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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MARC ANDRE EDWARDS, Defendant and Appellant.	B284206 (Los Angeles County Super. Ct. No. YA091481)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alan B. Honeycutt. Affirmed in part and reversed in part; sentence vacated and remanded with directions.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and John R. Prosser, Deputy Attorneys General, for Plaintiff and Respondent.

Marc Andre Edwards appeals from a judgment entered after a jury found him guilty of willful, deliberate, and premeditated attempted murder, discharge of a firearm at an occupied motor vehicle, and possession of a firearm by a felon. The jury also found gang and firearm enhancement allegations to be true. The trial court sentenced him to 48 years to life in prison.

Edwards contends (1) his trial counsel rendered ineffective assistance in declining to object to the prosecutor's argument regarding premeditation and deliberation, (2) the trial court erred in imposing a 10-year gang enhancement under Penal Code section 186.22, subdivision (b)(1)(C)[1] on the attempted murder count which carried a life sentence, and (3) he is entitled to a new sentencing hearing in light of Senate Bill No. 620, which amended section 12022.53 to give trial courts discretion to strike certain firearm enhancements. We reject Edwards's first contention and agree with his second and third. We vacate the sentence and remand the matter for a new sentencing hearing and order the trial court to impose the correct gang enhancement (the 15-year parole eligibility under § 186.22, subd. (b)(5)) on the attempted murder count.

BACKGROUND

Evidence presented at trial demonstrated the following facts.

On October 26, 2014, about 3:45 a.m., victim Natalia Sua was driving with two passengers in the back seat when her pickup truck was struck by a Cadillac that ran a stop sign. One of Sua's passengers heard an occupant of the Cadillac say to

[1] Further statutory references are to the Penal Code.

someone in a Mercedes driving behind the Cadillac something "about getting a gun." The driver of the Cadillac was later identified as Brandon Frisen, a member of the Nutty Blocc Compton Crips. The driver of the Mercedes was later identified as defendant Edwards, a member of the Front Hood Compton Crips, a criminal street gang allied with Frisen's gang.

After the collision, Sua's vehicle eventually came to a stop at a different intersection. A sheriff's deputy on patrol observed the Mercedes pull up next to the passenger side of Sua's vehicle, and then the deputy heard multiple gunshots. Bullets struck the front and rear passenger side doors, a passenger side window, and the front windshield of Sua's vehicle. The passenger side window shattered. Sua and her passengers ducked to avoid the gunshots. No one was struck.

The sheriff's deputy located the Mercedes, which had crashed. He observed Edwards crouching down in front of the car, appearing to conceal something. The deputy detained Edwards and recovered a .45 caliber handgun on the ground next to the front passenger side tire. A criminalist later determined that seven cartridge casings recovered from the scene of the shooting were fired from that handgun. Edwards tested positive for gunshot residue and his DNA was found on the trigger and trigger guard of the handgun.

At trial, the parties stipulated that Edwards was previously convicted of a qualifying felony supporting the charge of possession of a firearm by a felon.

The jury found Edwards guilty of the attempted murder of Sua (§§ 187, subd. (a) & 664; count 2), and found true the allegation that the attempted murder was willful, deliberate and premeditated. The jury also found Edwards guilty of shooting at

an occupied motor vehicle (§ 246; count 5) and possession of a firearm by a felon (§ 29800, subd. (a)(1); count 6). The jury further found true the allegations that Edwards committed the crimes in counts 2 and 5 for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b))[2] and that he personally and intentionally discharged a firearm in the commission of the crimes in counts 2 and 5 (§ 12022.53, subds. (b), (c) & (e)(1)).[3]

The trial court sentenced Edwards to 48 years to life in prison: a life term for the attempted murder in count 2, plus 20 years for the personal and intentional discharge of a firearm (§ 12022.53, subds. (c) & (e)(1)), and 10 years for the gang enhancement (§ 186.22, subd. (b)(1)(C)); a consecutive term of 15 years to life for shooting at an occupied motor vehicle in count 5, based on the gang enhancement (§ 186.22, subd. (b)(4)); and a consecutive term of three years (the upper term) for possession of a firearm by a felon in count 6.

DISCUSSION

Ineffective Assistance of Counsel Claim

Edwards contends his trial counsel rendered ineffective assistance in declining to object to the prosecutor's argument regarding premeditation and deliberation. To establish

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[2] Because Edwards does not challenge the sufficiency of the evidence supporting the true findings on the gang enhancement allegations, we do not summarize that evidence here.

[3] The jury was unable to reach a unanimous verdict on counts 1 and 3, which alleged the attempted murders of Sua's passengers. The trial court declared a mistrial as to these counts and subsequently dismissed them pursuant to section 1385. The information does not contain a count 4.

ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that he was prejudiced by the deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692; *People v. Williams* (1997) 16 Cal.4th 153, 215.)

Proceedings below

Using CALCRIM No. 601, the trial court instructed the jury:

"The defendant acted willfully if he intended to kill when he acted. The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with premeditation if he decided to kill before completing the acts of attempted murder.

"The length of time the person spends considering whether to kill does not alone determine whether the attempted killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration of choice and its consequences is not deliberate and premeditated. On the other hand, a cold, calculated decision can be reached quickly. The test is the extent of the reflection, not the length of time.

"The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved."

During closing argument, the prosecutor stated:

"So the next question, is it willful, deliberate and premeditated? Willful equals intended to kill. Deliberate equals

weigh the considerations for and against his choice. And premeditated equals decided to kill before starting the shooting.

"So when you're deliberating, the first thing you have to decide is was this an attempted murder, and I've shown you that it is. Only then do you move on to the allegations. Then you ask yourselves, okay, he committed attempted murder. Was this willful, deliberate, and premeditated? The separate sort of thing you have to consider.

"So a cold, calculated decision to kill can be reached quickly. This isn't something that requires days of planning, hours of planning, or even minutes of planning. It can happen in the blink of an eye.

"So here's the classic example I like to use. You come up to a red light. We do this every day. Is the light yellow? Is it a light yellow [*sic*]? Should I go? Should I not go? Is there a cop in the area? You make these decisions all the time. You look to the left; you look to the right. All right. It's safe to enter. Then you go forward. That split-second decision, that's deliberation. Should I go? Should I not go? Is it safe? That's premeditation. It involved premeditation. You weighed it beforehand. You're not just going to go without deciding if it's safe or not. So this is kind of a silly example, but this just shows you that you have these thought processes every single day, and it happens very, very quickly.

"So turning to this case, was it deliberate and premeditated? Well, we know the defendant saw this car accident with his gang ally and some strangers. We know that he wanted to get payback on behalf of his gang ally, and he deliberated about how best to do that. This required some thought process.

"Well, what should we do? They just hit Swag [Brandon Frisen's gang moniker]. We were partying. Okay. I've decided I'm going to follow them. We talked about getting the gun, and I'm going to kill them. That's deliberation. Decided to get his gun and chase the victims and kill them. He followed the victims. Terrifying. He pulled up alongside of them, stopped his car right next to them knowing exactly what was going to happen. As soon as he pulled up, those shots started ringing out; that's premeditated. He knew what he was going to do before he did it; that's premeditation. He thought about it. He pulled the trigger seven times emptying his clip; that's willful, intentional acts, seven of them actually. That's willful. And then he fled.

"So was this deliberate and premeditated? Absolutely. Absolutely, folks. He thought about it. He decided what to do. He followed them. He made the decision to kill or try to kill all three of the occupants."

Analysis

Edwards argues "the prosecutor committed misconduct by trivializing and misstating the concepts of premeditation and deliberation," in equating "the deliberative process involved in deciding to take a life, or attempt to do so" with "deciding to run a red light." He further maintains the comments "lighten[ed] the prosecution's burden" of proving premeditation and deliberation.

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.

Furthermore, and particularly pertinent here, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Morales* (2001) 25 Cal.4th 34, 44; *People v. Cash* (2002) 28 Cal.4th 703, 733.) " 'Although counsel have "broad discretion in discussing the legal and factual merits of a case [citation], it is improper to misstate the law." ' " (*People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1266.)

Edwards's trial counsel was not ineffective in declining to object to the prosecutor's argument because the prosecutor did not misstate the law or trivialize the prosecution's burden of proving premeditation and deliberation. Consistent with the law on premeditation and deliberation, the prosecutor described "carefully weigh[ing] the considerations for and against [the] choice and, knowing the consequences, decid[ing]" whether or not to run the light. (CALCRIM No. 601.) He considered whether the light was yellow, whether it was safe to enter the intersection, and whether there was a police officer in the area. The prosecutor did not posit a scenario where the driver proceeded rashly or impulsively without evaluating the choice.

In support of his position, Edwards relies on *People v. Nguyen* (1995) 40 Cal.App.4th 28 (*Nguyen*). There, the prosecutor commented during closing argument: " 'The standard is reasonable doubt. That is the standard in every single criminal case. And the jails and prisons are full, ladies and gentlemen. [¶] It's a very reachable standard that you use every day in your lives when you make important decisions, decisions about whether you want to get married, decisions that take your life at stake when you change lanes as you're driving. If you have

reasonable doubt that you're going to get in a car accident, you don't change lanes. [¶] So it's a standard that you apply in your life. It's a very high standard. And read that instruction, too. I won't paraphrase it because it's a very difficult instruction, but it's not an unattainable standard. It's the standard in every single criminal case.' " (*Id.* at p. 35.)

In disapproving the prosecutor's comments, the appellate court in *Nguyen* explained: "The prosecutor's argument that people apply a reasonable doubt standard 'every day' and that it is the same standard people customarily use in deciding whether to change lanes trivializes the reasonable doubt standard. It is clear the almost reflexive decision to change lanes while driving is quite different from the reasonable doubt standard in a criminal case. The marriage example is also misleading since the decision to marry is often based on a standard far less than reasonable doubt, as reflected in statistics indicating 33 to 60 percent of all marriages end in divorce." (*Nguyen*, *supra*, 40 Cal.App.4th at p. 36.) The appellate court also stated: "We strongly disapprove of arguments suggesting the reasonable doubt standard is used in daily life to decide such questions as whether to change lanes or marry. The argument is improper even when the prosecutor, as here, also states the standard for reasonable doubt is 'very high' and tells the jury to read the instructions." (*Ibid.*) Notwithstanding its disapproval of the prosecutor's argument, the court in *Nguyen* affirmed the judgment because it found the defendant waived the issue by failing to object and was not prejudiced. (*Id.* at pp. 36-37.)

Nguyen is not an apt comparison. It addressed a different concept—the reasonable doubt standard. Moreover, in this case, in explaining the concepts of premeditation and deliberation, the

prosecutor did not describe an "almost reflexive decision." (*Nguyen*, *supra*, 40 Cal.App.4th at p. 36.) Instead, as discussed above, the prosecutor here described a decision based on a careful evaluation of the pros and cons of proceeding.

Even if Edwards could establish his trial counsel's deficient performance in failing to object to the prosecutor's argument, his ineffective assistance of counsel claim would still fail because he cannot establish prejudice—"a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Ibid.*)

The evidence of premeditation and deliberation in this case was strong. After witnessing the car accident between his ally and the victims, and being involved in a discussion about retrieving a firearm, Edwards followed the victims, pulled his car alongside theirs, and shot seven times at the victims' vehicle. The evidence demonstrated "a cold, calculated decision to kill." (CALCRIM No. 601.) Moreover, the trial court properly instructed the jury on premeditation and deliberation and "[w]e must presume the jury followed the instruction." (*Nguyen*, *supra*, 40 Cal.App.4th at p. 37.)

Imposition of 10-Year Gang Enhancement on Count 2

Edwards contends, and the Attorney General concedes, the trial court erred in imposing the 10-year gang enhancement under section 186.22, subdivision (b)(1)(C) on the attempted murder count. Both sides agree the court should have imposed the 15-year minimum parole eligibility date under section 186.22, subdivision (b)(5) instead.

"Penal Code section 186.22, subdivision (b) establishes alternative methods for punishing felons whose crimes were committed for the benefit of a criminal street gang. Section 186.22, subdivision (b)(1)(C) (section 186.22(b)(1)(C)) imposes a 10–year enhancement when such a defendant commits a violent felony. Section 186.22(b)(1)(C) does not apply, however, where the violent felony is 'punishable by imprisonment in the state prison for life.' (Pen.Code, § 186.22, subd. (b)(5).) Instead, section 186.22, subdivision (b)(5) . . . applies and imposes a minimum term of 15 years before the defendant may be considered for parole." (*People v. Lopez* (2005) 34 Cal.4th 1002, 1004.)

The sentence for count 2, the attempted murder count, is life in prison. Accordingly, the trial court erred in imposing the 10-year gang enhancement under section 186.22, subdivision (b)(1)(C) on this count. The trial court should have imposed the 15-year minimum parole eligibility date under section 186.22, subdivision (b)(5) and is ordered to do so upon remand.

Remand for Resentencing in Light of Senate Bill No. 620

When sentencing Edwards on count 2, the attempted murder count, the trial court imposed a 20-year enhancement pursuant to section 12022.53, subdivisions (c) and (e)(1), because the jury found Edwards personally and intentionally discharged a firearm. At the time of sentencing, the trial court lacked authority to strike or dismiss enhancements under section 12022.53. (See, e.g., *People v. Somnang Kim* (2011) 193 Cal.App.4th 1355, 1362-1363, citing former § 12022.53, subd. (h).)

In October 2017, the Legislature amended section 12022.53 to provide that the "court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss

an enhancement otherwise required to be imposed by this section." (§ 12022.53, subd. (h); Stats. 2017, ch. 682, § 2.)[4] The amendment went into effect on January 1, 2018, before the judgment of Edwards's conviction became final. (See Cal. Const., art. IV, § 8, subd. (c).) Edwards contends the statute requires that the trial court be given an opportunity to exercise its new discretion to strike the firearm enhancement imposed as part of his sentence. We agree.

An amendment to the Penal Code will not generally apply retroactively. (See § 3.) However, an exception applies when the amendment reduces punishment for a specific crime. (See *In re Estrada* (1965) 63 Cal.2d 740, 745; accord, *People v. Brown* (2012) 54 Cal.4th 314, 323-324.) Reduction of a punishment indicates the Legislature has "expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act," and "should apply to every case to which it constitutionally could apply." (*In re Estrada*, *supra*, at p. 745.)

The exception to nonretroactivity extends to amendments that do not necessarily reduce a defendant's punishment but give the trial court discretion to impose a lesser sentence. (*People v. Francis* (1969) 71 Cal.2d 66, 75-76.) Edwards argues the amendment to section 12022.53 applies retroactively to defendants in his position. The Attorney General concedes the point, and we agree.

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[4] Under section 1385, the court may, in furtherance of justice, "strike or dismiss an enhancement" or "strike the additional punishment for that enhancement." (§ 1385, subds. (a) & (c); see *People v. Meloney* (2003) 30 Cal.4th 1145, 1155.)

Nevertheless, the Attorney General argues that we need not remand the case for resentencing because the record indicates the trial court "would not . . . have exercised its discretion to lessen the sentence." (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 (*Gutierrez*) [declining to remand for the trial court to consider its new discretion to strike a recidivist allegation where the record showed "no purpose would be served"].) In *Gutierrez*, the trial court increased the defendant's sentence beyond what it believed the "Three Strikes" law required, by imposing the high term and two additional discretionary one-year enhancements. The court stated during sentencing that imposing the maximum sentence would be appropriate. (*Ibid.*) On appeal, the defendant requested that his case be remanded to the trial court for resentencing after our Supreme Court decided in *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 that a trial court has discretion to strike prior strikes in determining a defendant's sentence. The appellate court denied the request, noting that because the trial court had indicated both in its comments and by the sentence itself that a maximum sentence was appropriate, "no purpose would be served" by a remand. (*Gutierrez*, *supra*, at p. 1896.)

The Attorney General argues that by the same reasoning, there is no need to remand Edwards's case, stating: "[T]he trial court found that the violent and serious nature of the crime—shooting at innocent victims of a traffic collision with an allied gang member—outweighed any mitigation [that he was only 18 years old at the time of the offenses and had a job as an assistant manager at a restaurant]. As to every discretionary choice the trial court had, it chose the most punitive option available. Nothing suggests that the trial court wished to impose a more

lenient sentence; indeed, the trial court found that the sentence imposed would still give appellant a 'meaningful opportunity at life.' "

We are not persuaded. In *Gutierrez*, the trial court stated during the initial sentencing hearing that " 'this is the kind of individual the law was intended to keep off the street as long as possible,' " and indicated it would not have exercised its discretion to lessen the sentence. (*Gutierrez*, *supra*, 48 Cal.App.4th at p. 1896.) In the current case, although the trial court imposed a longer prison term than required, the court did not state or imply that it would have imposed the firearm enhancement even had it discretion not to do so.

Furthermore, because the law at the time of sentencing did not allow the trial court to strike firearm enhancements, Edwards had no reason to argue that the court should strike his enhancement. As our Supreme Court explained in a somewhat similar circumstance in *People v. Rodriguez* (1998) 17 Cal.4th 253, 258, "The evidence and arguments that might be presented on remand cannot justly be considered 'superfluous,' because defendant and his counsel have never enjoyed a full and fair opportunity to marshal and present the case supporting a favorable exercise of discretion." (*Ibid.* [requiring the presence of defendant and counsel at a hearing in which the court would determine whether it could reasonably exercise its discretion to strike a prior strike].)

DISPOSITION

Edwards's sentence is vacated. On remand, the trial court shall (1) impose the 15-year minimum parole eligibility date under section 186.22, subdivision (b)(5) on the attempted murder count (count 2), and (2) hold a new sentencing hearing to consider

whether to exercise its discretion under section 12022.53, subdivision (h) to strike or dismiss an enhancement otherwise required by section 12022.53. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

JOHNSON, J.

BENDIX, J.