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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. JOEL GONZALEZ, Defendant and Appellant.	B278443 (Los Angeles County Super. Ct. No. MA063025)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daviann L. Mitchell, Judge. Affirmed in part, and conditionally reversed and remanded.

Ralph H. Goldsen, 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, Margaret E. Maxwell, Deputy Attorney General and Yun K. Lee, Deputy Attorney General, for Plaintiff and Respondent.

Appellant Joel Gonzalez appeals from the judgment of conviction for murder. Appellant challenges the form jury instructions on self-defense and accomplice testimony, and he challenges the court's orders relating to the examination of witnesses during the trial. Appellant also maintains that Proposition 57 applies and entitles him to a fitness/transfer hearing in juvenile court to determine whether he should be treated as a juvenile rather than an adult offender. As we shall explain, except Proposition 57, appellant has failed to demonstrate prejudicial error. Accordingly, we conditionally reverse and remand this case for the juvenile court to hold a transfer hearing in accord with Proposition 57 and the applicable provisions of the Welfare and Institutions Code.

FACTUAL AND PROCEDURAL BACKGROUND

In 2014, Daniel Pensamiento (Daniel),[1] the victim, and his younger brother, Jerson Pensamiento (Jerson) were members of the 18th Street criminal street gang and lived in Antelope Valley. On the evening of April 17, 2014, appellant, who was 17 years old at the time and a member of Desmadrosos (DSM) criminal street gang, Tala Maafala, a fellow DSM gang member, and two other DSM members approached Jerson and Daniel while the pair stood in front of a market near the corner of 17th Street East and Palmdale Boulevard.

DSM and the 18th Street gang are rivals in that area and Daniel and appellant exchanged derogatory remarks about each other's gang. During this initial exchange of insults, appellant challenged Daniel and Jerson by lifting his shirt to show them the grip of a gun that was tucked in his pants. Appellant

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[1] Because the victim and his brother have the same last name, they are referenced by their first names to avoid confusion.

testified that Daniel responded by lifting his shirt, showing a wooden handle of a gun in Daniel's pants.

Appellant then stepped back to his group, who stood several feet away. When Maafala asked appellant where Daniel and Jerson were from, appellant replied, "Faketeen," a disrespectful term for the 18th Street gang. Appellant also told Maafala that he was not too concerned about the negative comments Daniel had made about the DSM gang.

Maafala then stepped closer to Daniel and Jerson, and appellant warned him that they might have weapons. Maafala saw Daniel and Jerson reaching towards their waistbands.[2] Maafala did not see a gun, but immediately turned around and walked away because he "was trying to not get shot or killed that night."

As Maafala turned away, appellant stated that he overheard Daniel say to Jerson, "Those [are the] fools [referring to appellant and his fellow gang members] from D.S.M. that jumped me."[3] And Daniel added, "I have half a mind to dome these fools," meaning shoot them in the head. Appellant immediately ran up to Daniel and shot him in the face.[4] Daniel died as a result of the gunshot wounds. Appellant, Maafala and the other DSM gang members fled.

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[2] According to Jerson, he and Daniel were unarmed, and Jerson claimed that he never put his hands into his waistband and he did not see Daniel do that either.

[3] Approximately two months before, Daniel and several DSM gang members, including appellant had a confrontation in front of the same market.

[4] A surveillance video from the market played during the trial depicts part of the interaction between appellant and Jerson and Daniel, including appellant lifting his shirt up and down in front of Daniel and Jerson, and the shooting.

Appellant, Maafala, and another DSM gang member present during the shooting, Marcos Rojas, were arrested and charged as adults with the murder of Daniel.[5] The information further alleged that the crime was committed for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(4)), and a weapons enhancement. (Pen. Code, § 12022.53, subds. (b), (c), (d) & (e)(1).)

During the trial, appellant testified that he shot Daniel in self-defense because he believed Daniel was armed and that he intended to shoot appellant and his fellow gang members.

The jury convicted appellant of first-degree murder and found the allegation that the crime was committed for the benefit of a gang to be true. The trial court sentenced appellant to 50 years to life in state prison.

Appellant filed a timely notice of appeal.

DISCUSSION

I. The Self-Defense Instruction Did Not Violate Due Process

Appellant argues that the form self-defense jury instruction, CALCRIM No. 505, violated his Constitutional Sixth Amendment right to due process and to present a defense. He contends that the form instruction is flawed because it erroneously told the jury that the jury could find appellant shot Daniel in self-defense only if appellant "believed there

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[5] Before trial, Rojas pleaded to a reduced charge and Maafala pleaded guilty to voluntary manslaughter and received a sentence of 14 years in state prison in exchange for his testimony in appellant's trial.

was imminent danger of death or great bodily injury to himself. [And] he . . . acted *only* because of that belief."[6] (Italics added.)

In *People v. Nguyen* (2015) 61 Cal.4th 1015 (*Nguyen*), the California Supreme Court recognized that a defendant who engages in a lethal response to imminent deadly force cannot claim self-defense if "he did not act on the basis of fear alone but also on a desire to kill." (*Id.* at p. 1044.) The *Nguyen* opinion cited with approval to the Fifth District's holding in *People v. Trevino* (1988) 200 Cal.App.3d 874 (*Trevino*) that former CALJIC No. 5.12 (the predecessor instruction to CALCRIM No. 505) correctly stated the law of self-defense by requiring that the party who killed must have had an honest and reasonable belief in the need for self-defense or the defense of another, and, in killing, must have "*act*[*ed*] *under the influence of such fears alone*." (*Nguyen, supra,* 61 Cal.4th at p. 1045, italics added, quoting *Trevino*, *supra*, 200 Cal.App.3d at p. 879; Pen. Code, §§ 197, 198.) The *Trevino* Court further suggested that, if at the time defendant also harbored emotions other than (and in addition to) fear toward the victim which did not *cause*

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[6] CALCRIM No. 505 instructed the jury, in part, that: "The defendant is not guilty of murder if he was justified in killing someone in self-defense. The defendant acted in lawful self-defense if: [¶] 1. The defendant reasonably believed that he was in imminent danger of being killed or suffering great bodily injury. [¶] 2. The defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger. [¶] AND [¶] 3. The defendant used no more force than was reasonably necessary to defend against that danger. [¶] Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of death or great bodily injury to himself. Defendant's belief must have been reasonable and he must have acted only because of that belief."

the defendant to commit the crime, he could request additional, clarifying instructions regarding the presence of those other, mixed motives. (*Trevino, supra,* 200 Cal.App.3d at p. 880.)

Here appellant claims that *Trevino* was wrongly decided and that CALCRIM No. 505 does not accurately state the law of self-defense. He claims the court was required, sua sponte, to inform the jury that it could find that he acted in self-defense if he harbored "mixed motives" when appellant shot and killed Daniel. Appellant argues that CALCRIM No. 505, as currently phrased and endorsed by *Trevino*, without a "mixed motive" explanation, violates due process because it gives "preclusive effect" to other motivations even if they are not the "but-for" cause of the killing.[7]

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[7] Appellant also points out that *Nguyen* left open the question presented here, observing that the *Nguyen* Court noted "that defendant did not argue in the trial court, nor has he argued on appeal, that the jury should have been instructed that acting based on mixed motives is permissible so long as reasonable fear was the but-for cause of his decision to kill. We therefore have no occasion to consider whether such a rule would be consistent with section 198 as interpreted in *Trevino* or other cases." (*Nguyen, supra,* 61 Cal.4th at p. 1046.)

We disagree with appellant and follow *Trevino*. In our view, CALCRIM No. 505 correctly states the law of self-defense under Penal Code sections 197 and 198[8] and it does not give

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[8] Penal Code section 197 provides, in pertinent part: "Homicide is . . . justifiable when committed by any person in any of the following cases:

(1) When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person.

(2) When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous, or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein.

(3) When committed in the lawful defense of such person, or of a spouse, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he or she was the assailant or engaged in mutual combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed." (Pen. Code, § 197.)

Penal Code section 198 provides: "A bare fear of the commission of any of the offenses mentioned in subdivisions 2 and 3 of [Penal Code s]ection 197, to prevent which homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be sufficient to excite the fears of a reasonable person, and *the party killing must have acted under the influence of such fears alone*." (Pen. Code, § 198, italics added.) Although Penal Code section 198 only makes reference to Penal Code section 197, subdivisions (2) and (3), the California Supreme Court has interpreted Penal Code section 198 to also apply to circumstances described in Penal Code section 197, subdivision (1). (See *People v. Randle*

preclusive effect to mixed emotions. As the *Trevino* Court aptly acknowledged: "[A] person who feels anger or even hatred toward the person killed, may . . . justifiably use deadly force in self-defense. . . . [¶] In [some] situations . . . it would be unreasonable to require an absence of any feeling other than fear, before the homicide could be considered justifiable. Such a requirement is not a part of the law. . . . Instead, the law requires that the party killing act out of fear alone." (*Trevino, supra,* 200 Cal.App.3d at p. 879, italics omitted.) But because, however, [the form instruction] does not "eliminate a feeling of anger or any other emotion so long as that emotion was not part of the cause of the use of deadly force[,]" it correctly stated the law. (*Id*. at p. 880.)

Like former CALJIC No. 5.12 at issue in *Trevino*, CALCRIM No. 505 as given here, did not remove the possibility that the appellant may have had other feelings about Daniel, and it did not inform the jury that it had to reject self-defense if the appellant harbored feelings other than fear. Instead, in accord with Penal Code section 198, CALCRIM No. 505 requires that appellant's fear for his life is the sole "but for" cause of the murder. Thus, CALCRIM No. 505 was an accurate and complete statement of the law. And if appellant wanted clarifying instructions on the role or presence of his feelings other than fear, he was required to request those instructions. He failed to do so, and thus cannot complain on appeal that the jury was not properly instructed. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503 ["A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed

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(2005) 35 Cal.4th 987, 998-999, overruled on other grounds in *People v. Chun* (2009) 45 Cal.4th 1172, 1201.)

clarification, without first requesting such clarification at trial."].) Appellant's attack on CALCRIM No. 505 fails.

II. The Accomplice Jury Instructions Did Not Prejudice Appellant

Appellant contends that the trial court erred when it instructed the jury on CALCRIM No. 301 that corroborating evidence must support all of Maafala's accomplice testimony. As we explain, although CALCRIM No. 301 misstated the law, the error was harmless.[9]

The trial court instructed the jury with CALCRIM No. 301: "Except for the testimony of . . . Maafala, *which requires supporting evidence if you decide he is an accomplice*, the testimony of only one witness can prove any fact." (Italics added.) The court after that instructed the jury that "[i]f the crime of [m]urder was committed, then . . . Maafala was an accomplice to that crime."

Penal Code section 1111 requires that accomplice testimony used *to convict* a defendant must be corroborated. (Pen. Code, § 1111 ["A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense."].) Nonetheless, no such limitation applies to accomplice

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[9] The Attorney General asserts that appellant has forfeited this argument because he failed to request the instruction be clarified or modified in the trial court. As we explain, CALCRIM No. 301 was not simply unclear or incomplete, it misstated the law. If the court instructs the jury with respect to accomplice testimony, it is obligated to provide instructions that are legally correct. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1015 [court has a duty to give legally correct instructions].) Such instructional error is not subject to forfeiture. (*People v. Smith* (2017) 12 Cal.App.5th 766, 778.)

testimony that exonerates a defendant; "[e]xculpatory testimony, by definition, cannot be said to support a conviction and, thus, need not be corroborated." (*People v. Smith*, *supra*, 12 Cal.App.5th at p. 780, italics omitted [holding that accomplice testimony that supports the defendant's defense is not subject to the rule requiring corroboration].) And, where an accomplice provides exculpatory evidence, it is error to instruct the jury that *all* of the accomplice's testimony must be corroborated and viewed with caution. (*Ibid.;* see also *Cool v. United States* (1972) 409 U.S. 100, 102 [court violates the defendant's right to present a defense where it conditions to the jury's review of exculpatory evidence, instructing that, if the jury was convinced of the accomplice's truthfulness "beyond a reasonable doubt," the jury should give the exculpatory testimony the same effect as testimony of a witness not implicated in the crime].)

Here, there is no dispute that Maafala was appellant's accomplice in the crime; he was charged with the same offense and the jury was informed Maafala was an accomplice to the murder. In addition, Maafala's testimony—that Daniel reached for his waistband immediately before appellant shot him—supported appellant's claim that he acted in self-defense and thus was exculpatory evidence that was not subject to the rule requiring corroboration. Accordingly, the CALCRIM No. 301 instruction was legally erroneous because it effectively informed the jury that all of Maafala's testimony, including the exculpatory testimony, required corroborating evidence before the jury could accept it as true.

In reaching this conclusion, we reject the Attorney General's argument that the CALCRIM No. 335 instruction in this case—which informed the jury that it could not convict the defendant of murder based on an accomplice's statement or testimony alone, but that such statements must be supported by

independent corroborating evidence[10]—cured the error in CALCRIM No. 301. It does not. Although CALCRIM No. 335 amplified how a jury should consider accomplice evidence used to convict the defendant, it does not express, or in our view, even imply that corroboration was necessary *only* for Maafala's testimony which implicated appellant. CALCRIM No. 335 is silent, providing no guidance to the jury on how to consider accomplice evidence that is either neutral or exonerating. And thus, the jury is left only with CALCRIM No. 301 to guide it.

Notwithstanding this analysis, we conclude that the instructional error was harmless. As the Attorney General asserts, the error did not result in prejudice because Maafala's version of events was corroborated by appellant. Appellant's testimony that Daniel lifted his shirt in an apparent display of the weapon directly confirmed Maafala's later observation of similar conduct. And although the jury was instructed that the evidence needed to support the testimony of one accomplice cannot be provided by the testimony of another accomplice—that limitation on accomplice testimony was provided specifically in the context of CALCRIM No. 335 which directed the jury on the use of accomplice testimony to *support a conviction*. The

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[10] CALCRIM No. 335 instructed: "You may not convict the defendant of [m]urder based on the testimony of an accomplice alone. You may use the testimony of an accomplice to convict the defendant only if: [¶] 1. The accomplice's testimony is supported by other evidence that you believe; [¶] 2. That supporting evidence is independent of the accomplice's testimony; [¶] AND [¶] 3. That supporting evidence tends to connect the defendant to the commission of the crime. [¶] . . . [¶] The evidence needed to support the testimony of one accomplice cannot be provided by the testimony of another accomplice. [¶] Any testimony of an accomplice that tends to incriminate the defendant should be viewed with caution."

instructions did not in any way preclude the jury from using the testimony of appellant to corroborate Maafala's testimony that supported appellant's defense. And, therefore, we believe that there is no reasonable probability that instructional error affected the outcome of this case, and that reversal is not required under either the state or federal standards of prejudice.

III. The Trial Court Did Not Err in Allowing the Prosecutor to Examine Maafala about DSM Gang Culture and Conduct

Appellant contends the trial court erred in permitting Maafala to testify both as a percipient witness and as an expert on gang culture. Appellant complains that Maafala was presented in a false light as an "expert" with "special knowledge," which enhanced his credibility and gave him an undeserved "stamp of judicial approval." We disagree.

During Maafala's direct-examination, when the prosecutor asked about the cliques of DSM in the Antelope Valley, defense counsel asked for a sidebar conference. Appellant's counsel complained that he did not have any discovery on the issue and that the questions were irrelevant to establish whether appellant or Maafala were DSM members. The prosecutor conceded that appellant and Maafala were not from the same DMS clique. Nonetheless his testimony would be relevant, he argued, to establish Maafala "as a gang expert so to speak" by showing Maafala's gang experience to qualify him to explain how the murder related to "gang life." The prosecutor also stated that appellant had previously received discovery on Maafala; defense counsel agreed but noted that the prosecutor "already has a gang expert coming in." The trial court indicated that it would allow the prosecutor to continue asking Maafala about DSM gang culture, but also stated that the prosecutor was "not going to redo all the [gang] stuff the second time" with the

police gang expert. The trial court also asked if the parties planned to stipulate that DSM was a gang under section 186.22, and both counsel agreed.[11]

The trial court did not abuse its discretion when it allowed the prosecutor to question Maafala about both the DSM gang culture and Maafala's eyewitness account of the shooting. (*People v. Kovacich* (2011) 201 Cal.App.4th 863, 902 [we review the admission of witness testimony under an abuse of discretion standard].) There is no general prohibition against a witness testifying as an expert and as a percipient witness, where, as here, a proper factual foundation has been established for both. All of Maafala's testimony was based on his percipient, firsthand experience and personal knowledge as a veteran, active member of the DSM gang, and also as an eyewitness to the crime. And unlike the police gang expert, who testified later in the trial, Maafala did not give expert opinions based on hypothetical situations and did not rely on information he heard from other gang members or gathered through police investigations of gangs. In addition, the trial court properly instructed the jury on how to evaluate the credibility and testimony of witnesses qualified as experts and lay, percipient witnesses. Thus, appellant has not demonstrated error.

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[11] At the beginning of the police gang expert's testimony, the parties stipulated that the deputy sheriff was qualified as a gang expert and that DSM is a criminal street gang under Penal Code section 186.22.

IV. The Trial Court Did Not Err in Permitting the Prosecutor to Cross-Examine Appellant on His Prior Uncharged Acts Committed for the Benefit of His Gang

Appellant contends that the trial court violated his due process and fair trial rights by allowing the prosecutor to elicit inadmissible character evidence from him. Specifically, he posits that the prosecutor questions about whether he had engaged in acts of creating gang-related graffiti were irrelevant to self-defense. We disagree.

On cross-examination, the prosecutor asked appellant whether he had previously committed acts of gang graffiti or "tagging" as a DSM member. The trial court overruled appellant's relevance objection, and appellant answered, "Numerous, no. Tagging just really never was my thing. Not something I would do myself and go do." Appellant testified that the "younger generation" put "in work" such as tagging or gang graffiti, but that he did not have to and that he was never disciplined by his gang for not putting in work.

" 'The test of relevance is whether the evidence "tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive." [Citation.]' " (*People v. Cowan* (2010) 50 Cal.4th 401, 482.) Evidence Code section 1101, subdivision (b) allows the presentation of otherwise inadmissible character evidence when it is relevant to prove some fact such as motive, opportunity, plan, knowledge, absence of mistake, intent. The trial court has "wide discretion in determining relevance under this standard." (*People v. Kelly* (1992) 1 Cal.4th 495, 523.)

The central issue in this case related to appellant's motive and intent for shooting Daniel—whether appellant shot Daniel in self-defense or due to their gang rivalry. The evidence that

appellant had previously "put in work" for the gang was arguably relevant to appellant's intent; it was material to his motive—that he killed Daniel for gang-related reasons. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167 ["[g]ang evidence is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related"].) Even assuming, however, the trial court erred in admitting the evidence, any error was harmless under any standard. Appellant admitted to tagging on the night of the shooting, thus evidence that he had previously engaged in creating gang- graffiti was inconsequential. Thus, admission of the testimony concerning appellant's prior acts of tagging is not prejudicial error.

V. Proposition 57 Applies Retroactively

Appellant was 17 years old at the time he committed the offense and was tried in adult criminal court. In November 2016, a month after appellant was sentenced and while this appeal was pending, California voters passed the Public Safety and Rehabilitation Act of 2016 (Proposition 57). The law became effective the next day. (See Cal. Const., art. II, § 10, subd. (a).) Thus, appellant's case was not final when Proposition 57 became effective, and therefore we address the retroactive application of Proposition 57 to this matter.

Proposition 57 eliminated the prosecutor's authority to file criminal charges against a minor directly in adult court. (*People v. Cervantes* (2017) 9 Cal.App.5th 569, 596, review granted May 17, 2017, S241323.) Instead, a prosecutor must now file a petition in the juvenile court to have the court declare the minor a ward of the court. (Welf. & Inst. Code, §§ 602, 650, subd. (c).) The prosecutor may then file a motion in the juvenile court to transfer the minor to adult court. (Welf. & Inst. Code, § 707, subd. (a)(1).) If the juvenile court declines to exercise its

discretion to transfer the case to adult court and instead decides to try the minor as a juvenile, the juvenile court may declare the minor a ward of the court if it finds that the minor committed the alleged offenses. (Welf. & Inst. Code, §§ 602, 725, subd. (b).) In that event, the juvenile court does not impose the punishment applicable to adults who violated the same statute; instead, it makes a dispositional order intended to treat and rehabilitate the minor. (See Welf. & Inst. Code, §§ 725, 727, 730, 731, 1700; *People v. Smith* (2003) 110 Cal.App.4th 1072, 1080.)

In light of the differences between the treatment of minors in adult court and juvenile court, the transfer hearing could have a significant impact on the nature and length of their incarceration. (See *People v. Smith, supra*, 110 Cal.App.4th at p. 1080 [listing the "immense" "practical consequences" of proceeding in criminal court instead of juvenile court].) Instead of imprisonment for, potentially, the rest of his life under his current sentence, appellant could be discharged from a juvenile facility when he reaches 23 years of age or even earlier. (See *People v. Vela* (2017) 11 Cal.App.5th 68, 77, review granted July 12, 2017, S242298.)

According to its terms, Proposition 57 "shall be liberally construed to effectuate its purposes." (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 57, Public Safety and Rehabilitation Act of 2016, § 9, p. 146; see also id., § 5, p. 145 ["This act shall be broadly construed to accomplish its purposes."].) Among the express purposes of Proposition 57 is to "[s]top the revolving door of crime by emphasizing rehabilitation, especially for juveniles." (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 57, Public Safety and Rehabilitation Act of 2016, § 2, p. 141.) The act's emphasis on rehabilitation is "a dramatic change of course and a ringing endorsement of rehabilitation as opposed to pure punishment,

especially for youthful offenders." (*People v. Cervantes, supra,* 9 Cal.App.5th at p. 605.)

"It is well settled that a new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise." (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287.) Although Proposition 57 is silent on whether it applies retroactively to pending cases, an exception to the presumption of prospectivity, established in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), applies here.

In *Estrada*, the Legislature reduced the punishment for a particular crime after the defendant committed the crime but before he was sentenced. (*Estrada, supra,* 63 Cal.2d at pp. 743-744.) Although the amending act was silent as to whether the reduced punishment applied to those who had been convicted of the crime prior to the amendment, the *Estrada* Court held that when a statute that is silent as to its retroactivity reduces the penalty for a "particular crime," "the new lighter penalty" will apply "to acts committed before its passage[,] provided the judgment convicting the defendant of the act is not final." (*Id.* at p. 745.)

Several years later, in *People v. Francis* (1969) 71 Cal.2d 66, the Supreme Court extended *Estrada's* retroactivity rule to a statutory amendment that did not necessarily reduce the penalty in any particular case, but rather provided the trial court with discretion to impose a lesser sentence. (*Id.* at pp. 75–78.) Thus, the fact that the application of Proposition 57 in the instant case might—but will not necessarily—result in lesser punishment, does not preclude application of the *Estrada* rule. (See *People v. Vela, supra,* 11 Cal.App.5th at p. 79 ["When a change in the law allows a court to exercise its sentencing discretion more favorably for a particular defendant, the reasoning of *Estrada* applies."].)

The Attorney General opposes the retroactive application of Proposition 57, relying on *People v. Tapia, supra*, 53 Cal.3d 282, and *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*) to argue that Proposition 57 reflects a change in procedural rules, not a reduction in punishment, and thus the *Estrada* rule is inapplicable. In *Tapia,* our Supreme Court distinguished statutory changes that redefined criminal conduct or reduced punishment (as in *Estrada*) from new laws that "address the conduct of trials," or changes in court procedures such as those presented in *Tapia* that govern the manner in which voir dire is conducted. (*Tapia, supra,* 53 Cal.3d at p. 288.)

To be sure, the transfer hearing provided by Proposition 57 has some characteristics of a conduct-of-trial or procedural change in the law.[12] Nevertheless, the changes wrought by Proposition 57 cannot reasonably be compared with the changes in voir dire at issue in *Tapia.* As set forth above, Proposition 57 will have potentially significant effects on the nature and length of the minor's confinement. As our Supreme Court has observed, "the certification of a juvenile offender to an adult court has been accurately characterized as 'the worst punishment the juvenile system is empowered to inflict.' " (*Ramona R. v. Superior Court* (1985) 37 Cal.3d 802, 810.) We therefore reject the characterization of Proposition 57 as a change in the law that merely addresses the conduct of trials.

Our decision is likewise not inconsistent with *Brown,* where the Supreme Court addressed an amendment to Penal Code section 4019, which increased the rate at which prisoners could earn conduct credits for good behavior while

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[12] In particular, a transfer hearing determines whether the minor's offenses are tried in adult court or adjudicated in juvenile court and, consequently, determines which court's procedures apply.

incarcerated. The *Brown* Court acknowledged that the change, if applied to the defendant's time served before the amendment, would have effectively reduced his punishment by increasing his credits. (*Brown, supra,* 54 Cal.4th at p. 325.) The Court, however, held that the amendment did not apply retroactively, and rejected the defendant's reliance on *Estrada.* "The holding in *Estrada*," the Court explained, "was founded on the premise that ' "[a] legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law" ' [citation] and the corollary inference that the Legislature intended the lesser penalty to apply to crimes already committed. In contrast, a statute increasing the rate at which prisoners may earn credits for good behavior does not represent a judgment about the needs of the criminal law with respect to a particular criminal offense, and thus does not support an analogous inference of retroactive intent." (*Brown, supra*, 54 Cal.4th at p. 325, fn. and italics omitted.)

In contrast, Proposition 57's punishment-mitigating changes apply only to the particular crimes for which the district attorney could have previously filed charges directly in adult court. (See former Welf. & Inst. Code, §§ 602, subd. (b), 707, subd. (d).) These crimes are enumerated in former Welfare and Institutions Code sections 602, subdivision (b), and 707, subdivision (b). The change in the law is thus not analogous to the change in conduct credit calculations in *Brown*, which applied to post-conviction behavior and regardless of the inmate's underlying criminal conduct. Because Proposition 57 potentially mitigates the punishment for particular crimes committed by minors, its retroactive application is not contrary to the holding in *Brown*.

In reaching our conclusion that Proposition 57 should be applied retroactively, we acknowledge a split among the Courts of Appeal exists on this issue and that the matter is currently under review by the California Supreme Court. (See, e.g., *People v. Cervantes, supra,* 9 Cal.App.5th 569, and *People v. Superior Court (Lara)* (2017) 9 Cal.App.5th 753, review granted May 17, 2017, S241231.) Our holding is consistent with cases which have concluded that Proposition 57 warrants retroactive application to defendants whose judgment is not yet final when the law took effect. (See, e.g., *People v. Vela, supra,* 11 Cal.App.5th 68.) To the extent our decision is contrary to the holdings in other cases, we decline to follow them.

DISPOSITION

The judgment is conditionally reversed and the matter remanded for the juvenile court to conduct a transfer hearing in accordance with Proposition 57. If the court determines that appellant should be transferred to adult court, the judgment shall be reinstated. If the juvenile court determines that appellant should not be transferred to adult court, the juvenile court shall hold proceedings to determine the proper disposition pursuant to applicable law.

The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.