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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. FRANKLIN M. PADILLA, Defendant and Appellant.	B231800 (Los Angeles County Super. Ct. No. BA352986)

APPEAL from a judgment of the Superior Court of Los Angeles County, Clifford L. Klein, Judge. Modified and affirmed.

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Stephanie A. Miyoshi and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Franklin M. Padilla appeals from his conviction of first degree murder. He challenges the sufficiency of evidence of premeditation and deliberation. He also contends his sentence constitutes cruel and/or unusual punishment in violation of his rights under the California and federal constitutions because he was 16 years old when the murder was committed. Appellant also claims a right to additional custody credits which respondent concedes.

We conclude there is substantial evidence from which the jury could find that appellant acted with premeditation and deliberation. The sentence does not violate the federal or state prohibitions against cruel and/or unusual punishment. We remand to correct the abstract of judgment to reflect the correct custody credits.

FACTUAL AND PROCEDURAL SUMMARY

This murder occurred during a "clean fight" (meaning no weapons were to be used) between two tagging crews, C.L. Dub and C.A.E. The fight was at a park near Los Angeles High School. Between 20 and 25 members of C.L. Dub were there. Witness Mariam Hernandez estimated 30 to 40 members of C.A.E. were present. Appellant was a member of Hellbound, whose members got along with C.A.E. but were enemies of C.L. Dub. Members of C.A.E. also considered members of C.L. Dub to be enemies. A fight broke out with many people involved. During the fight, voices called out "C.L. Dub" and "C.A.E". When someone yelled that police were coming, the fighting stopped, and people started to run in different directions.

Appellant, then 16 years old, appeared with a gun in his waistband. Sandy Garcia, a girl he briefly had dated, yelled to him, "Don't do nothing that you're going to regret" and "Don't do nothing." Appellant pointed the gun toward a group of people who were running and fired. Most of the people in this group were members of C.L. Dub. The shot hit Adrian "Hefty" Diaz-Garcia in the left shoulder. He died from his wound. Appellant ran from the scene. He was arrested that night after multiple witnesses who knew him from high school identified him as the shooter.

Appellant was charged with murder in adult court under Welfare and Institutions Code section 707. He was charged with a violation of Penal Code section 187, subdivision (a)[1] with allegations that he personally and intentionally had discharged a firearm causing death within the meaning of section 12022.53, subdivisions (b) through (d). It also was alleged that at the time of the commission of the offense, he was at least 14 years old and at least 16 years old. (Welf. & Inst. Code, § 707, subd. (d)(1) and (d)(2)(a).) The jury convicted appellant of first degree murder and found the firearm allegations true. The trial court found the age allegations true and sentenced appellant to an indeterminate term of 25 years to life for the murder conviction with an additional consecutive term of 25 years to life for the firearm enhancement under section 12022.53, subdivision (d). Appellant was given 959 days of actual custody credits. This timely appeal followed.

DISCUSSION

I

Appellant challenges the sufficiency of the evidence to establish that he acted with premeditation and deliberation, an element of his conviction for first degree murder.

"In assessing the sufficiency of the evidence supporting a jury's finding of premeditated and deliberate murder, a reviewing court considers the entire record in the light most favorable to the judgment below to determine whether it contains substantial evidence—that is, evidence which is reasonable, credible, and of solid value—from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] When the circumstances reasonably justify the jury's findings, a reviewing court's opinion that the circumstances might also be reasonably reconciled with contrary findings does not warrant reversal of the judgment. (*Ibid.*)" (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1068–1069 (*Mendoza*).)

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[1] Statutory references are to the Penal Code unless otherwise indicated.

The standards to prove deliberate and premeditated first degree murder are well-established. More is required than an intent to kill. (*Mendoza, supra,* 52 Cal.4th at p. 1069.) '"'"Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance. [Citations.]" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) "'Premeditation and deliberation can occur in a brief interval. "The test is not time, but reflection. 'Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.'"' [Citation.]" [Citations.]' [Citation.]" (*Mendoza,* at 1069.) Three categories of evidence have been found to support findings of premeditation and deliberation: planning activity, preexisting motive, and manner of killing. (*People v. Solomon* (2010) 49 Cal.4th 792, 812, citing *People v. Anderson* (1968) 70 Cal.2d 15, 26–27.) But this is not an exhaustive list that "'would exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation.' [Citations.]" (*Solomon,* at pp. 812–813.)

Appellant argues that premeditation and deliberation were not proven because there is no evidence that he targeted the victim or that he had a motive to kill him. He contends that possession of a gun alone is not sufficient to establish deliberation and premeditation.

In *People v. Sanchez* (2001) 26 Cal.4th 834, Ramon Gonzalez, a gang member, was standing outside a house when a car in which Julio Cesar Sanchez was a passenger drove by several times. Sanchez was a member of a rival gang. There was evidence that gang signs were thrown by either the passengers in the car or the gang members in front of the house. (*Id*. at p. 841.) The last time the car drove by, shots were exchanged and an innocent bystander was hit and killed by a single stray bullet. Since the guns and bullet casings used in the shooting were not recovered, it could not be determined whether Sanchez or Gonzalez had fired the fatal shot. A police officer testified about the hatred between the two gangs. (*Id*. at p. 840.) Both Sanchez and Gonzalez were convicted of first degree murder. (*Id*. at p. 839.) The Supreme Court found evidence to support the finding of premeditation and deliberation as to Sanchez in that both he and Gonzalez,

members of rival gangs, had armed themselves before the shooting. Sanchez and his fellow gang member drove slowly by Gonzalez's house and there was evidence that the two groups were throwing gang hand signs at one another. Sanchez took up "a shooter's position" on the window frame of the open vehicle window. (*Id*. at p. 850.) The *Sanchez* court concluded: "Although the actual shooting here may have been almost spontaneous, the mutual planning of one another's murder supports a finding of premeditation as to both [Sanchez] and Gonzalez." (*Ibid*.)

The *Sanchez* court applied *People v. Rand* (1995) 37 Cal.App.4th 999 (*Rand*), which also dealt with a gang murder. The *Rand* court concluded: "A studied hatred and enmity, including a preplanned, purposeful resolve to shoot anyone in a certain neighborhood wearing a certain color, evidences the most cold-blooded, most calculated, most culpable, kind of premeditation and deliberation." (*Id*. at p. 1001.) In finding sufficient evidence of premeditation and deliberation, the *Rand* court cited evidence of the gang rivalry as motive for the killing, and the defendant's conduct in deliberately aiming at persons he believed were rival gang members. (*Id*. at pp. 1001–1002.) It reasoned: "'[A] cold and calculating decision to kill can be arrived at very quickly; we do not measure the necessary reflection solely by its duration.' [Citation.]" (*Id*. at p. 1002.)

The possession of a gun may constitute evidence of premeditation and deliberation. For example, in *People v. Young* (2005) 34 Cal.4th 1149, there was evidence that the defendant planned entry into the victim's house with a loaded gun in his hand. Based on this evidence, the Supreme Court concluded that the jury could infer that defendant "'considered the possibility of murder in advance' and intended to kill. [Citations.]" (*Id*. at p. 1183.)

Here there was evidence of rivalry between tagging crews with whom appellant was affiliated and the victim's tagging crew, C.L. Dubs. Multiple students at Los Angeles High School testified that they knew a "clean rumble" was planned between the groups on the afternoon of the shooting. The groups met and engaged in mutual combat, punching and kicking each other, but not using weapons. Appellant disregarded the no-

weapons ground rule for the fight and brought a loaded gun with him. Sandy Garcia saw appellant with the gun and warned him, "Don't do nothing that you're going to regret" and "Don't do nothing". Shortly after that she heard a gunshot. Witnesses testified that most of the people around the victim were members of appellant's rival, C.L. Dubs. Several witnesses saw appellant raise the gun and point it at the crowd before firing. Appellant ran from the scene after the shooting.

Substantial evidence supported the jury's finding that appellant acted with deliberation and premeditation.

II

A. Categorical Challenge

Appellant first raises a categorical challenge to his sentence as cruel and unusual under the Eighth Amendment of the United States Constitution and as cruel or unusual under California Constitution, article I, section 17. He contends that his sentence is unconstitutional under *Graham v. Florida* (2010) __ 530 U.S. __ [130 S.Ct. 2011] (*Graham*), which held that a sentence of life imprisonment without the possibility of parole (LWOP) for a juvenile offender who has not committed a homicide is unconstitutional as cruel and unusual punishment under the Eighth Amendment. Appellant contends that the *Graham* analysis applies to him because his sentence amounts to a virtual life sentence and gives him no meaningful opportunity for rehabilitation. He relies on language in *Graham* stating that while a state is not required to guarantee eventual freedom to a juvenile offender convicted of a *nonhomicide* crime, the state must give a juvenile "'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" (*Graham*, *supra*, 130 S.Ct. at p. 2030.) He also points out that under *Graham*, an assessment cannot be made at the outset as to whether juveniles who commit truly horrifying crimes may be "irredeemable" and deserving of incarceration for life because it would deprive the juvenile of an opportunity to demonstrate growth and maturity. (*Id*. at pp. 2029–2030.) Appellant argues that his sentence will not give him the requisite opportunity to obtain release.

Appellant recognizes that *Graham* was expressly limited to juveniles who have committed nonhomicide offenses and that he stands convicted of first degree murder. Nevertheless, he argues that his crime was "a rash act by an immature sixteen year old" and cites language in *Graham* recognizing the immature characteristics of juveniles which make it difficult to differentiate between the immature juvenile offender and the juvenile whose crime "'reflects irreparable corruption.' [Citation.]" (*Graham, supra,* 130 S.Ct. at p. 2026.)

In addition, appellant relies on *People v. Mendez* (2010) 188 Cal.App.4th 47 (*Mendez*).[2] Unlike the case before us, *Mendez* involved nonhomicide offenses. The court in that case held that a sentence of 84-years-to-life, characterized as a de facto no-parole life sentence, was unconstitutional. The question whether *Graham* applies to lengthy indeterminate terms other than life without possibility of parole is before the California Supreme Court in *People v. Caballero*, review granted April 13, 2011, S190647; *People v. Ramirez*, review granted June 22, 2011, S192558; and *People v J.I.A.*, review granted September 14, 2011, S194841.[3]

As respondent points out, this case is distinguishable from *Graham* and its California progeny because appellant did commit a homicide and did not receive an LWOP sentence. In *People v. Blackwell* (2011) 202 Cal.App.4th 144 (*Blackwell*), the court held that *Graham* was not controlling because the juvenile in that case had been convicted of first degree murder with special circumstances and sentenced to LWOP. (*Id*. at p. 156.) The court reasoned: "Juvenile defendants convicted of murder simply do not stand in shoes similar to those of juveniles convicted of nonhomicide offenses. 'Serious nonhomicide crimes "may be devastating in their harm . . . but 'in terms of

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[2] We note that the California Supreme Court has granted review in another case cited by appellant, *People v. Nunez*, review granted July 20, 2011, S194643.

[3] This term the United States Supreme Court docket includes two cases raising the issue of whether imposition of a life-without-possibility-of-parole sentence on a fourteen year old for homicide violates the prohibition against cruel and unusual punishment. (*Miller v. Alabama*, case No. 10-9646 and *Jackson v. Hobbs*, case No. 10-9647.)

moral depravity and of the injury to the person and to the public,' . . . they cannot be compared to murder in their 'severity and irrevocability.'"' (*Graham*, *supra*, 130 S.Ct. at p. 2027.)" (*Id.* at p. 157.)

The *Blackwell* court applied the two-step approach employed by *Graham* for categorical challenges to punishment as cruel and unusual: "'The Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. [Citation.] Next, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning and purpose" [citation], the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.' (*Graham*, *supra*, 130 S.Ct. at p. 2022.)" (*Blackwell*, *supra*, 202 Cal.App.4th at p. 157.) The defendant in *Blackwell* did not argue there was a national consensus against imposing an LWOP sentence in cases where a 16- or 17-year-old commits homicide under circumstances warranting imposition of the death penalty if he were an adult. (*Id*. at pp. 157-158.) Blackwell also did not cite any jurisprudence under the Eighth Amendment supporting such a claim. (*Id*. at p. 158.) Similarly, appellant in this case does not argue there is a national consensus barring imposition of a life sentence, which is not LWOP, on a 16-year-old who personally commits first degree murder. Nor does he cite direct authority under the Eighth Amendment precluding such a sentence.

We decline to extend the holding in *Graham* to this case. Unlike the defendants in *Graham* or *Mendez*, appellant personally committed first degree murder. The reasoning of *Graham* and *Mendez* therefore does not apply. The sentence is not prohibited by the Eighth Amendment.

B. Disproportionate Punishment

Appellant also argues that his sentence is cruel and unusual under the Eighth Amendment or cruel or unusual under California Constitution, article I, section 17 because it is grossly disproportionate to his culpability. A similar claim was made in *Mendez, supra,* 188 Cal.App.4th 47. The *Mendez* court explained the similar proportionality tests used by federal and California courts in assessing such a claim: "Although articulated slightly differently, both standards prohibit punishment that is 'grossly disproportionate' to the crime or the individual culpability of the defendant. (*Solem v. Helm* (1983) 463 U.S. 277, 288; *People v. Dillon* (1983) 34 Cal.3d 441, 450, 478, fn. 25 [(*Dillon*) abrogated on other grounds in *People v. Chun* (2009) 45 Cal.4th 1172, 1185–1186].) Under both standards, the court examines the nature of the offense and the defendant, the punishment for more serious offenses within the jurisdiction, and the punishment for similar offenses in other jurisdictions. [Citations.] Any one of these three factors can be sufficient to demonstrate that a particular punishment is cruel and unusual. (*People v. Dillon, supra,* at p. 487, fn. 38.)" (*Mendez,* at pp. 64–65.)

Appellant likens the circumstances of this case to *Dillon, supra,* 34 Cal.3d 441, in which the Supreme Court reduced a judgment from first degree to second degree murder because the punishment for first degree murder was cruel or unusual. (*Id*. at p. 489.) We disagree. The shooting in *Dillon* occurred when the 17-year-old defendant and two schoolmates went to investigate a marijuana farm in the Santa Cruz Mountains and to steal some marijuana if possible. A guard at the farm threatened the boys with a cocked shotgun and ordered them out. Several weeks later Dillon returned to the farm with his brother. They fled after hearing a shotgun blast. Later, Dillon and several companions returned to the farm to steal marijuana. Some were armed with shotguns and Dillon carried a .22 semi-automatic rifle. One of the boys accidentally fired his shotgun twice as the guard circled behind Dillon and his partner. They heard the guard coming and saw he was carrying a shotgun. Dillon began rapidly firing his rifle and fatally wounded the guard. (*Id*. at p. 451–452.)

The *Dillon* court found the punishment for first degree murder cruel or unusual on these facts, noting that Dillon thought that one of his friends had been shot when he heard the shotgun discharged and that the guard was preparing to shoot him. (*Dillon*, *supra*, 34 Cal.3d at p. 482.) In addition, there was testimony by a clinical psychologist about Dillon's extreme immaturity and poor judgment. (*Id*. at p. 483.) The Supreme Court noted that because Dillon was a minor, he could not have been given a greater punishment even if he had committed premeditated and deliberate first degree murder. (*Id*. at p. 487.)

In arguing that we should follow *Dillon* to find his sentence cruel or unusual, appellant cites evidence that he was 16 years old at the time of the shooting, and contends there "was little credible evidence" that he intended to kill the victim. He points out that the shooting occurred "in the midst of chaos" with people running and that he fired one shot into a crowd of people. He concludes that he is not a "vicious criminal" who should be sentenced to 50 years to life in prison and that he does not pose an unusual risk to society.

We disagree with this characterization of the evidence. Appellant brought a weapon to a fight which was to be held without the use of weapons, disregarded Sandy Garcia's warning not to do anything he would regret, aimed at a crowd of running people made up mostly of his rivals, and shot the victim in the back. There is no evidence that he acted in self-defense or that he had been threatened in any way. Except for appellant's youth, the factors present in *Dillon*, *supra*, 34 Cal.3d 441 are not present here. In addition, his sentence is not disproportionate to sentences upheld for similar crimes. (*People v. Em* (2009) 171 Cal.App.4th 964 [affirming sentence of 50 years to life for 15-year-old defendant who committed murder during robbery]; *People v. Gonzales* (2001) 87 Cal.App.4th 1 [upholding sentences of 50 years to life for 16-year-old gang members who engaged in fistfight during which a 14 year old shot the victim]; *People v. Villegas* (2001) 92 Cal.App.4th 1217 [sentence of 40 years to life for 17-year-old gang member convicted of attempted first degree murder].)

We conclude that appellant's punishment does not violate the prohibitions against cruel and/or unusual punishment under either the federal or California constitutions.

III

Appellant argues he should have received an additional two days of custody credit, for a total of 961 days. Respondent agrees the original calculation was incorrect and calculates that appellant was entitled to a total of 962 days. We agree with respondent's calculation. The abstract of judgment is to be modified to reflect the correct credits.

DISPOSITION

The matter is remanded to the trial court with directions to modify the abstract of judgment to state that appellant has earned 962 days of actual custody credits. The trial court is directed to forward the modified abstract to the Department of Corrections and Rehabilitation. The judgment as modified is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.