Filed 1/24/18 P. v. Brown CA2/3

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>LEVAR BROWN,<br><br>Defendant and Appellant. | B269810<br><br>(Los Angeles County Super. Ct. No. BA426270) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Edmund W. Clarke, Judge. Affirmed as modified and remanded with directions.

Paul Couenhoven, 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, Shawn McGahey Webb and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Levar Brown raises contentions of trial and sentencing error following his conviction by jury of first degree murder with a firearm-use enhancement (Pen. Code, §§ 187, 12022.53, subd. (b)–(d)).[1] For the reasons discussed below, the judgment is affirmed as modified and remanded with directions.

## BACKGROUND

Viewed in accordance with the usual rules of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

Claudious Johnson testified that in May 2010,[2] he lived on the top floor of a two-story apartment building on Figueroa Street in Los Angeles with his twin brother Claudio Johnson, another brother, their mother, and their sister. Claudio and Claudious were 20 years old. The family had just moved into the apartment at the beginning of May.

Around 7:00 a.m., on May 30, Claudious saw Claudio go out the back door of the apartment, which opened onto a porch from which there were stairs leading down to a parking area behind the apartment building. This is where Claudio parked his car. As he usually did each morning, Claudio was going to his car to "get a smoke." Claudious subsequently heard a man, not Claudio, in the backyard repeatedly yelling " 'Where you from?' " and " 'What you got?' " Claudious testified he rushed outside

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

[2] All further date references are to the year 2010 unless otherwise specified.

hoping Claudio was not in trouble. From the porch, Claudious saw Claudio and another man at the edge of the parking area. The man was pointing a gun at Claudio's head.

The gunman was wearing a gray hooded sweatshirt (or "hoody") with the hood pulled over his head. He also wore "a stocking cap with holes cut out to see." This stocking covered the upper part of the gunman's face. Because the stocking was made of a sheer fabric, like pantyhose, Claudious could see the gunman's face through it. Claudious testified that three times recently he had seen the gunman driving an old Cadillac past Claudious's apartment building.

Claudious yelled at the gunman, saying: " 'He don't bang [i.e., asserting that Claudio was not in a gang]. Don't shoot him, he don't bang.' " The man responded by pointing the gun at Claudious and telling him to come downstairs. When Claudious said he was not going to come down, the man said, "If [you] don't I'm gonna kill him." Claudious testified he got mad and initially started toward the stairs with the idea of helping his brother, but then thought better of it and turned around. As he ran back to the door of his apartment, Claudious heard the gunman tell Claudio to "[g]et on his knees," and he saw Claudio comply. Claudious ran back into the apartment to "tell my mom that her son [was] about to get killed." When a shot rang out, Claudious ran back outside. He saw Claudio lying on the ground and the gunman fleeing on foot.

On the day of the shooting, F.M. was living on Flower Street, around the corner from the victim. At about 7:00 a.m. she was sitting on her front porch when she heard a gunshot. Thirty to 40 seconds later, she saw a man walk swiftly down 59th Place and turn onto Flower Street. The man was wearing a light gray

hoody. He had the hood over his head and he had a stocking covering his face. The stocking was a "silver silk silhouette stocking" like a "stocking for your hair." It covered the man's eyes, nose, and mouth, but not his chin. (3RT 1537, 1539-1540.) The man seemed to be coming from the direction of the gunshot. There was a bulge in the front pocket of his hoody.

The man unlocked the driver's side door of a gray Cadillac parked across the street from F.M.'s house, got in, and started the engine. The man "put the car in reverse and slammed on the gas pedal," "lost control of the car, because [it] started swerving," and then crashed into the rear of F.M.'s neighbor's Toyota Camry, which was parked on the street. After a few seconds, the Cadillac drove off. F.M. gave a 9-1-1 operator what she thought was a partial license plate number from the Cadillac: 6LEW16.

Los Angeles Police Department Officer Edward Pernesky and his partner happened to be just blocks away and were the first responders to the shooting scene. Claudious flagged them down and said his brother had been shot. Pernesky found Claudio lying face down in "the parking lot in the alley area to the rear of the [apartment building]." He appeared to have been shot in the back of the head. Pernesky could not find a pulse and Claudio was later pronounced dead at the scene. Claudio's mother and sister were crying hysterically at the foot of the apartment's rear staircase, so Pernesky went over to talk to them. His partner was still interviewing Claudious. Pernesky allowed Claudio's mother to go over to her son's body to say a last goodbye.

While waiting for an ambulance to arrive, Pernesky "canvassed the area" for evidence. He found "two sets of car keys" about ten feet from Claudio's body. One set contained the

key to a Land Rover. The other set had two keys, a Los Angeles Public Library card, a Ralph's supermarket rewards card, and an Albertson's supermarket rewards card. No gun, bullets, or bullet casings were found. A block away on Flower Street, police found the damaged Camry across from F.M.'s house. Pieces of a broken tail-light assembly were lying in the street near the Camry.

Claudio was pronounced dead at 7:14 a.m. The autopsy subsequently showed he had died from a single gunshot wound to the head, the bullet entering the back of his head and exiting his forehead.

A few nights after the shooting, on June 3, police stopped a 2000 gray Cadillac because its left tail-light was not working. The Cadillac's tail-light assembly was broken. The car's license plate number was 6LEA210 and the car was registered to defendant Brown, who was driving. Asked if he was in a gang, Brown said that he was.

On June 27, Brown's Cadillac was towed and impounded after having been left on the street in the Marina Del Rey area for a few weeks. Brown retrieved his car from the tow yard on July 10. In August, a man purchased the Cadillac and sold it to a junkyard. When the car was subsequently recovered by the police, it still had a broken left tail-light. The broken tail-light piece recovered from the crime scene matched the Cadillac's damaged tail-light assembly. When police showed F.M. a photograph of Brown's Cadillac, she identified it as the car she had seen drive away after Claudio was shot.

In addition to the Cadillac, Brown also owned a Land Rover. On July 21, Brown went to a California Highway Patrol office and reported that his Land Rover had been stolen on June 28. Brown explained that after his Land Rover became

disabled on the 10 Freeway, a tow truck arrived, drove his car away, and he never saw it again.

Brown's ex-girlfriend testified Brown had owned a Land Rover and a Cadillac, and that he would not let anyone else drive these cars. She also identified one of the keys recovered from the shooting scene as Brown's Land Rover key, which she recognized because one of the key's buttons had been damaged.

The police discovered that one of the other keys found at the shooting scene unlocked the front door of Brown's apartment. The library and supermarket rewards cards found at the shooting scene were also linked to Brown. "Single source" DNA samples (meaning samples to which there had been only one genetic contributor) obtained from the keys and the cards found at the crime scene were tested against DNA taken from both Brown and Claudio. Claudio was excluded as a contributor, but the DNA profile matched Brown. Based on a statistical calculation, one in 400 quintillion unrelated people (or one in "50 billion Earths") would have been expected to have this profile.

Claudious identified Brown as the gunman in a six-pack photo display and then again at trial. At the preliminary hearing, however, Claudious testified that Brown was not the gunman. At trial, Claudious testified he had been purposefully untruthful at the preliminary hearing because he was angry and had been planning to take matters into his own hands: "I didn't want to tell the truth so [Brown] can get out and I . . . take it on my hands. Take matters into my hands." Claudious testified that after his brother's killing, he and his father started going to a group meeting at their church; Claudious had been going to this meeting twice a week ever since. He explained that, as a result of talking to his father and the people at church, he realized

"tak[ing] matters into [his] own hands" was the wrong thing to do.

2. *Defense evidence.*

L.D. was a neighbor of Claudio's family. On the morning of May 30, she was awakened by somebody yelling, " 'Get on the ground. Get on the ground.' " She went to her window and saw a man with his back to her holding a gun to Claudio's head. She heard Claudious say, " 'Leave my brother alone. My brother don't bang.' " The gunman responded, " 'If you don't come out I'm gonna shoot.' And when [Claudious] slammed the door, that's when the . . . gunshot went off . . . " The gunman was wearing a gray or white hoody.

After firing the single shot, the gunman ran down 59th Place toward Flower Street. When he reached the corner, he removed the hood from his head, turned around, and looked back toward the shooting scene. L.D. testified that this was when she got a look at his face:

"Q. Did you make eye contact with him?

"A. Yes, sir.

"Q. And did you recognize him?

"A. I thought he looked like somebody in the neighborhood, but I'm not for sure."

L.D. testified that this moment was the only time she saw the gunman's face. Because she thought the gunman might have seen her in that moment, L.D. quickly shut her window blinds. Although L.D. admitted that she "didn't get a good look at him really," she also testified that she was "a hundred percent sure" the gunman was not Brown.

3. *Procedural history and trial outcome.*

Following Brown's conviction by jury of first degree murder with an enhancement for personally and intentionally discharging a firearm and causing death during the commission of murder (§§ 187, 12022.53, subd. (d)), he was sentenced to a prison term of 50 years to life.

**CONTENTIONS**

Brown contends on appeal that (1) the trial court prejudicially erred by denying his motion to present third-party culpability evidence, and (2) his presentence custody credits were miscalculated.

1. *In limine motion regarding third-party culpability evidence.*

Brown filed an in limine motion seeking to present evidence of third-party culpability. Emphasizing the gang aspect of Claudio's shooting, the motion suggested that Michael Hughley, also known as "Knockdown," had been the shooter. The motion asserted Hughley was a member of the 59 Hoover Crips gang, which allegedly controlled the neighborhood where the shooting occurred. The motion further asserted Hughley had been arrested a few months after the shooting in possession of a gun that matched the description Claudious had given police (a rusted steel revolver with wooden grips) and that Hughley knew a set of keys had been dropped at the scene, information allegedly not released to the public. The motion also relied on police interviews with Claudious and his sister during which the following information had been learned: a gang member in the neighborhood they knew as Knockdown, along with a friend of his, had been harassing the family ever since they first moved into the apartment; Knockdown had sexually harassed

Claudious's sister verbally; and on the day before the shooting, Knockdown had threatened Claudio with a gun.

The People acknowledged that, as demonstrated by the police interviews cited in Brown's motion, Claudious had given contradictory identifications of the gunman over the course of time. In his initial police interviews, Claudious inconsistently told detectives that he did not see the gunman; that he did see the gunman, who was a gang member from the neighborhood named Knockdown; and that the gunman might have been a friend of Knockdown's. Claudious subsequently identified Brown as the gunman in a photo array, but testified at the preliminary hearing that Brown was not the gunman. Then, at two subsequent trials (before Judges Rappe and Ohta),[3] Claudious testified Brown had been the gunman. The People also asserted that "[o]n August 17, 2010, [L.D.] was shown a photographic lineup which included a photograph of Knockdown. She specifically stated that Knockdown was NOT the shooter. She told the detectives that Knockdown was someone she had seen in the neighborhood in the past. She further explained that she

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[3] The proceedings leading to Brown's conviction were very convoluted. The records of his prior trial proceedings (which are by no means complete) indicate the following chronology: Initial trial proceedings were held by Judge Rappe and ended in a mistrial in March 2014; a retrial before Judge Egerton was terminated when the People dismissed the proceeding because of a missing witness in July 2014; a further retrial before Judge Ohta ended in a hung jury (which voted 11-1 for conviction); and the current retrial before Judge Clarke took place in 2015.

thought the shooter was an individual who she had seen hanging out with Knockdown."[4]

After noting that it had read the many motion papers filed by each side, the trial court tentatively announced it was inclined to deny Brown's motion to introduce third-party culpability evidence: ". . . I have scoured these facts and looked for direct or circumstantial evidence that the person that the defense proposes as the suspicious third party, Mr. Hughley . . . , was physically present at any time close to the shooting. These facts, as I understand it, include a single actor, basically execution style, having a person kneel down and shooting him in the head. Witnesses have not described more than one actor." "The defense can always argue that some other person perpetrated the offense, and it's mistaken identity, etcetera. But to argue that a specific person is actually the one who did it, and not the defendant, the defense needs to link that other specific person to the perpetration of the crime by either direct or circumstantial evidence, and I found none. [¶] There's abundant information that would make that potential person a suspect, in that he would have motives, or that he was a person who acted in an unkindly way towards the decedent or people close to him. But I saw nothing that would place that third party at the crime scene, or acting in any way that might be called perpetration of the crime."

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[4] As authority for this assertion, the People cited page and line numbers from "transcripts [of police interviews] previously provided to the court by defense as attachments to defendant's Motion to Admit Third Party Evidence." Although the transcripts are not part of our record on appeal, Brown has not challenged the accuracy of the People's factual recitation.

Invited to respond, defense counsel did not dispute the fact that L.D. had told police Knockdown was definitely not the person who shot Claudio. Defense counsel said only, "Well, Your Honor, I was going to suggest to the court that we hold this whole motion in abeyance. Nothing's going to be discussed in opening statement concerning Mr. Hughley or Knockdown, and I don't think —" The court interrupted counsel to say, "[I]t's always open. I think that the ruling I make is based on the evidence I expect. And that doesn't mean that things couldn't change, that something develops during the trial . . . that causes me to change it." Defense counsel concurred with this approach, and never raised the issue again.

2. *Legal principles.*

" 'A criminal defendant has a right to present evidence of third party culpability if it is capable of raising a reasonable doubt about his own guilt.' " (*People v. Sandoval* (1992) 4 Cal.4th 155, 176.) The seminal case regarding third party culpability evidence is *People v. Hall* (1986) 41 Cal.3d 826 (*Hall*): "To be admissible, the third-party [culpability] evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's *possible* culpability. . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: *there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime*." (*Id*. at p. 833, italics added.) "[C]ourts should simply treat third-party culpability evidence like any other evidence: if relevant it

is admissible [citation] unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion [citation]." (*Id.* at p. 834.)

"Relevant [third-party culpability] evidence may be excluded under Evidence Code section 352 if it creates a substantial danger of undue consumption of time or of prejudicing, confusing, or misleading the jury. [Citation.]" (*People v. Avila* (2006) 38 Cal.4th 491, 578.) As the United States Supreme Court in *Holmes v. South Carolina* (2006) 547 U.S. 319 [126 S.Ct. 1727] (*Holmes*), explained: "While the Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. [Citations.] Plainly referring to rules of this type, we have stated that the Constitution permits judges 'to exclude evidence that . . . poses an undue risk of . . . "confusion of the issues." ' [Citation.] [¶] A specific application of this principle is found in rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged. [Citations.]" (*Id.* at pp. 326–327.)

"We review [a] trial court's ruling [excluding third-party culpability evidence] for abuse of discretion. [Citation.]" (*People v. Prince* (2007) 40 Cal.4th 1179, 1242.) If the trial court has erred, that error is tested on appeal under the *Watson* standard. (*Hall*, *supra*, 41 Cal.3d at p. 836 [citing *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*) and stating: "In these circumstances, we conclude it is not reasonably probable that a result more

favorable to defendant would have been reached in the absence of the error."]; accord *People v. Geier* (2007) 41 Cal.4th 555, 582–583, overruled on other grounds by *Melendez–Diaz v. Massachusetts* (2009) 557 U.S. 305 [129 S.Ct. 2527] [even assuming trial court erred by excluding third party culpability evidence, error was harmless under *Watson*].)

3. *Discussion*.

We conclude that, even assuming arguendo the trial court abused its discretion by refusing to admit the proposed third party culpability evidence, any error was clearly harmless. Therefore, we affirm Brown's judgment of conviction.

We agree with Brown that there were various facts pointing to Hughley (whom the police apparently investigated) as a possible suspect. But the evidence that Brown was the perpetrator was extremely strong. There was a significant gang element to the shooting, with the gunman uttering the challenge: "Where you from?," and there was evidence that Brown was a gang member. In addition to Claudious's eyewitness identification, both key rings found at the crime scene contained keys and cards linked to Brown; DNA evidence tied Brown to the keys dropped at the scene and excluded Claudio; a neighbor provided eyewitness testimony that moments after the shooting, a man got into Brown's Cadillac and drove off; Brown's ex-girlfriend testified Brown would not allow anyone else to drive his Cadillac; and the broken tail-light pieces found at the scene matched the damage to Brown's Cadillac's tail-light. Brown's story about the theft of his Land Rover (i.e., that he did not report the theft of his car by a private tow truck driver for three weeks) lacked credibility and suggested he wanted to distance himself from the keys found at the scene.

Additionally, the theory that Hughley was the gunman was *directly contradicted* by L.D.'s statement to police that she was certain Hughley had not been the gunman. Hence, the strongest trial evidence exculpating Brown as the gunman (L.D.'s testimony that Brown was not the person who shot Claudio), came from the *same source* who would have provided the strongest testimony undercutting Brown's third party culpability theory (L.D.'s testimony that she was certain Hughley was not the gunman). Brown does not suggest, nor do we see, how he would have been able to overcome this credibility contradiction, i.e., convince the jury that L.D. was credible in one of her eyewitness identifications, but not credible in the other. Hence, we do not find it reasonably probable that Brown would have obtained a more favorable result had the third party culpability evidence been admitted. (See *Watson*, *supra*, 46 Cal.2d at p. 837.)

Contrary to Brown's assertion, the trial court's ruling, even if it was erroneous, did not amount to a constitutional violation of his right to put on a defense. "As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense. Courts retain . . . a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice. [Citations.] As we [have] observed . . . , this principle applies perforce to evidence of third-party culpability. . . ." (*Hall*, *supra*, 41 Cal.3d at p. 834–835.)

We conclude that tested by the *Watson* standard, any error in excluding the proffered third-party culpability evidence was harmless.

2. *Brown's presentence custody credits must be recalculated.*

Brown contends, and the Attorney General properly agrees, that the trial court miscalculated his presentence custody credits.

Brown was arrested on April 11, 2011, and sentenced on January 14, 2016. The trial court awarded him actual presentence custody time for only 1,738 days, but a proper calculation—which gave him credit for both the day of arrest and the day of sentencing—would have resulted in 1,740 days. (See *People v. Morgain* (2009) 177 Cal.App.4th 454, 469 ["defendant is entitled to credit for the date of his arrest and the date of sentencing"]; *People v. Browning* (1991) 233 Cal.App.3d 1410, 1412 [day of sentencing counted for presentence custody credits even though it was only partial day].) We will order this error corrected.

3. *Sentencing claim based on new law.*

Brown contends he is entitled to the benefit of a new sentencing statute that went into effect on January 1, 2018. We agree.

In post-argument briefing, Brown contends that, as a result of Senate Bill 620, signed by Governor Brown on October 11, 2017, this matter must be remanded for the trial court to exercise discretion as to whether to strike the section 12022.53, subdivision (d) enhancement. As relevant here, Senate Bill 620 provides that effective January 1, 2018, section 12022.53 is amended to permit the trial court to strike a sentencing enhancement under that section. The new provision states as follows: "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.

The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 2.)

Senate Bill 620 went into effect January 1, 2018. Because appellant's conviction is not yet final, appellant is eligible to have the matter remanded for resentencing because the amended statute granting discretion to the trial court has the potential to lead to a reduced sentence. (See *In re Estrada* (1965) 63 Cal.2d 740, 742–748 [for a non-final conviction, "where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed"]; *People v. Francis* (1969) 71 Cal.2d 66, 75–78 [where statute enacted during pending appeal gave trial court discretion to impose a lesser penalty, remand was required for resentencing].)

The Attorney General, however, argues that we should not remand because no reasonable court would exercise its discretion to strike Brown's firearm-use enhancement, as this is " 'a case in which the factors in aggravation so powerfully outweigh any possible excuse that we can say with confidence that no more favorable result is likely on resentencing.' (*People v. Robinson* (1992) 11 Cal.App.4th 609, 615–616, disapproved on another ground in *People v. Scott* (1994) 9 Cal.4th 331, 353, fn. 16.)" We disagree. It is well-recognized that, in the first instance, sentencing issues are to be decided by the trial court. Here, the trial court originally had no sentencing discretion to exercise because the Penal Code mandated a term of 25 years to life for first degree murder without special circumstances, and a consecutive term of 25 years to life for the firearm enhancement. (See §§ 190, subd. (a), 12022.53, subd. (d).) Under the amended

statute, the trial court now has such discretion. Accordingly, because the record does not disclose whether the trial court would have stricken the firearm-use enhancement if it had had discretion to do so, a remand for resentencing is necessary.

**DISPOSITION**

The judgment is affirmed as modified and remanded with directions. The judgment of conviction is affirmed. Brown is entitled to an additional two days of presentence custody credit, for a total of 1,740 days. The matter is remanded for the limited purpose of having the trial court determine whether to strike Brown's section 12022.53, subdivision (d), firearm-use enhancement. The trial court is directed to prepare and forward an amended abstract of judgment to the Department of Corrections and Rehabilitation.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

EDMON, P. J.

We concur:

LAVIN, J. DHANIDINA, 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.