himself for the next potential confrontation.” The prosecutor argued that defendant’s possession of the knife was admissible “under 1101(b) as it goes to his intent when carrying such a significant and dangerous and deadly weapon in the manner in which he was carrying it, which was concealed.”

The trial court initially wished to wait until defendant testified to rule on the issue. “I think it’s going to make a difference to me what Mr. McClain says on the stand. Depending upon how he testifies with regard to what happened, and then where he got the one knife that was used and how long he had it, and the fact that he armed himself with that, things like that. Depending upon what he says this very well might come in.” However, after the prosecutor continued to argue that he should be allowed to present the knife evidence in his case-in-chief, the court agreed to rule on the issue earlier. The court concluded that the probative value of the knife evidence was not substantially outweighed by its prejudicial effect, and it ruled that the evidence was admissible.

The police officer who had arrested defendant then testified that he found a knife wrapped in an American flag attached to defendant’s calf with elastic wristbands. The knife was covered by defendant’s pants. A second police officer testified that defendant had told him that this knife had not been used to stab Carr. Defendant testified that he was carrying this knife “for protection because I had a beef with one of the local Mexican gangs there, in my neighborhood.” He claimed he had

been “jumped” by a “Sureno gang” in his neighborhood. The second police officer testified on rebuttal that defendant had told him that he was carrying the knife because of his fear of Harris. The prosecutor did not mention this knife in his opening or closing argument.

Defendant’s trial counsel argued to the jury that defendant was “an eighteen year old man with no experience” and asked “[w]here is his criminal background?” “This man is not a violent man in his background. He’s gonna say, well, look, he carried around a little knife on his leg. All right, he did. He told you why. That’s something he left out, I want to address it right off. But where is his violent past? What’s he done?” “He’s got no history of violence.” “That little knife that Eric had carried around that’s not evidence that he was a person that knew what he was doing. He told you why he had it. Don’t let him bring that up. Little knife was on him, he surrendered it to the police. No indication it’s ever been used. It’s a kid thing. And, actually, that doesn’t show that he’s a violent man, unless they can show he ever used it. He told you why, a number of explanations. He does live in a dangerous neighborhood he said. That’s true. Sometimes kids carry knives. That’s not circumstantial evidence of an intent to kill.”

Harris’s trial counsel also mentioned defendant’s possession of this knife during his closing argument. “I don’t know how much should be made about the fact that Eric McClain had a knife on him when he got arrested. Nobody is saying that that was the knife that was used in the attack. But the fact that he had a knife, it isn’t just like a little pocket knife that you could carry around with you to cut open an envelope or something. I mean, this is, you’ve seen the picture of it, or actually the knife, you’ve seen it, I mean, it’s a relatively serious knife, not like the butcher knife that we have apparently was the stabbing weapon. But it’s a fairly serious knife. He had that. So, I would submit to you he was accustomed to carrying that thing around.”

2. Analysis

Defendant contends that the knife evidence was not admissible under Evidence Code section 1101, subdivision (b). He claims that this evidence was irrelevant and highly prejudicial and that its admission violated due process and deprived him of a fair trial.

We proceed on the assumption that the admission of the knife evidence was erroneous. (*People v. Riser* (1956) 47 Cal.2d 566, 577 [“When the prosecution relies, however, on a specific type of weapon, it is error to admit evidence that other weapons were found in his possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons.”].)

“[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*. [Citations.] Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error.” (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

The sole issue at trial was whether defendant had the intent to kill when he stabbed Carr multiple times in the back of his chest and arm. Defendant testified at trial, and he was unable to provide any coherent explanation for why he had stabbed Carr. Defendant implicitly asked the jury to find that he had only intended to harm, but not kill, Carr. Defendant’s subsequent possession of a knife did not offer any assistance to the jury in resolving this precise question. A person may possess a concealed knife, even with the intent to use it, without having the intent to *kill*. While defendant’s subsequent possession of a knife did reflect poorly on his character, this evidence was fairly innocuous in comparison to his admitted conduct in willingly participating in an armed robbery and then repeatedly stabbing the unarmed, naked victim in the chest when he tried to escape. We are convinced that it is improbable

that the verdict would have been different in the absence of the challenged knife evidence.

We also find no due process violation. “Only if there are *no* permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must ‘be of such quality as necessarily prevents a fair trial.’ [Citation.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose.” (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920.)

Defendant relies heavily on *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378 (*McKinney*). However, *McKinney* bears only superficial similarities to the case before us. In *McKinney*, a large quantity of evidence showing that McKinney possessed and was fascinated by knives and death was admitted at his trial for killing his mother with an unidentified knife. The Ninth Circuit found that the admission of this evidence violated due process because there were no permissible inferences that could be drawn from it and it formed a significant part of the prosecution’s case, which was wholly circumstantial.

The same cannot be said here. The challenged knife evidence consisted solely of the knife and the arresting officer’s brief testimony about its discovery. The prosecutor made no mention whatsoever of this knife in his opening or closing arguments. The minimal nature of this evidence and the prosecution’s lack of reliance on it demonstrated that it was not of “such a quality as necessarily prevents a fair trial.” The challenged evidence had no significant relevance on the sole disputed issue at trial, and its admission did not deprive defendant of due process or a fair trial.

B. Aggravated Term

Defendant challenges the trial court’s imposition of an upper term based on factors that were neither admitted by him nor found true by a jury.

The trial court imposed an aggravated term for the attempted murder count. “The court found no real mitigated factors in this matter. The aggravated term is imposed for the following reasons; first of all, as Mr. Boyd [the prosecutor] points out, it is the court’s intention to run count number three [the robbery count], which could be run consecutive, concurrently. Also, the victim in this matter found himself in a particularly vulnerable position. Mr. McClain was on juvenile probation and not doing well on juvenile probation. And then most significantly, the planning and sophistication of the particular crime.”

In *Cunningham v. California* (2007) ____ U.S. ____ [127 S.Ct. 856], the U.S. Supreme Court held that California’s sentencing scheme violates the Sixth Amendment because it does not require jury findings beyond a reasonable doubt on the aggravating circumstances that are necessary to support the imposition of an aggravated term. Here, three of the four aggravating circumstances, including the one that the trial court found “most significant[,]” were facts that were not found true by the jury beyond a reasonable doubt. Therefore, the imposition of the aggravated term violates the Sixth Amendment, and reversal is required unless the error was harmless beyond a reasonable doubt. We cannot find this error harmless beyond a reasonable doubt, so we must reverse and remand for resentencing.

IV. Disposition

The judgment is reversed, and the matter is remanded for resentencing.

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

Duffy, J.