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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO MORAN, Defendant and Appellant.	B291474 (Los Angeles County Super. Ct. No. KA104376)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert J. Perry, Judge. Affirmed as modified.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

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

Francisco Moran (appellant) and Ulises Jose Gutierrez (Gutierrez) were charged with the attempted first degree murder of Jonathan Maldonado (Maldonado) (Pen. Code, §§ 664, 187, subd. (a); count 7)[1] and the murder of Maurio Sotelo (Sotelo) (§ 187, subd. (a); count 8). As to counts 7 and 8, the information contained gun allegations as well as gang allegations.

In a second trial, which followed a mistrial, appellant was tried separately from Gutierrez. The jury found appellant guilty of willful, deliberate and premeditated attempted murder in count 7, and guilty of first degree murder in count 8. Also, it found the gun and gang allegations to be true.

On count 7, appellant was sentenced to life in prison with the possibility of parole after 15 years (§ 186.22, subd. (b)(5)), plus an enhancement of 25 years to life pursuant to section 12022.53, subdivisions (d) and (e)(1). On count 8, he was sentenced to 25 years to life, plus 10 years pursuant to section 186.22, subdivision (b)(1)(C), plus a stayed term of 25 years to life pursuant to section 12022.53, subdivisions (d) and (e)(1). The sentences were consecutive.

Appellant was ordered to pay a restitution fine of $300 (§ 1202.4, subd. (b)), a parole revocation fine of $300 (stayed pending successful completion of parole) (§ 1202.45), a $40 court operations assessments on each count (§ 1465.8, subd. (a)(1)), and a $30 criminal conviction assessments on each count (Gov. Code, § 70373).

On appeal, appellant argues he received ineffective assistance of counsel because trial counsel failed to request CALCRIM No. 373, an instruction that would have warned the

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

jury not to speculate whether Gutierrez has been or will be prosecuted. In addition, appellant argued that the trial court erred when it imposed a 15-year parole ineligibility term instead of a seven-year parole ineligibility term as to count 7, and when it imposed a 10-year gang enhancement as to count 8. Finally, relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), appellant argues that the trial court should not have imposed fines and assessments without determining his ability to pay them.

We strike the section 186.22, subdivision (b)(5) 15-year parole ineligibility term as to count 7 and impose a seven-year ineligibility term pursuant to section 3046, subdivision (a)(1). We strike the section 186.22, subdivision (b)(1)(C) 10-year enhancement imposed with respect to count 8. As modified, the judgment is affirmed.

FACTS

Prosecution evidence

The Attempted Murder and the Murder

On July 19, 2013, soon after 12:30 a.m., Baldwin Park Police Officer Jose Jimenez saw Maldonado lying on the porch of a house on Feather Avenue. Officer Jimenez recognized Maldonado as a member of the Eastside Bolen Parque criminal street gang who went by the moniker "Bones." He had a single gunshot wound to the left side of his chest. When Officer Jimenez approached Maldonado, he refused to talk or cooperate. Later, he was treated at a hospital and survived.

A police officer recovered a bullet from the scene and booked it into evidence.

That same night, at approximately 1:15 a.m., police officers found Sotelo unconscious and bleeding on a bus bench near the

intersection of Los Angeles Street and Merced Avenue. He did not survive his wounds. At that scene, Detective Karen Shonka of the Los Angeles County Sheriff's Department found a wig that was hanging on a wrought iron fence behind the bus bench. A member of the Los Angeles County Sheriff's crime lab found a lead bullet in a nearby stucco wall.

Subsequently, a deputy medical examiner determined that Sotelo died from a gunshot wound to his neck. During the autopsy, the deputy medical examiner recovered a bullet from Sotelo's body.

Maryemma Rozema

December 2, 2013, police interview

On December 2, 2013, Maryemma Rozema (Rozema), Sotelo's ex-girlfriend, was arrested on charges unrelated to Sotelo's murder. Detective Shonka and Baldwin Park Police Detective Adam Acuna interviewed Rozema about the murder.

She disclosed the following events. She saw Sotelo sitting on a bench with "Negro," "Looney," "Ruben," and "Yolo," and stopped to talk to them. Looney was wearing a wig Rozema had previously given to Looney's girlfriend. After two hours, Rozema left to meet her friend Brynn Sigala (Sigala). As Rozema was walking away, she heard Looney say, "oh, sh**."

Rozema turned around. She saw a dark green or black car with tinted rear windows. "Lucky," who was in the driver's seat, had a gun in his hand. A woman was in the passenger seat. Rozema heard a gunshot and saw a flash of light. She jumped a fence and saw a man who told her that Lucky had shot Bones. According to Rozema, she did not tell the police earlier that Lucky shot Sotelo because she was scared.

Trial testimony

At trial, Rozema testified that she did not witness the murder. The night of the murder, she saw Sotelo sometime before 12:00 a.m. Then she went to her grandmother's house with Sigala and they smoked PCP and crystal meth. Later, they returned to what she called "the block" to see Sotelo. Rozema saw police tape near the bus bench and some police officers.

After she approached the area, a police officer told Rozema to move away. She ran across the street, turned on her cell phone video camera, and climbed over a wall hoping to see what was happening while staying out of view of the police officers. A neighbor walked out of an apartment and told her Sotelo had been killed. Rozema turned off her cell phone video camera and started crying.

Subsequently, the police raided Rozema's grandmother's house looking for Rozema's boyfriend. She showed the officer the video she took.

A few months later, Rozema was arrested after being caught with a double-edge knife. She was on drugs at the time. To stay out of jail, she put together all the stories she had heard on the street about Sotelo's murder and lied about being a witness.

Sigala

July 22, 2013, police interview

Detective Shonka interviewed Sigala on July 22, 2013 at the police station. Upon being a shown a picture of the wig found at the crime scene, Sigala said the wig belonged to her friend Rozema[2] and that she was wearing it the night of the homicide.

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[2] Sigala referred to "Emma," and we assume she was referring to Rozema.

Prior testimony

Sigala was deemed unavailable at trial and her testimony from a prior proceeding was read to the jury.

In her that testimony, she stated that on the night of the murder she and Rozema went to a friend's house and then to Rozema's grandmother's house. Eventually, they took a walk and saw police. They approached the scene and Rozema began videotaping. Somebody told her that a person had died, and she began crying.

Sigala wore wigs and was wearing one the night of the murder. Rozema also wore wigs, but was not wearing one that night. Sigala was asked if she recognized the wig in a picture of the wig found hanging on the fence behind the bench. She did not recognize it. It was curly, and she did not wear that type of wig. She did not think that Rozema did, either.

Arturo Mendoza

Arturo Mendoza (Mendoza),[3] who knew appellant by the moniker "Sneaks," testified that both appellant and he were Northside Bolen Parque gang members. As for Gutierrez, Mendoza knew him by his real name as well as by the moniker Lucky. Eastside Bolen Parque and K.H.A. (Kings Have Arrived) were Northside Bolen Parque's enemies. The bench where the shooting happened was in an area first claimed by Eastside Bolen Parque but later claimed by K.H.A.

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[3] In 2014, Mendoza was charged with an unrelated murder along with Gutierrez and a few others. Subsequently, Mendoza offered to provide information to the District Attorney's Office about various crimes. In exchange for his testimony, he was offered a plea deal.

In 2013, Mendoza socialized with appellant as well as Gutierrez. The day after Sotelo's murder, Mendoza saw Gutierrez and appellant and mentioned to them "that something had happened." At that point, appellant said that he and Gutierrez were responsible and Gutierrez said they shot someone at a bus stop with a .357 caliber gun. Appellant said they were "looking for dudes to hit up and to bang on" and "[i]f they ended up being from somewhere, eastside or whatever, [they were] going to . . . shoot [them]." Eventually, appellant said he shot the person in the head or neck area. Gutierrez confessed that he shot another man that same night.

Jail cell recording

In January 2014, appellant was in custody on an unrelated charge. Detective Shonka placed appellant in a jail cell with a paid informant and a recording device. A few hours later, Detective Shonka took appellant out of the cell. She told him that she was investigating Sotelo's murder and provided certain details of the crime. She did not, however, mention the caliber of the gun used, where on the body Sotelo was shot, or how many shots were fired. As a ruse, she showed appellant a "pseudo" six-pack of suspects in which his picture was circled. Appellant was then placed back in the cell with the informant.

A recording of the ensuing conversation in the jail cell was played for the jury.

Appellant said he was being charged "like the other murder." The informant asked what happened and where it happened. Appellant said he was driving a black Honda at midnight. After dropping off a friend, Lucky and "Tiny" were in the back seat and "Little Man" was in the front passenger seat.

They saw "two fools" walking on the street. Lucky "hop[ped] out on them" and shot one. The victim did not die.

When asked about what happened next, appellant said, "We go gangbanging still. We just keep going." Around the corner, they saw a man "chilling at the bus stop." Appellant said he shot the man multiple times and saw a bullet go through his head and into a house. Per appellant, they used the same .38 revolver for both shootings.

Appellant said, "I'm not supposed to get caught either, I already knew this. I was not supposed to get caught. I was already told . . . don't get caught, fool, because you're going to do some time. Here I am doing this dumb fool, palabra. I was already at two months. I was going to keep going, fool. I was going to bounce to Mexico. All of us were, me, Lucky, and they told me f**k, what are we doing, fool? Let's get rid of the G-ride, we f**king get caught with it."[4]

The informant asked about the gun. Appellant said it was a .38-caliber revolver. Later, appellant said, "they killed my brother, fool. That's what made me like get . . . enraged. . . . They killed my brother fool. [T]hat turns you. It messes you up, fool. [¶] . . . ¶] . . . I protect my community. . . . [W]hen you come into the hood . . . , we're going to come back."

Firearms Expert

A firearms expert compared three bullets that had been collected during the investigations. One of the bullets was damaged and could not be analyzed. The other two bullets were fired from the same firearm.

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[4] "G-Ride" was a reference to the black Honda.

Gang evidence

Detective Acuna testified as a gang expert. The Northside Bolen Parque gang,[5] the Eastside Bolen Parque gang, and the K.H.A. gang, are all rivals. Los Angeles Street in Baldwin Park is the dividing line between the Northside and Eastside. The area of Feather Avenue is claimed by Eastside.

Appellant was a member of the Northside Bolen Parque gang with the moniker of "Sneaks." Maldonado was a member of the Eastside Bolen Parque gang. Prior to the shooting, Detective Acuna had seen Sotelo near the intersection of Los Angeles Street and Merced Avenue. Police department records indicated that he was associated with the Eastside Bolen Parque gang.

Given a hypothetical based on the facts of the case, Detective Acuna opined that the shooting of Maldonado and the shooting of Sotelo were for the benefit of the Northside Bolen Parque gang.

Defense evidence

Appellant did not present evidence.

DISCUSSION

I. Ineffective Assistance of Counsel.

Appellant seeks reversal on the theory that defense counsel's performance fell below an objective standard of reasonableness under prevailing norms (*People v. Ledesma* (2006) 39 Cal.4th 641, 746 (*Ledesma*) [stating the standard for finding ineffective assistance of counsel]; (*Strickland v. Washington* (1984) 466 U.S. 668, 693 (*Strickland*)) because he did not ask the

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[5] The defense stipulated that the Northside Bolen Parque gang is a criminal street gang.

trial court to instruct the jury with CALCRIM No. 373, the standard "[o]ther [p]erpetrator" instruction which provides: "The evidence shows that (another person/other persons) may have been involved in the commission of the crime[s] charged against the defendant. There may be many reasons why someone who appears to have been involved might not be a codefendant in this particular trial. You must not speculate about whether (that other person has . . .) been or will be prosecuted. Your duty is to decide whether the defendant on trial here committed the crime[s] charged."

Reversal based on ineffective assistance of counsel is required only if a reviewing court concludes it is reasonably probable that the result would have been more favorable to a defendant but for his or her trial counsel's unprofessional errors. (*Ledesma*, *supra*, 39 Cal.4th at p. 746.)

A "defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." (*Strickland, supra,* 466 U.S. at p. 693.) That standard is inappropriate because ineffective assistance "asserts the absence of one of the crucial assurances that the result of a proceeding is reliable[.]" (*Id*. at p. 694.) The "result of the proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have undermined the outcome." (*Ibid*.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Ibid*.)

"In any case, when considering a claim of ineffective assistance of counsel, 'a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged

deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.' [Citation.]" (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241 (*Fairbank*).)

A. Relevant Facts.

Prior to jury voir dire, the trial court informed the prospective jurors that appellant and Gutierrez committed murder and attempted murder, and that Gutierrez was a named defendant but he was not part of the trial. Then the trial court stated: "You're not to be concerned about whether he has been or will be prosecuted."

When instructing the jury after trial, the trial court did not instruct pursuant to CALCRIM No. 373.

B. Analysis.

Following *Fairbank*, we go straight to analyzing prejudice. We find that defendant was not prejudiced by trial counsel's failure to request CALCRIM No. 373.

The firearms expert testified that two of the bullets recovered in this case came from the same gun. Appellant confessed the crimes to the jailhouse informant and said that he and his partner used a .38 revolver. Also, appellant and Gutierrez confessed their crimes to Mendoza. Maldonado was a member of the East Parque Bolen gang, a rival of appellant's and Gutierrez's gang, the Northside Parque Bolen. The gang expert testified that that crimes were committed for the benefit of the East Parque Bolen gang. Evidence of appellant's guilt as an aider and abettor of the attempted murder of Maldonado and as the direct perpetrator of the murder of Sotelo was overwhelming. The testimony of Rozema and Sigala did not inure to appellant's benefit. At most, Rozema suggested in her police interview that

Gutierrez was the shooter, not appellant. Even if that was so, it would not have absolved appellant of criminal liability as an aider and abettor. The evidence showed that appellant was with Gutierrez during a shooting spree. Regardless, appellant confessed to being Sotelo's shooter. The absence of CALCRIM No. 373 does not undermine our confidence in the outcome of the trial.

II. Sentence.

As to count 7, appellant contends that the trial court erred when it imposed a 15-year parole ineligibility term for the gang enhancement under section 186.22, subdivision (b)(5). The People agree.

When, as here, a trial court imposes a 25-year enhancement pursuant to section 12022.53, subdivision (d) based on a violation of section 186.22, subdivision (b), the trial court may not also impose the parole ineligibility term set forth in section 186.22, subdivision (b)(5) unless the defendant personally used or discharged a firearm. (*People v. Brookfield* (2009) 47 Cal.4th 583, 590.) Gutierrez shot Maldonado, not appellant. We therefore conclude that the 15-year parole ineligibility term must be stricken. As an inmate imprisoned for life, appellant should have instead received a seven-year parole ineligibility term. (§ 3046, subd. (a)(1).)

Appellant contends that the trial court improperly imposed a 10-year section 186.22, subdivision (b)(1)(C) gang enhancement on count 8. The People again agree.

The law is undisputed. Section 186.22, subdivision (b)(1)(C) imposes a 10-year enhancement when a defendant commits a violent felony for the benefit of a criminal street gang. But the enhancement does not apply if the violent felony is

"punishable by imprisonment in the state prison for life." (§ 186.22, subd. (b)(5); *People v. Lopez* (2005) 34 Cal.4th 1002, 1004.) On count 8, appellant was sentenced to life in state prison. Consequently, the 10-year enhancement must be stricken.

III. Ability to Pay Fines and Assessments.

Appellant contends that the fines and assessments must be set aside on due process grounds because the trial court did not determine his ability to pay.

We cannot concur.

This issue was forfeited because it was not raised below. (*People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464 [*Dueñas* issue forfeited because defendant did not object to fees or fines in the trial court]; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1155 (*Frandsen*) [same].)

Appellant maintains that he did not forfeit the issue because the assessments and fines were unauthorized given his status as an indigent. (*People v. Scott* (1994) 9 Cal.4th 331, 354 [an unauthorized sentence may be challenged at any time, and even if there was no objection in the trial court].) But even if his alleged inability to pay would have made the assessments and fines unauthorized, appellant's ability to pay, or lack thereof, was never established.

Next, appellant contends that an objection would have been futile because it would not have been supported by pre-*Dueñas* law, and because *Dueñas* represented a dramatic and unforeseen change in the legal landscape. (*People v. Black* (2007) 41 Cal.4th 799, 811–812 [objection not forfeited if the pertinent law changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change].)

This argument was rejected in *Frandsen* because "nothing in the record of the sentencing hearing indicate[d] that [defendant] was foreclosed from making the same request that the defendant in *Dueñas* made in the face of those same mandatory assessments." (*Frandsen*, *supra*, 33 Cal.App.5th at p. 1154.) Further, the court concluded that the defendant "plainly could have made a record had his ability to pay actually been an issue. Indeed, [defendant] was obligated to create a record showing his inability to pay the maximum restitution fine, which would have served to also address his ability to pay the assessments." (*Ibid*.) The court discerned that *Dueñas* "was foreseeable" because it "applied 'the *Griffin-Antazo-Bearden* analysis," which flowed from *Griffin v. Illinois* (1956) 351 U.S. 12, *In re Antazo* (1970) 3 Cal.3d 100, and *Bearden v. Georgia* (1983) 461 U.S. 660. (*Frandsen*, *supra*, at p. 1154.) Also, "'[t]he principle that a punitive award must be considered in light of the defendant's financial condition is ancient.' [Citation.] The Magna Carta prohibited civil sanctions that were disproportionate to the offense or that would deprive the wrongdoer of his means of livelihood. [Citation.]" (*Frandsen*, *supra*, at pp. 1154–1155.) The court concluded that *Dueñas* "applied law that was old, not new." (*Frandsen*, *supra*, at p. 1155.)

The reasoning in *Frandsen* applies with equal force here, and we adopt it. Like *Frandsen*, we decline to follow the *Dueñas* court's subsequent opinion in *People v. Castellano* (2019) 33 Cal.App.5th 485, 489 [*Dueñas* is "a newly announced constitutional principle that could not reasonably have been anticipated at the time of trial"].)

Regardless of the forfeiture, we offer the following observations.

Dueñas held that trial courts may not impose three criminal assessments and fines—the court operations assessment (§ 1465.8), the criminal conviction assessment (Gov. Code, § 70373), and the restitution fine (§ 1202.4)—without first ascertaining the "defendant's present ability to pay." (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1164, 1171, fn. 8.) The record indicates that appellant will be able to pay the assessments and fines. A defendant's ability to pay includes "the defendant's ability to obtain prison wages and to earn money after his release from custody." (*People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837; *People v. Gentry* (1994) 28 Cal.App.4th 1374, 1376.) Prisoners earn wages ranging from $12 per month (for the lowest skilled jobs) to $56 per month (for the highest). (Cal. Dept. of Corrections & Rehabilitation, Operations Manual, §§ 51120.6, 51121.10 (2019).) Given appellant's life sentence as well as the seven-year ineligibility term, he will earn enough to pay the assessments and fines.

DISPOSITION

As to count 7, the section 186.22, subdivision (b)(5) 15-year parole ineligibility term is stricken and a seven-year ineligibility term is imposed pursuant to section 3046, subdivision (a)(1). As to count 8, the section 186.22, subdivision (b)(1)(C) 10-year enhancement is stricken. As modified, the judgment is affirmed. The trial court shall prepare and file an amended abstract of judgment reflecting appellant's corrected sentence. Copies of the amended abstract shall be forwarded to the Department of Corrections and Rehabilitation and to counsel for both appellant and respondent.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT