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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAVIER DIEGO MONDRAGON, Defendant and Appellant.	B244552 (Los Angeles County Super. Ct. No. PA068596)

APPEAL from a judgment of the Superior Court of Los Angeles County. Harvey Giss, Judge. Affirmed.

Laura S. Kelly, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell, Susan Sullivan Pithey and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

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Javier Diego Mondragon appeals from the judgment entered upon his conviction by jury of first degree murder in violation of Penal Code section 187, subdivision (a).[1] The jury also found true the allegations that appellant personally and intentionally discharged a firearm causing great bodily injury and death (§ 12022.53, subd. (d)), and that he committed the murder for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)). The trial court sentenced appellant to 50 years to life in state prison, calculated as 25 years to life for the murder, plus a consecutive term of 25 years to life for the firearm enhancement.

Appellant contends the trial court prejudicially erred in reopening voir dire after 12 jurors were sworn. Appellant also contends the trial court erred by instructing the jurors that the death penalty and life without the possibility of parole were not potential punishment in this case.

We conclude the court erred in reopening voir dire but the error did not prejudice appellant. We affirm the judgment.

FACTUAL BACKGROUND

Prosecution Case

Murder of Mario Rodriguez on December 15, 2006

On December 15, 2006, Juan Maciel invited his friends Anthony Bertocchi, Hinnacio Moya, and Mario Rodriguez to a birthday party in Arleta. Bertocchi and Rodriguez arrived at approximately 11:00 p.m. and parked on the street. Rodriguez carried some beer and a nitrous oxide tank. As Bertocchi and Rodriguez walked down the street to meet Moya they were confronted by three men. One of three men stated, "What the fuck are you looking at, bitch." Bertocchi and Rodriguez ignored them and continued walking until they met Moya.

Bertocchi and his friends could not get into the party and decided to hang out by a friend's car parked on the street. Maciel came outside to be with them. The three men, who earlier had confronted Bertocchi and Rodriguez, approached again. Appellant was

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[1] All statutory references shall be to the Penal Code unless otherwise noted.

the tallest of the three. He was "skinny" and had a "fade" with "a little bit of curly hair on top." Salvador Salvatierra was the shortest of the three. He had a tattoo on the side of his face and a bar code tattoo on the back of his neck. Ruben Rodriguez was the third man.[2] He had a goatee, was "stocky," and "looked a little older." Salvatierra, who was drunk, wanted to buy beer and argued with Rodriguez. When Ruben intervened and said, "Let's forget about this," Salvatierra began arguing with Moya. Moya was about to fight Salvatierra when appellant pulled out a rifle and paced back and forth. Salvatierra and Ruben claimed to be "Paca Trece" gang members and appellant claimed to be an "HK" gang member. Appellant stated, "I'm about to blast someone," and fired three to five shots into the air. Appellant lifted up his shirt and revealed an "HK" tattoo.[3]

Rodriguez picked up the nitrous oxide tank and the beer and walked away with Maciel. Bertocchi was with a group of people that were "trying to calm down" Moya. Appellant, Salvatierra, and Ruben walked backwards continuing to call out their gang names and making gang signs with their hands. They approached Rodriguez. Appellant pointed the rifle at Rodriguez and Salvatierra challenged Rodriguez to a fight. Rodriguez told Maciel he would fight Salvatierra and asked Maciel to hold the nitrous oxide tank. When Maciel placed the nitrous oxide tank in his car, he heard gunshots. Maciel turned around and saw appellant pointing the rifle at Rodriguez. Rodriguez held his arm and his chest and ran towards Maciel. Rodriguez collapsed on the driveway and his friends put him in Bertocchi's car. While driving to the hospital Bertocchi flagged down a patrol car and the officers took Rodriguez out of the car. An ambulance arrived shortly afterwards and Rodriguez was pronounced dead at the scene. Rodriguez suffered a fatal gunshot wound to the neck and another fatal gunshot wound to the chest. He also suffered

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[2] Ruben Rodriguez will be referred to by his first name, to avoid confusion with the victim Mario Rodriguez, not out of disrespect.

[3] Prosecution exhibit 68 was a photograph of appellant's chest taken December 27, 2006, which showed a tattoo of some writing on the top, and the letters "H" and "K" on his chest.

additional gunshot wounds to the hip and abdomen. Three bullet fragments extracted during Rodriguez's autopsy were consistent with .22-caliber bullets.

Investigation

1. Forensics

Los Angeles Police Department (LAPD) Detective Jose Martinez responded to the crime scene and recovered four shell casings by the driveway where Rodriguez had been shot. He recovered four more shell casings further down the street where the confrontation with Moya had taken place. Ballistics testing showed the eight casings were .22-caliber and fired from the same firearm. Two of the three bullet fragments recovered from Rodriguez's body were .22-caliber and fired from the same firearm. The third bullet fragment was too damaged to determine whether it was fired from the same firearm.

2. Moya's Identification

Moya went to the police station where he was shown a series of photographs obtained from other investigations involving HK gang members. Moya identified appellant as the shooter and he was certain of his identification. He identified Salvatierra as the man with whom he argued, and identified Ruben as the third member of appellant's group.[4] Moya identified appellant at trial as the shooter.[5]

3. Appellant's Interview

On April 4, 2008, Detective Martinez interviewed appellant.[6] Appellant stated that he was a member of the HK tagging crew for approximately five or six years and was jumped into the Pacoima 13 or Paca Trece gang ("Treces") in 2007. Other members of HK were active members of Treces but appellant stated he was no longer associated

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[4] Moya's photo identification interview was recorded and played to the jury.

[5] Bertocchi also identified appellant at the trial as the man with the firearm.

[6] Appellant's interview was recorded and played to the jury.

with them. Appellant identified himself and Salvatierra from a photograph. He stated that Salvatierra used to be called "Siege" from HK, but was now called "Tiny" from Treces, and had a bar code tattoo on the back of his neck. At the time of the interview, appellant had "Pacas" tattooed on his stomach. Appellant used to have a large "H" and "K" tattooed on his chest but the Treces made him cover it up with another tattoo.

4. Salvatierra's Interview

On September 2, 2010, LAPD Detective Corey Farell and Detective Byers arrested Salvatierra and interviewed him. Salvatierra's interview was recorded and portions of the interview were played to the jury. At trial, Salvatierra did not recall or denied his prior testimony from the preliminary hearing and his interview with Detectives Farell and Byers. Salvatierra was "very hesitant" throughout the interview and did not want to get involved. He admitted that he was a tagger and belonged to the HK gang, and that he covered up a "Siege" tattoo by his right sideburn. After approximately two hours of denying knowledge he provided details of the murder that were corroborated by physical evidence and information not provided to him by the detectives. Salvatierra stated that he was at a party with appellant and Ruben when "someone started talking shit." Salvatierra was ready to fight when he heard gunshots and "everybody was running." He followed appellant and Ruben to appellant's house. Salvatierra stated that the firearm looked like "a little mini A.K. 47" and that neither he nor Ruben had it. Appellant hid the firearm in a kitchen cabinet in his house.

Salvatierra stated that he could get killed for saying who had the firearm. He was worried about snitching. During the interview he was afraid that people outside the room could hear what he was saying and he asked the detectives to speak lower. Salvatierra wrote a note stating that he would need protective custody if he went to jail and that his entire family would be in danger.

Gang Testimony

LAPD Officer Timo Peltonen testified as the prosecution's gang expert. Paca Trece was one of the oldest gangs in Pacoima 13. In 2006, there were approximately 300 documented Paca Trece members and the gang's primary activities included robberies,

murders, sale of narcotics, assault with deadly weapons, and witness intimidation. In 2006, HK was a tagging crew consisting of approximately five members that began as a clique of Paca Trece but was eventually absorbed completely into Paca Trece. Officer Peltonen was assigned to the gang enforcement detail and was familiar with their "gang culture, their gang membership, boundaries and rivalries of the gang."

Officer Peltonen reviewed a number of photographs of appellant's tattoos, including one taken in December 2006 which showed he had "HK" tattooed on his chest, another taken in 2007 which showed he had "Pacas" tattooed on his stomach, and one taken in April 2008 which showed that his "HK" tattoo had been covered up. Officer Peltonen also reviewed photographs of appellant and other individuals flashing Paca Trece and HK gang signs. He opined that appellant was a member of Paca Trece and HK in December 2006. Responding to a hypothetical question based on the facts of this case, Officer Peltonen opined that the shooting and killing of Rodriguez was committed in association with, and for the benefit of, a criminal street gang.

Defense Case

No evidence was presented on behalf of appellant.

DISCUSSION

I. Jury Selection

Appellant contends that the trial court erred in reopening voir dire after the jury was sworn. He argues the error was structural requiring reversal, and he was deprived of "his right to his chosen and sworn jury."

A. Factual Background

On June 11, 2012, defense counsel and the prosecutor accepted the 12-member jury panel and the trial jury was sworn. The court adjourned for the day and planned to pick three alternate jurors the following day. On June 12, 2012, before the selection of alternates commenced, Juror No. 6 asked to speak to the court. In chambers, with both counsel present, Juror No. 6 stated that she was nervous about the trial because many of her family members including her husband and two brothers-in-law were in law

enforcement. She also stated her employer did not pay for jury service and that she had filed for bankruptcy.

After Juror No. 6 left chambers, defense counsel moved for a mistrial. He stated that "he very well might have exercised a peremptory challenge" on Juror No. 6 had he known the information she had just revealed. The prosecutor objected to a mistrial. The court brought Juror No. 6 back into chambers for further questioning. She stated she was worried about her family's safety if appellant was found guilty and her fear would cause her to vote not guilty. After Juror No. 6 left chambers the court stated the prosecution was "going to get the short end of the stick" based on her statements. The prosecutor suggested removing Juror No. 6 and continuing with voir dire. The court noted that the alternates had not been selected and agreed with defense counsel that jeopardy had already attached. Defense counsel renewed his motion for a mistrial and stated he would not agree to replacing Juror No. 6.

After a recess, the court cited *People v. Griffin* (2004) 33 Cal.4th 536 (overturned on other grounds by *People v. Riccardi* (2012) 54 Cal.4th 758) (*Griffin*), for the proposition that jeopardy did not attach for purposes of the double jeopardy clause until the 12 regular jurors and the alternates are impaneled and that the trial court had the authority, but not sua sponte duty to reopen jury selection when the trial court discharged a juror before the selection and swearing in of the alternate jurors. Based on *Griffin*, the court stated it intended to excuse Juror No. 6 for cause, replace her with the person in Seat 13, and reopen jury selection with five peremptory challenges remaining for the defense and nine for the prosecution. Defense counsel objected and moved for a mistrial, which the court denied. The court then excused Juror No. 6 and reopened voir dire.

Once voir dire was reopened, defense counsel sought clarification on the number of peremptory challenges available to each side. The court explained that if the panel was accepted with the person from Seat 13 replacing Juror No. 6 then both sides had 3 peremptory challenges for the selection of three alternates, but counsel was free to excuse anyone because they were still picking a jury. The person from Seat 13 replaced Juror No. 6. The first peremptory challenge was to the prosecutor and the following nine

challenges occurred: (1) The prosecutor excused Juror No. 6; (2) Defense counsel accepted the panel and the prosecutor excused Juror No. 6; (3) Defense counsel excused Juror No. 6; (4) The prosecutor excused Juror No. 6; (5) Defense counsel excused Juror No. 1; (6) The prosecutor excused Juror No. 12; (7) Defense counsel excused Juror No. 12; (8) The prosecutor excused Juror No. 12; (9) Defense counsel accepted the panel and the prosecutor excused Juror No. 5. Defense counsel, who had two remaining peremptory challenges, accepted the panel. The prosecutor had three remaining peremptory challenges and also accepted the panel. The trial jury was sworn, and two alternates were selected and sworn.

B. Legal Analysis

It is undisputed that 12 jurors were sworn in this case on June 11, 2012. Under *People v. Cottle* (2006) 39 Cal.4th 246 (*Cottle*), once the jurors were sworn, the trial court lacked authority to reopen jury selection as to those trial jurors. That the trial court excused Juror No. 6 for cause did nothing to affect the application of *Cottle* because the *Cottle* court did not indicate that there were any exceptions to this rule. The court in *Cottle* observed, "[t]his conclusion [that the trial court lacks authority to reopen jury selection once the 12 trial jurors are sworn] does not leave the court without recourse should a juror become unable to serve. Code of Civil Procedure sections 223 and 234 and Penal Code section 1089 provide for the removal of a juror upon a showing of good cause." (*Id.* at p. 259.)

The trial court only had the discretion to reopen the selection of the regular jurors if the panel was not yet sworn. "The phrase '"the jury is sworn'" refers to the trial jury, not the alternates. (*Cottle*[, *supra*, 39 Cal.4th at p. 255].) If a party were allowed to use peremptory challenges to members of the jury after the jury was sworn, but before the alternates were selected, gamesmanship would be encouraged. (*Id.* at p. 257.) 'For example, if a favorable juror was selected as an alternate, a party would then try to challenge a member of the jury so that the alternate could replace the juror. Nothing in the legislative history suggests an intention to create such a scheme.' (*Ibid.*)" (*People v. DeFrance* (2008) 167 Cal.App.4th 486, 503.) The People correctly concede that the trial

court should not have reopened jury selection after the jury was sworn. (*Cottle, supra*, 39 Cal.4th 246.)

Appellant acknowledges that double jeopardy claims are not sustainable here. Double jeopardy does not attach until the 12 regular jurors and any alternate jurors have been selected and sworn. (*Griffin, supra*, 33 Cal.4th at pp 565-566.) But, appellant cites a number of federal cases involving claims of due process violations based on structural error and argues he was deprived "of the right to a sworn, chosen jury."

Precedent holds that the right to be tried by the particular jury that has been selected is protected by double jeopardy principles. (See *Downum v. United States* (1963) 372 U.S. 734, 736 [10 L.Ed.2d 100, 102-103] [referring to the "valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him" but explaining such right "may be subordinated to the public interest—when there is an imperious necessity to do so"]; but see *Arizona v. Washington* (1978) 434 U.S. 497, 505 & fn. 16 [54 L.Ed.2d 717, 728] ["a rigid application of the 'particular tribunal' principle is unacceptable . . ." and departing from the ideal does "not invariably create unfairness"].)

However, in these and similar cases, the courts were referring to juries that had been selected *and sworn*. Our Supreme Court has held that "a criminal defendant *who is in the midst of trial* has an interest . . . in having his or her case resolved by *the jury that was initially sworn to hear the case*—and in potentially obtaining an acquittal from that jury. [Citation.] [Fn. omitted.] It also follows that in certain circumstances, conduct by the prosecution or the court that results in mistrial, thereby terminating the trial prior to resolution by the jury, may impair that aspect of a defendant's protected 'double jeopardy' interest." (*People v. Batts* (2003) 30 Cal.4th 660, 679, italics added.) And, when addressing cases discussing the '"particular tribunal' or 'chosen jury'" issue, the high court observed "these cases do no more than determine that jeopardy attaches once a jury and alternates are chosen [citation], and that granting an unnecessary mistrial bars retrial [citation]. They do not stand for the proposition that defendant becomes immune from further prosecution merely because one particular juror is improperly discharged, an

alternate substituted, and an actual verdict duly entered." (*People v. Hernandez* (2003) 30 Cal.4th 1 (*Hernandez*).)

Here, appellant was not in the "midst of trial" because he was never placed in jeopardy. Precedent holds that the right to a "particular" jury applies when and only when a jury has been sworn, and jeopardy has actually attached. (See *Hernandez, supra,* 30 Cal.4th at p. 8.) We are not free to expand that rule. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Even though the trial court erred, a judgment may not be reversed on appeal unless the error caused a "miscarriage of justice." (Cal. Const., art. VI, § 13.) The prejudicial effect of an error must be examined and may be found harmless. The *Watson* test applies to errors of state law. Under that standard, we affirm the judgment unless there is a reasonable probability that a result more favorable to the appellant would have been reached in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) A reasonable probability is one sufficient to undermine the confidence in the outcome of the proceedings. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.)

Juror No. 6 was properly discharged for cause and defense counsel stated that had he known she lied during voir dire he would have exercised one of his peremptory challenges against her. However, the record does not support appellant's contention that reopening voir dire disadvantaged the defense and aided the prosecution because the defense had only five peremptory challenges while the prosecution had nine. Defense counsel had two remaining peremptory challenges when he accepted the trial jury. Furthermore, the evidence against appellant was overwhelming. Moya identified appellant as the shooter within hours of the shooting and at trial. Bertocchi identified appellant at trial as the man with the firearm. Salvatierra acknowledged that appellant was the one with the firearm. Here, there is little probability of a different result due to the court's error. Thus, any error was harmless.

II. No Instructional Error Regarding Potential Punishment

Appellant contends the trial court improperly instructed the jurors that the death penalty and life without the possibility of parole were not potential punishment in this case and that the error violated his due process right to a fair trial.

During voir dire, the trial court instructed the panel of jurors as follows: "You must reach your verdict in this case without any consideration of the subject matter of punishment. That will be left to the court. So should you find the defendant guilty and find one or more of the special allegations alleged regarding what use of a weapon is true, you are not to worry about what the consequence of that will be. That's left to the court; but since this is a murder charge I am informing you now so that you have no second thoughts about it, the prosecution is not seeking the death penalty and life without possibility of parole is not on the line because no special circumstances are alleged in this particular case. So do not worry about that particular subject matter or what the consequence of an honest and true verdict will be. That's for the court."

Before the prosecutor resumed his opening statement the court stated: "At this time then the second thing I want to bring up we brought in a third panel yesterday, and I don't believe I mentioned this fact to the panel. When the court has read the charges to you in this case and count one, the only substantive count alleged beside the special allegations charges of murder, the court wants you to understand that the prosecution has not filed any special circumstance allegations. Therefore, you must understand despite the fact that sentence or punishment is not to be considered in deciding this case that the death penalty and life without possibility of parole, which are the two options when the case is a capital case, don't exist in this case. There is no death penalty and no life without parole. Otherwise the court does all the sentencing in this case. That's important for you to understand because I know there may be people that have in their mind that if that were the case that they might want to up the ante or change their way of thinking about the case as to what it takes to get a conviction or the overview that they might have. So I don't want you to freeze up with that in mind."

Before the jury began deliberations, the trial court instructed the jurors regarding punishment as follows: "You must reach your verdicts without any consideration of the subject matter of punishment. That is a subject matter for the court. I want to repeat because the charge is murder in this case that before the trial began I made it very clear this is not deemed a capital case, and the prosecution filed no special circumstances based on their understanding of the facts and the subject matter of death or life without possibility of parole. It is not in the cards in the verdict if you should return a verdict."

It is "improper for the jury to consider what disposition of the defendant may be made or what treatment he may receive" if convicted. (*People v. Allen* (1973) 29 Cal.App.3d 932, 936.) Reference to a potential "punishment is generally held reversible" because a jury may be misled in determining guilt or innocence by improper consideration of potential punishment. (*Id.* at pp. 936-937.) But, appellant's contention overlooks that it is improper references to potential punishment that are prohibited. Here, the trial court properly reminded the jury that it was not to concern itself with the subject matter of punishment because that was for the court to decide.

Appellant contends that these admonitions suggested a potentially light sentence, which would induce the jury to ignore the gravity of its task and be more likely to convict. He argues the jurors "may change their way of thinking about the case" or may "lower the ante and reduce the burden of proof." Appellant's contention is purely speculative and contrary to the record herein. The trial court properly instructed the jury that it must reach its verdicts "without any consideration of the subject matter of punishment (CALCRIM No. 3550); it must decide the case on the evidence and laws and nothing else (CALCRIM Nos. 103, 104 & 200); and it must not convict appellant unless the prosecution proved his guilt beyond a reasonable doubt (CALCRIM No. 220.) It is presumed the jury followed these instructions. (*People v. Boyette* (2002) 29 Cal.4th 381, 436.)

To the extent that one could discern any impropriety from the court's remarks, we find it harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705].) Appellant was charged with murder, and the issues for jury

resolution were whether appellant was the shooter, and whether the crime was of first or second degree. The court's remarks did not affect the jury's consideration of these issues.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J. *

FERNS

We concur:

_____, Acting P. J.

ASHMANN-GERST

_____, J.

CHAVEZ

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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.