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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. CURTIS RAY WEAVER, Defendant and Appellant.	B284523 (Los Angeles County Super. Ct. No. BA449412)

APPEAL from the judgment of the Superior Court of Los Angeles County. Mildred Escobedo, Judge. Affirmed.

Doris M. LeRoy, 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, Senior Assistant Attorney General, Scott A. Taryle and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * * * * * *

Defendant and appellant Curtis Ray Weaver appeals from his conviction by jury of one count of first degree murder, with a true finding on a firearm use enhancement, and one count of being a felon in possession of a firearm. Defendant contends the trial court made prejudicial evidentiary and instructional errors, and also requests remand for resentencing in light of the amendment of Penal Code section 12022.53 during the pendency of this appeal.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged by information with murder (Pen. Code, § 187, subd. (a); count 1), assault with a semiautomatic firearm (§ 245, subd. (b); count 2), and possession of a firearm by a felon (§ 29800, subd. (a)(1); count 3). As to count 1, it was alleged defendant personally used and discharged a firearm causing death within the meaning of subdivisions (b), (c) and (d) of section 12022.53. As to count 2, it was alleged defendant personally used a firearm within the meaning of section 1203.06, subdivision (a)(1) and section 12022.5, subdivision (a). Defendant pled not guilty and denied the special allegations.

The case proceeded to a jury trial in July 2017. The following material facts were established at trial.

On the afternoon of July 31, 2016, several friends, including Dewayne Parham, Jr., Semaj Smith, Alontae Short and Lakeitha Lair, were having a barbeque to celebrate the birthday of one of their friends. Ms. Lair had been friends with Mr. Parham since 1989, and Mr. Short had known him since he was a boy. Everyone called Mr. Parham Firebug or Bug. The barbeque was at the home of Ms. Smith's sister, located at the

intersection of West 62nd Street and Harvard Boulevard in Los Angeles, across the street from Harvard Park.

Mr. Short arrived in the morning, before the party got started, and went to the grocery store several times with Mr. Parham and another friend to buy meat, paper plates and other items for the party. Mr. Parham spent the better portion of the afternoon grilling food in the front yard of the home. A lot of people from the neighborhood stopped by throughout the day. Verrance Jones was there, whom everyone called Smoke or Smokey. Defendant arrived alone at some point in the afternoon. Both Ms. Lair and Mr. Short knew of defendant from the neighborhood but they were not friends. Ms. Smith had dated defendant for a while, but ended the relationship because he was violent with her.

Most of the partygoers, including defendant, were drinking and just hanging out, talking. Ms. Smith thought defendant appeared "tipsy" but he was not "falling-down drunk." At some point during the party, Ms. Smith saw defendant lift up his shirt, complaining that it was hot, and noticed he had a gun tucked into the waistband of his pants.

Around 5:00 p.m., some people started to leave, but defendant remained, as did Mr. Parham, Mr. Short, Ms. Smith, Mr. Jones and a few others. Ms. Lair decided to go and walked to her car that was parked in the lot adjacent to Harvard Park. She did not see anyone arguing before she left the party.

Mr. Short's mother, Jilliner Bryant, lived on the opposite corner of the intersection from where the party was being held. Sometime around 5:30 p.m., Ms. Bryant was outside talking with a friend a few doors down from the party. She heard defendant cursing loudly and arguing with Smokey on the sidewalk.

Ms. Bryant retreated to the porch of her home, concerned there might be trouble. The porch was up a short flight of stairs and she could still see what was happening across the street as the party wound down.

Defendant continued to make a scene, "talking smack" and brandishing a handgun. According to Mr. Short, defendant pulled his shirt up several times to reveal the gun tucked into the waistband of his pants. Defendant confronted Smokey, pushed him, grabbed him by the throat, and threatened to kill him, saying "I'll smoke you."

At that point, Mr. Parham intervened, telling defendant to calm down. According to both Ms. Smith and Mr. Short, Mr. Parham tried to keep things from getting out of control, but defendant continued to act aggressively and talk "trash." Mr. Parham convinced Smokey to get into his car so he could drive him home. As Mr. Parham started to drive off with Smokey, defendant yelled, "when you get back, I'm going to light this shit up."

While Mr. Parham was gone, defendant paced around, "calling everybody bitches." Mr. Short noticed that defendant continued to hold onto his gun in the front pocket of his pants. He tried to keep his eye on defendant because there were still a few other people hanging around and he was concerned about what defendant might do. Defendant yelled several times, to no one in particular, "I'm going to light this mother f----r up."

Mr. Parham returned a few minutes later, and defendant started yelling and cussing at him before he could even park his car. As Mr. Parham got out of the car, defendant walked up to within two or three feet of him and cocked one arm, pantomiming a punch. Mr. Parham, who appeared exasperated, tried to back

away from defendant and said something to the effect, "he gone, so why you trippin'?" Defendant did not relent. He said, "If you had that n---a in the car, I'd light him up." Mr. Parham again told defendant to calm down, asking "what's wrong with you, bro?" Defendant said, "f--k you, you bitch ass n---a. Get away from me in my 'hood." Mr. Short saw that defendant had his hand on his gun in his pocket, partially displayed.

Mr. Parham, who did not have a weapon of any kind, then said something to the effect of "okay," "put down the gun," "let's fight." Defendant immediately pointed his gun at Mr. Parham and cocked it. Mr. Parham responded "I ain't even going to fight then. I already seeing what you trying to do." Mr. Short saw Mr. Parham put up his hands in exasperation and back away. Despite some parked cars on the street, Mr. Short said he had a clear, unobstructed view of the altercation and could hear most of what they were saying.

Mr. Parham turned around and started to walk back toward his car. Defendant said something to Mr. Parham that Mr. Short did not hear. Whatever was said caused Mr. Parham to turn around again. Mr. Short thought Mr. Parham looked mad. Mr. Parham started to step back in the direction of defendant, at which point defendant fired two shots towards his chest.

Ms. Bryant, who was still standing on her porch across the street, recalled the events similarly, except she saw Mr. Parham briefly raise his fists in front of his face as if gesturing to fight. But, almost immediately, he dropped his hands to his sides. By this time, Ms. Bryant could no longer see defendant because his truck was parked at the curb and was partially blocking her view. However, she could see Mr. Parham and she could still hear

defendant yelling and arguing with Mr. Parham, and no one else was in the street. Ms. Bryant heard gunshots and saw Mr. Parham jerk and drop to the ground.

After Mr. Parham fell to the ground, defendant shot him again in the back. Ms. Bryant was shocked and incredulous. She and her son immediately crossed the street to go to Mr. Parham. When they got to where he was lying in the street, another friend of theirs, Alverta, was leaning over him and praying. Defendant was still standing there looking at Mr. Parham, but then he got into his truck and drove away.

From the parking lot at Harvard Park, Ms. Lair heard the gunshots, and saw people running. She denied seeing the shooting. Ms. Lair got into her car and drove toward the party. She saw Mr. Parham lying in the street. Ms. Lair was upset; it was a "traumatic" thing to see. She drove a couple of blocks to the home of Mr. Parham's brother, Tyrone Johnson. When she pulled up to Mr. Johnson's home, she yelled for him repeatedly and told him his brother had been shot. She then drove back to the scene to see if the paramedics had arrived.

Mr. Johnson testified he was inside his house when he heard Ms. Lair drive up, screaming hysterically for him. He ran outside and Ms. Lair was crying and yelling that defendant shot his brother ("Curtis Ray shot your brother."). She told him to go to the intersection of 62nd Street and Harvard. He immediately drove over and found his brother lying on the ground, unresponsive.

Ms. Smith testified that she had gone into the house after Mr. Parham left with Smokey. She started to clean up the house, porch and yard because many of the guests had left. Ms. Smith was walking back and forth from the house to the yard. Through

an open window, she heard Mr. Parham return and defendant started shouting at him again. She heard gunshots and ran to see what had happened. She saw Mr. Parham holding his stomach and then drop to the ground. Her brother-in-law pulled her back inside the house. Through the window, Ms. Smith saw defendant get in his truck and drive away. She called 911.

While she was on the phone with 911, Ms. Smith heard Mr. Short screaming that defendant had shot Mr. Parham. At some point, Mr. Short called Mr. Johnson and told him that defendant had shot his brother.

Portions of the videotape from the dashboard camera in the responding officers' patrol car were played for the jury. Ms. Bryant confirmed that she was one of the individuals depicted in the video informing the officers that defendant had shot Mr. Parham and then had driven away in his truck.

The medical examiner testified that Mr. Parham died from gunshot wounds to his abdomen and back.

Twenty-five days after the shooting, defendant was arrested in Alabama. His truck was searched. It had two bullet holes in the passenger side door, and a gun cleaning kit inside. The handgun was not located. The cell phone records for two phones taken from defendant at the time of his arrest showed travel from California, beginning on August 1, through New Mexico and Texas and ending in Alabama.

Detective Stacey Szymkowiak testified that witnesses to the shooting were initially reluctant, and apparently fearful, to speak with him and his partner. After defendant was arrested, it became easier to get individuals to cooperate and explain what they had witnessed that day. While in jail, defendant's phone calls were recorded and some in-person visits were videotaped. A

number of the recorded calls and visits were played for the jury. In several phone calls, defendant and his brother discussed efforts to identify who might be testifying against him, in particular Mr. Short. Detective Szymkowiak testified about a visit from defendant's sister-in-law in which defendant told her, "don't forget to tell James what I said," while holding up a note saying, "Semaj is James. . . . I need her to tell Short not to come to court."

Defendant did not testify or present any witnesses. The parties stipulated that defendant had suffered two prior felony convictions for the purpose of establishing the elements on count 3 only.

The jury found defendant guilty of the first degree murder of Mr. Parham, of being a felon in possession of a firearm, and found the special allegations true. The jury acquitted defendant of the assault on Mr. Jones (Smokey).

The court sentenced defendant to a term of 50 years to life, plus three years, calculated as follows: 25 years to life on count 1, plus a consecutive term of 25 years to life for the enhancement pursuant to Penal Code section 12022.53, subdivision (d), plus a consecutive three-year upper term on count 3. The court awarded 352 days of custody credits, ordered victim restitution, and imposed various fines and fees not at issue in this appeal.

This appeal followed.

DISCUSSION

1. Imperfect Self-defense

Defendant contends the court prejudicially erred in excluding evidence of Mr. Parham's reputation as a skilled and "fierce" fighter which was relevant to his claim of self-defense.

Defendant argues such evidence went to his state of mind, specifically, whether he believed Mr. Parham presented an imminent threat of harm. He contends the court's exclusion of the evidence prejudicially impacted his constitutional right to present a defense.

"An appellate court applies the abuse of discretion standard to review any ruling by a trial court on the admissibility of the evidence." (*People v. Cox* (2003) 30 Cal.4th 916, 955.) "That means reversal is not appropriate unless we are compelled to conclude that the trial court ' " 'exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' " [Citation.]' " (*People v. Paniagua* (2012) 209 Cal.App.4th 499, 518.) There was no such abuse here.

During a discussion between the court and counsel about potential gang evidence, defense counsel raised the issue that Mr. Parham had a reputation for being a fighter and such evidence was relevant to their defense. The court indicated its intent to exclude any reference to gangs, but did not otherwise specifically rule on the alleged reputation evidence. Defendant does not challenge that ruling here.

Later, during the questioning of both Mr. Short and Ms. Bryant, the court sustained relevance objections to defense questions asking if Mr. Parham had a reputation in the neighborhood for being a good fighter. Defendant did not seek to ask any other questions or offer any other evidence regarding Mr. Parham's alleged reputation as a fighter.

Evidence of a victim's reputation for violence may be relevant to a defendant's self-defense claim, but *only* if there is evidence that the defendant knew of the victim's reputation or

was otherwise afraid of the victim based on threats or other conduct. (See, e.g., *People v. Tafoya* (2007) 42 Cal.4th 147, 165-166.)

Defendant did not present any such evidence here, nor did he make a reasonable proffer that any such evidence existed. At most, there was testimony from Ms. Bryant that Mr. Parham may have briefly raised his fists when defendant approached him just before shooting, and defendant suggested that one witness (presumably Mr. Short or Ms. Bryant) could testify about Mr. Parham's reputation ("one of the witnesses knew him to be such a good fighter that he could knock people out"). Such evidence, even had it been admitted, does not support a reasonable inference that defendant knew of Mr. Parham's alleged reputation or otherwise feared him.

In any event, even assuming it was error to preclude the evidence defendant sought to elicit from Mr. Short and Ms. Bryant, any error was harmless and did not impinge on defendant's constitutional right to present a defense.

" 'As a general matter, the "[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense." [Citations.] Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. [Citation.] If the trial court misstepped, "[t]he trial court's ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense." [Citation.] Accordingly, the proper standard of review is that announced in *People v. Watson* (1956) 46 Cal.2d 818, 836, and not

the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension.' " (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428.)

All of the evidence pointed to defendant as the provocateur and aggressor that day. There was no evidence that Mr. Parham acted in an aggressive or threatening way toward defendant at all, nor any evidence he had threatened defendant in the past or that defendant was scared of him. It is undisputed that Mr. Parham was unarmed. The witnesses consistently described Mr. Parham as the person trying to diffuse the situation and deflect defendant's hostility, going so far as to drive Smokey home, who had been the main focus of defendant's anger that afternoon.

Mr. Short testified that Mr. Parham told defendant something to the effect of "okay, let's fight" but when defendant responded by pointing and cocking his gun, Mr. Parham backed away and declined to fight. Ms. Bryant substantially corroborated this description of their interaction by her son, adding only that Mr. Parham briefly raised his fists up, but then dropped them to his sides. Defendant proceeded to shoot Mr. Parham at close range, and then shot him again in the back when he fell to the ground.

The jury was correctly instructed on imperfect self-defense, including that the defense is not available where the defendant, by this own wrongful conduct, has "created" the circumstances under which force is used. No reasonable jury could conclude other than that defendant was the aggressor and the creator of the circumstances that resulted in the shooting. It is not reasonably probable that defendant would have obtained a more favorable outcome had the evidence been admitted.

2. Instruction on Voluntary Intoxication

In his opening brief, defendant argued the trial court erred in instructing on voluntary intoxication. However, after the filing of defendant's opening brief, the Supreme Court issued its decision in *People v. Soto* (2018) 4 Cal.5th 968, rejecting a nearly identical instructional error argument and concluding that evidence of voluntary intoxication is not admissible on the question of whether a defendant believed it was necessary to act in self-defense. Defendant concedes his argument is no longer viable in light of *Soto*. We agree *Soto* is directly on point and that no further discussion is necessary.

3. The Admission of Hearsay by Mr. Johnson

Defendant next argues the court erred in admitting testimony from Mr. Johnson, the victim's brother, about a hearsay statement identifying defendant as the shooter. Mr. Johnson testified that Ms. Lair came to his home, crying and hysterical, and told him that defendant had shot his brother. The trial court allowed the testimony under the excited utterance exception to the hearsay rule. Defendant contends the evidence was uncontroverted at trial that Ms. Lair did not witness the shooting and was herself relying on unidentified hearsay statements in telling Mr. Johnson his brother had been shot, such that the excited utterance exception did not apply.

Evidence Code section 1240 provides that "[e]vidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." "When reviewing a ruling on the spontaneous declaration exception we

bear in mind 'each fact pattern must be considered on its own merits, and the trial court is vested with reasonable discretion in the matter.' " (*People v. Riva* (2003) 112 Cal.App.4th 981, 995.)

Defendant does not contest that Ms. Lair's statement was made while she was under the stress of excitement caused by the shooting; a fact amply supported by the record. Rather, defendant contends the statement was not admissible because Ms. Lair, based on her own trial testimony, did not witness the shooting.

The statutory language requires that the hearsay declarant "perceive" the act, condition or event about which the statement is made. As our Supreme Court has explained, the "Evidence Code does not use the term 'witnessed by.' Rather, it refers to an act, condition, or event 'perceived by' the declarant. (Evid. Code, § 1240, subd. (a).) . . . There are many ways someone can acquire the personal knowledge required to support a conclusion that the person perceived an event." (*People v. Blacksher* (2011) 52 Cal.4th 769, 810, citations omitted (*Blacksher*).)

In *Blacksher*, the hearsay declarant did not see the defendant shooting her daughter and grandson. However, she did see the defendant enter the room where they were, heard her daughter scream, followed by the sound of gunshots, and then found her daughter and grandson lying mortally wounded on the floor. (*Blacksher*, *supra*, 52 Cal.4th at pp. 810-811.) In concluding that the declarant's statement identifying the defendant as the shooter was properly admitted as an excited utterance, the Supreme Court reasoned: "These observations were clearly relevant to the circumstances of the shooting. Nothing indicated [the declarant] was insincere in her quite logical belief that defendant had shot the victims. At best, the

issue of whether [the declarant] actually saw defendant fire the shots went to the weight of her statements, not their admissibility." (*Id*. at p. 811.)

Here, Ms. Lair testified she was in the park when she heard the gunshots and therefore did not see who shot Mr. Parham. However, there was testimony from Detective Szymkowiak that the witnesses had been reluctant to cooperate and explain what they had seen that day until after defendant was arrested. There was also testimony regarding defendant's apparent efforts to dissuade witnesses from testifying. Mr. Johnson described Ms. Lair's behavior that day, moments after the shooting, when she came to his house hysterical and crying, telling him that defendant had just shot his brother. Such evidence, taken together, permitted the court, and the jury, to reasonably infer that Ms. Lair had witnessed the shooting, despite the fact she later recanted her statement when interviewed by the police.

Although not raised below, Ms. Lair's statement was also properly admitted under Evidence Code section 1235 as a prior inconsistent statement.

In any event, defendant has not shown any prejudice from the admission of Ms. Lair's statement to Mr. Johnson. " 'When the court abuses its discretion in admitting hearsay statements, we will affirm the judgment unless it is reasonably probable a different result would have occurred had the statements been excluded.' " (*People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1526.)

Ms. Lair testified at trial. Defendant was able to thoroughly cross-examine her as to what she actually saw of the shooting and the events surrounding it, and to argue to the jury

the relative weight to give her testimony. Defendant was also able to cross-examine Mr. Johnson about the circumstances under which Ms. Lair made the statement to him, and to argue to the jury whether it was credible to believe Ms. Lair had identified defendant as the shooter when she denied seeing the shooting.

Further, there was substantial evidence of defendant's guilt from other witnesses, including Mr. Short and Ms. Bryant who witnessed the shooting. There was videotape of Ms. Bryant at the scene telling the responding officers that defendant had shot Mr. Parham and fled in his truck. Ms. Smith testified she heard Mr. Short yelling, shortly after the shooting, that defendant had shot Mr. Parham. There was also evidence of defendant's consciousness of guilt, including his flight to Alabama the day after the shooting and his efforts to dissuade witnesses, including Mr. Short, from testifying. It is not reasonably probable defendant would have obtained a more favorable outcome had the court excluded Mr. Johnson's testimony that Ms. Lair had identified defendant as the shooter.

4. The Gun Use Enhancement

Finally, defendant contends remand is warranted for resentencing with respect to the gun use enhancement on count 1 in light of the amendment of Penal Code section 12022.53 during the pendency of this appeal. Respondent concedes the retroactivity of the statutory amendment, but argues remand is not warranted in light of statements made by the trial court at sentencing.

On January 1, 2018, Senate Bill No. 620 (2017-2018 Reg. Sess.) took effect, which amends Penal Code section 12022.53, subdivision (h). Among other things, trial courts are now vested with the discretion to strike or dismiss an

enhancement imposed under section 12022.53. (Stats. 2017, ch. 682, § 2.)

The discretion to strike a firearm enhancement under Penal Code section 12022.53 may be exercised as to any defendant whose conviction is not final as of the effective date of the amendment. (See *In re Estrada* (1965) 63 Cal.2d 740, 742-748; *People v. Brown* (2012) 54 Cal.4th 314, 323; see also *People v. Vieira* (2005) 35 Cal.4th 264, 305-306 ["a defendant generally is entitled to benefit from amendments that become effective while his case is on appeal"]; *People v. Smith* (2015) 234 Cal.App.4th 1460, 1465 ["[a] judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari have expired"]; *Bell v. Maryland* (1964) 378 U.S. 226, 230 ["[t]he rule applies to any such [criminal] proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it"].)

It is undisputed defendant's appeal was pending on January 1, 2018, when the amendments to section 12022.53 took effect.

In arguing that remand is not warranted here, respondent relies on *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 (*Gutierrez*). Respondent contends that, like *Gutierrez*, there is no reasonable possibility the trial court would exercise its newly granted discretion to strike the firearm enhancement given the court's statements at the sentencing hearing. We agree.

In *Gutierrez*, the trial court sentenced the defendant to the maximum possible sentence, which included an enhancement for a prior strike conviction and two other discretionary enhancements. (*Gutierrez*, *supra*, 48 Cal.App.4th at p. 1896.) While the defendant's appeal was pending, the Supreme Court

held that trial courts have discretion to strike prior convictions under the Three Strikes law in the furtherance of justice. The Court of Appeal, however, declined to remand for resentencing. The court reasoned it was obvious the trial court would not exercise its newfound discretion given it increased the defendant's sentence beyond what it believed was required by the Three Strikes law and stated the maximum sentence was appropriate. (*Gutierrez,* at p. 1896.)

Similarly here, the trial court made statements and sentencing choices that demonstrate it would not exercise its discretion to strike the firearm enhancement if the case were remanded. The court acknowledged its discretion to run the determinate term on count 3 concurrent, but imposed a consecutive, upper term sentence instead, stating "[t]he aggravating factors are very clear, this was a cold-blooded shooting. He shot him point blank, left him there to die, walked away and got in his car and left. Fled from the State of California to Alabama." The court stated it was a "very egregious case, there was no issue here of any hostility on any part between this defendant and the victim. [¶] There was some factual senario [*sic*] of hostility between the defendant and another person which the decedent was attempting to quell . . . . [¶] . . . [O]n his return from trying to ameliorate the situation, the defendant in cold blood, shoots him down out of his anger for having taken away the third person that he was having hostilities with."

After imposing 50 years to life on count 1, the trial court chose to increase defendant's sentence by an additional, consecutive three-year term, instead of imposing a concurrent sentence on count 3. There is no reason to believe the court

would therefore exercise its discretion to strike the firearm enhancement on remand. Accordingly, we conclude no purpose would be served by remanding this matter for a new sentencing hearing.

DISPOSITION

The judgment of conviction is affirmed.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.