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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. ULISES CARCAMO, Defendant and Appellant.	B280073 (Los Angeles County Super. Ct. No. BA432316)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lisa B. Lench, Judge. Affirmed and remanded in part.

Patricia A. Scott, 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 Colleen M. Tiedemamn, Deputy Attorneys General, for Plaintiff and Respondent.

Ulises Carcamo appeals from a judgment which sentences him to 50 years to life in prison for the first degree murder of Aniya Knee Parker. Carcamo contends there is insufficient evidence to prove he shot and killed Parker with premeditation or deliberation. Alternatively, he seeks remand for the opportunity to create a record of information to be considered at a future youth offender parole hearing for which he is newly eligible under recently amended Penal Code section 3051.[1] He further seeks remand for the trial court to exercise its discretion to strike a firearm enhancement under section 12022.53, subdivision (h), which became effective on January 1, 2018. We remand for the limited purposes requested by Carcamo, but otherwise affirm the judgment.

FACTS

Carcamo and Eric Carrillo were members of a street gang called Clanton 14 or C14. Carcamo was known by the moniker, "Silly." Prior to his initiation into C14, Carcamo used the moniker "Keps." Carrillo was known as "Lokito" or "Loco." Carcamo often helped Carrillo, who was homeless, to find food, shelter, and clothing.

Parker's Murder

During the evening of October 1, 2014, Carcamo and Carrillo drank alcohol and ingested methamphetamine with a third Clanton 14 gang member, Soldier, for several hours on a dead end street within Clanton 14 territory. In the early morning hours of October 2, the three gang members decided to take a walk around the neighborhood.

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[1] All further section references are to the Penal Code unless otherwise specified.

Soldier walked a few feet ahead of Carrillo and Carcamo. At the intersection of Kenmore Avenue and Melrose Avenue, they passed an African American man and an African American woman, Parker. Parker asked if they had a "connect." Carrillo understood she was asking to buy drugs. Because he had drugs on him to sell, Carrillo responded, "Yeah." Carcamo continued walking while Carrillo stopped to speak with Parker. When Carrillo asked whether Parker had any money on her, she backed away from him and pulled a pocket knife. Carrillo believed she felt threatened that he would rob her. Carrillo panicked when he saw the knife and hit her in the face with his fist. She cried out for help and turned to walk away. At that point, Carcamo turned, walked past Carrillo, and shot Parker in the back. After she was shot, Parker managed to cross the street and lay down by a lamppost.

Parker died from two gunshot wounds, one to her left bicep and another to her left lateral chest and back area. The bullet damaged her left lung and went through her heart. The medical examiner did not determine whether a single bullet was responsible for both wounds because the bullet was removed at the hospital. Parker was a 47-year-old African American transgender woman who was six feet tall and weighed 175 pounds.

Although two nearby surveillance cameras captured the shooting, officers were unable to identify the assailants. The surveillance videos were shown to the public during news broadcasts on October 10. Later, several people, including Carrillo, implicated Carcamo in Parker's murder.

The Burglary

On January 29, 2015, J.R. parked his 2011 Chevrolet Silverado truck near his home at around 5:00 p.m. At approximately 3:00 a.m., J.R. was awakened by barking dogs and looked outside at his truck. He saw someone standing in front of his truck and someone moving inside the cab. The two individuals left after J.R. activated the truck's alarm and went outside to investigate. J.R. made eye contact with someone who appeared to be a Latino male wearing all black clothing and a black cap.

After the individuals left, J.R. noticed two beverage containers sitting on the hood of the truck. When J.R. looked in the truck, he saw a gun with a cracked handle on the passenger seat. The police recovered a .380 semiautomatic weapon loaded with four rounds in the magazine and one round in the chamber. J.R. identified Carcamo as possibly one of the persons he saw that night, though he was unable to make a positive identification. DNA taken from the beverage container left on J.R.'s truck matched that of Carcamo's, with a statistical frequency of one in 20 quintillion.

The Trial

Carcamo was charged with murder (count 1; § 187, subd. (a)), possession of a firearm by a felon (counts 2 & 4; § 29800, subd. (a)(1)), and second degree burglary of a vehicle (count 3; § 459). As to count 1, it was alleged that Carcamo personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (b)–(d). As to counts 1 and 2, it was further alleged the crimes were committed for the benefit of a criminal street gang with the intent to further and assist criminal conduct by gang members. (§ 186.22, subd. (b)(1)(C).)

At trial, the People presented testimony from Carrillo, H.S., and S.G. H.S. lived in an apartment building near where the three C14 members congregated on October 1. H.S. knew Carcamo and saw him frequently in the neighborhood. H.S. testified Carcamo once asked him if he had "seen the video." When H.S. asked him what he was talking about, Carcamo did not answer. H.S. spoke with Officer Ziegler from the LAPD about that conversation. At trial, H.S. denied implicating Carcamo during the police interview. However, Officer Zeigler testified H.S. reported he knew Carcamo as "Silly" and that he was the shooter in the video. Prior to trial, H.S. was approached by an unidentified man and warned about his testimony against Carcamo.

S.G. was a drug user who frequently associated with C14 members. S.G. saw the video on the news and recognized Carcamo, Carrillo, and another C14 gang member she knew as "Alcohol." S.G. did not go to the police with this information.

On October 15, S.G. was arrested for an unrelated attempted robbery. S.G. tried to parlay the information she had about the Parker murder into a more favorable outcome on her robbery charge. S.G. was unsuccessful, however, and she testified at trial despite failing to receive any leniency in exchange for her cooperation.

S.G. told the detective investigating Parker's murder that someone with the moniker "Flaco" was the shooter.[2] When the detective was unable to identify anyone with that moniker, S.G. admitted Silly was the shooter. S.G. testified she did not want to implicate Carcamo because he was her friend. She feared the

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[2] During her testimony, S.G. also referred to the shooter as "Seco."

members of C14 would retaliate against her and her family for testifying.

S.G. also testified Carcamo confessed to her on the night of Parker's murder that he shot someone. That night, S.G. was in the area and became aware that a shooting had occurred. Approximately three hours after S.G. observed the police respond to the incident, she went to a friend's home to buy drugs. Carcamo, Carrillo, and Alcohol were in the apartment. She knew all of them to be members of C14. Carcamo told her he shot at someone, but was unsure whether that person had been hit. He then told her they all changed clothes after the shooting. S.G. saw Carcamo with a small black gun that night, although she was unsure whether it was his gun or her friend's boyfriend's gun. S.G. was approached a few months before trial by three people in a car and warned, "Keps better be fine."

Meanwhile, Carrillo was detained on October 14 on an unrelated gun possession charge. After his arrest on the gun charge, Carrillo was interviewed about Parker's murder and shown the video. He identified Soldier and reported the shooter was another C14 gang member named Solid.

On January 8, 2015, Carrillo was arrested for the Parker murder. He admitted being at the scene and identified Carcamo as the shooter. In exchange, he received a nine-year state prison sentence. He admitted he initially identified Solid as the shooter because he liked Carcamo and did not want to implicate him. At trial, Carrillo testified to the events leading to Parker's murder, as described above. A few months before trial, someone called Carrillo's younger brother to warn Carrillo to "stop telling." Carrillo believed he would be killed if he went back out to the streets.

The People also presented expert testimony on criminal street gangs from LAPD Officer Mark Austen. Officer Austen testified that C14 has approximately 280 members. The primary activities of C14 are narcotic sales, street robberies, attempted murder, and murder. Officer Austen knew Carcamo was known as Silly or Keps and had spoken with him a few times. Carcamo admitted his membership in C14 and showed Officer Austen his tattoos. Austen opined the shooting was committed for the benefit of a criminal street gang since three members of C14 worked together to shoot someone in the middle of the street in the heart of the gang's territory.

The Verdict and Sentence

Carcamo was found guilty on all counts with true findings as to all of the special allegations. Carcamo was sentenced to a total of 50 years to life, comprised of 25 years to life for the first degree murder conviction plus 25 years to life for the firearm enhancement under section 12022.53, subdivision (d). The trial court ordered that Carcamo serve a minimum period of 15 years before being found eligible for parole pursuant to section 186.22, subdivision (b)(1)(C). The court did not impose sentences for the firearm enhancements under section 12022.53, subdivisions (b)–(c). (§ 12022.53, subd. (f).)[3] The court stayed the sentences on counts 2 and 4 pursuant to section 654. As to count 3, the burglary conviction, the court imposed a two-year sentence to run

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[3] The trial court erred in failing to impose *and stay* sentence on these enhancements. (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1130.) Because we remand for reconsideration of the firearm enhancement, we do not further address the issue. We note the issue, however, for the edification of the trial court upon resentencing.

concurrently to the sentence imposed on count 1, noting "[t]he court does not see any reason to add an additional eight months to the sentence already imposed given the nature of the most serious crime compared to the nature of this crime." Carcamo timely appealed.

DISCUSSION

Carcamo challenges the judgment on the ground there was insufficient evidence of premeditation or deliberation for a first degree murder conviction. After briefing was substantially completed, the Governor approved two amendments to existing law which impact Carcamo's case. Carcamo requested supplemental briefing on the effect of the new laws on his case. We granted the request. In the briefing, he seeks remand to create a record of information under recently amended section 3051 and for the trial court to exercise its discretion to strike a firearm enhancement under section 12022.53, subdivision (h), both of which became effective on January 1, 2018. We affirm the judgment and grant his request for remand on both issues.

I. Substantial Evidence Supports the Jury's Finding

Carcamo first argues the shooting did not have the hallmarks of premeditation or deliberation for a first degree murder conviction. Instead, he views the evidence as showing the killing was rash and impulsive. According to Carcamo, the evidence, at most, proves he committed murder in the second degree rather than first degree murder. We disagree.

In reviewing the sufficiency of evidence under the due process clauses of the United States Constitution and the California Constitution, an appellate court must determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v.*

Virginia (1979) 443 U.S. 307, 319; *People v. Rowland* (1992) 4 Cal.4th 238, 271.) "In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court 'must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) The same standard also applies in cases in which the prosecution relies primarily on circumstantial evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396.) Further, the credibility of witnesses and the weight accorded the evidence are matters within the province of the trier of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

A killing which is willful, deliberate, and premeditated is murder of the first degree. (§ 189.) In *People v. Anderson* (1968) 70 Cal.2d 15, 26–27 (*Anderson*), the California Supreme Court cataloged three common factors it found in cases addressing premeditation and deliberation: planning, motive, and manner of killing. (*Ibid.*) *Anderson* noted that a reviewing court will generally sustain a conviction where there exists evidence of all three elements, where there is strong evidence of prior planning activity, or where there exists evidence of a motive to kill, coupled with evidence of either planning activity or a manner of killing which indicates a preconceived design to kill. (*Ibid.*; *People v. Stitely* (2005) 35 Cal.4th 514, 543.)

The high court cautioned, however, that "[t]he categories of evidence . . . do not represent an exhaustive list of evidence that could sustain a finding of premeditation and deliberation, and the reviewing court need not accord them any particular weight.

[Citations.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1183; *People v. Koontz* (2002) 27 Cal.4th 1041, 1081.)

The California Supreme Court has also held there is no requisite minimum length of time between the premeditation and the action to commit the killing. (*People v. Thomas* (1945) 25 Cal.2d 880, 900.) "The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .' [Citations.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 767, overruled on another ground by *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2.)

Here, the jury could reasonably infer from the circumstances of the shooting that Carcamo's conduct was the result of preexisting reflection as opposed to a rash, unconsidered impulse. All three factors cited by the *Anderson* court are present.

As to planning, the evidence showed Carcamo brought a handgun on their walk around the neighborhood during the middle of the night. It was readily accessible and loaded. The jury could reasonably infer from this evidence that Carcamo anticipated the excursion might end in violence. (*People v. Miranda* (1987) 44 Cal.3d 57, 87 ["the fact that defendant brought his loaded gun into the store and shortly thereafter used it to kill an unarmed victim reasonably suggests that defendant considered the possibility of murder in advance."]; *People v. Morris* (1988) 46 Cal.3d 1, 23, disapproved on another ground by *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5 ["when one plans to engage in illicit activity at an isolated location during

the early morning hours, and one brings along a deadly weapon which is subsequently employed, it is reasonable to infer that one 'considered the possibility of homicide from the outset.' "].)

As to motive, the People's gang expert opined the shooter had several motives. First, he was motivated to stop someone he perceived to be a threat to his fellow gang member; the shooting took place in C14 territory after Parker displayed a knife to Carrillo. According to the expert, Carcamo was also motivated to show that C14 members are not afraid to shoot someone in the middle of the street in the heart of their territory, thus warning the community not to contact the police if they witness crimes by C14 members.

Finally, Carcamo's manner of killing provides evidence of premeditation. Parker had already turned around to walk away after her altercation with Carrillo. Carcamo ran past Carrillo to shoot Parker in the back. (See *People v. Wells* (1988) 199 Cal.App.3d 535, 541 [defendant ran after the victim and fired slowly enough to take careful aim].) There was no need for Carcamo to defend Carrillo as Carrillo had already defended himself by punching Parker in the face. The jury could reasonably infer premeditation from Carcamo's conduct, despite the relatively short period of time between Carcamo's altercation with Parker and the shooting.

When viewed in the light most favorable to the prosecution and in support of the judgment, substantial evidence supports a finding of premeditated and deliberate murder.

II. Limited Remand is Necessary

A. Carcamo May Create a Record for His Future Youth Parole Hearing

During the pendency of this appeal, the Governor approved Assembly Bill No. 1308 (AB 1308), which amends section 3051 to raise the age of those eligible for youth offender parole hearings from those who were under 23 years old to those who were 25 years of age or younger when they committed their controlling crimes. (Stats. 2017, ch. 675, § 1.) Under existing law, a youth offender who is convicted of an offense for which the sentence is a term of 25 years to life shall be considered for release at a youth offender parole hearing during his 25th year of incarceration. (§ 3051, subd. (b)(3).) At the hearing, the Board of Parole Hearings must "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (§ 4801, subd. (c).)

At the time of Carcamo's sentence, there was no need to create a record regarding his "diminished culpability" as a juvenile or the "hallmark features of youth" because he was 23 years old and not eligible for a youth offender parole hearing under former section 3051. Carcamo now requests a limited remand to make a record of information relevant to his future youth offender parole hearing under AB 1308. The Attorney General acknowledges AB 1308 applies to Carcamo and does not object to a limited remand for this purpose.

We agree remand is necessary. There is no question that AB 1308 applies to Carcamo: it has retroactive effect (Stats. 2017, ch. 675, § 1); Carcamo was under 25 years old at the time of

Parker's murder; and he was sentenced to two 25-years-to-life terms. Further, the California Supreme Court, in evaluating former section 3051 as it applied to juvenile offenders under the age of 23, held that juvenile offenders must be given the opportunity to compile information regarding the juvenile offender's characteristics and circumstances at the time of the offense to be considered at a future youth offender parole hearing, including statements by family members, friends, school personnel, faith leaders, and representatives from the community. (*People v. Franklin* (2016) 63 Cal.4th 261, 283.) Noting that such statements are more easily compiled at or near the time of the juvenile's offense rather than decades later when memories have faded or records have been lost, the high court remanded the matter to allow the defendant "sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing." (*Id.* at p. 284.) Likewise, Carcamo should be allowed the opportunity to make a similar record for his future youth parole hearing.

B. The Trial Court May Exercise its Discretion to Strike the Firearm Enhancement

An additional term of 25 years to life was imposed on Carcamo for a firearm enhancement under section 12022.53, subdivision (d). At the time Carcamo was sentenced, the trial court was prohibited from striking the firearm enhancement under subdivision (h) of section 12022.53. Senate Bill 620 (SB 620), effective January 1, 2018, however, amended subdivision (h) to remove that prohibition and grants the trial court discretion to strike or dismiss an enhancement imposed under section 12022.53. (Stats. 2017, ch. 682, § 2.) Carcamo

requests we remand the matter for the trial court to exercise its newfound discretion under SB 620.

We agree the trial court should be given the opportunity to exercise its discretion in this case. The discretion to strike a firearm enhancement under section 12022.53 may be exercised as to any defendant whose conviction is not final as of its effective date. (See *In re Estrada* (1965) 63 Cal.2d 740, 742–748; *People v. Brown* (2012) 54 Cal.4th 314, 323.) Here, Carcamo's appeal was not final when SB 620 went into effect on January 1, 2018. (See *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"]; see also *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"].) The Attorney General agrees SB 620 applies retroactively to Carcamo's case because it is not yet final.

Nevertheless, the Attorney General relies on *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 to argue remand would serve no purpose because it would be a manifest abuse of discretion to strike the firearm enhancement given the evidence adduced at trial. *Gutierrez* is distinguishable. The trial court in *Gutierrez* sentenced the defendant to the maximum possible sentence and indicated it would not have exercised its discretion to lessen the sentence. (*Id.* at p. 1896.) Thus, the court on appeal found it was unnecessary to remand to allow the trial court to exercise its discretion since it was obvious it would not do so. (*Ibid.*)

That is not the case here. The trial court did not sentence Carcamo to the maximum possible sentence and was silent as to what it would do if it had discretion to strike the firearm enhancement. Instead, the trial court imposed a concurrent sentence for the burglary count. In addition, the court did not know it could have chosen to strike the 25-year-to-life enhancement under section 12022.52, subdivision (d) and impose either the 20- or 10-year enhancement under subdivisions (b) or (c) instead. As a result, we find remand is necessary to allow the trial court to exercise its discretion. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 257.)

DISPOSITION

The matter is remanded to allow Carcamo sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing and to allow the trial court to exercise its discretion to strike the firearm enhancement under section 12022.53, subdivision (h). The judgment is otherwise affirmed.

BIGELOW, P.J.

We concur:

RUBIN, J. HALL, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.