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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. PAULO OLEA CORRALES et al., Defendants and Appellants.	B282369 (Los Angeles County Super. Ct. No. KA112385)

APPEAL from judgment of the Superior Court of Los Angeles County, Thomas C. Falls, Judge. Reversed in part, affirmed in part.

Mark R. Feeser, under appointment by the Court of Appeal, for Defendant and Appellant Paulo Olea Corrales.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant Ramiro Gutierrez.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, David A. Wildman, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendants and appellants Paulo Olea Corrales and Ramiro Gutierrez guilty of three counts of shooting from a motor vehicle (Pen. Code, § 26100, subd. (c)[1] [counts 7–9]),[2] and found true as to all three counts the allegations that a principal personally and intentionally discharged a handgun during the commission of the crimes within the meaning of section 12022.53, subdivisions (c)(1) and (e)(1), a principal personally used a handgun during the commission of the crimes within the meaning of section 12022.53, subdivisions (b)(1) and (e)(1), and that the crimes were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). Gutierrez was additionally found guilty of two counts of possession of a firearm by a felon

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

[2] The information did not include counts 1–3. Prior to trial the parties stipulated to renumber counts 4–9 as counts 1–6 solely for purposes of submission to the jury.

(§ 29800, subd. (a) [counts 4 & 6]) and one count of criminal threats (§ 422, subd. (a) [count 5]). The jury found true the allegation that Gutierrez personally used a firearm in count 5 (§ 12022.5, subd. (a)), and that the crimes were committed for the benefit of a criminal street gang in counts 4–6 (§ 186.22, subd. (b)(1)(C)). In a separate bench trial the court found true the allegations that Gutierrez had suffered a prior strike conviction (§§ 667, subd. (d), 1170.12, subd. (b)), had suffered a prior serious felony conviction (§ 667, subd. (a)(1)), and had served a prior prison term (§ 667.5, subd. (b)).

On the prosecution's motion, the gun allegations in counts 7–9 were stricken as to both defendants (§ 12022.53, subds. (b), (c), (e)(1)), and the 10-year gang enhancements under section 186.22, subdivision (b)(1)(C) were reduced to 5-year enhancements under section 186.22, subdivision (b)(1)(B) in all counts.

As to Corrales, the trial court imposed a sentence of 8 years, consisting of the lower term of 3 years in count 7, plus 5 years for the gang enhancement. In counts 8 and 9 it imposed 8-year terms to run concurrently with the sentence in count 7.

As to Gutierrez, the trial court selected count 5 as the principal term, and imposed the upper term of 3 years doubled to 6 years pursuant to the three strikes law, plus a 4-year term for the gun enhancement under section 12022.5, subdivision (a), plus a 5-year gang enhancement under section 186.22, subdivision (b)(1)(B), for a total of 15 years in

state prison. The court imposed a concurrent sentence of 11 years in count 4, comprised of the upper term of 3 years, doubled to 6 years pursuant to the three strikes law, plus 5 years for the gang enhancement under section 186.22, subdivision (b)(1)(B). In count 7, the trial court imposed a term of 3 years 4 months (one-third of twice the middle term of 5 years), plus 20 months (one-third the enhancement term of 5 years), for a total of 5 years to run consecutively to count 2. In counts 8 and 9, Gutierrez was sentenced to concurrent terms of 15 years, comprised of the middle terms of 5 years, doubled to 10 years pursuant to the three strikes law, plus 5 years for the section 186.22, subdivision (b)(1)(B) gang enhancement. In count 6, the court imposed the middle term of 2 years doubled to 4 years pursuant to the three strikes law, plus 5 years for the gang enhancement, which it stayed pursuant to section 654. It also imposed an additional 5 years for the prior serious felony conviction under section 667, subdivision (a)(1), for a total sentence of 25 years.

Defendants contend that the convictions for shooting at a person from a motor vehicle under section 26100, subdivision (c) in counts 7–9 must be reduced to convictions for the lesser included offense of shooting from a motor vehicle under section 26100, subdivision (d), because the trial court failed to instruct the jury that it must find a defendant shot "at another person," which is an element of the offense. Alternatively, they contend that two of the convictions for shooting from a motor vehicle must be stricken because the evidence did not support conviction of

three separate counts based on a single discharge of a firearm.

We conclude that the trial court erred in failing to instruct the jury that to convict defendants of violating section 26100, subdivision (c), it must find that a defendant shot at another person. However, the error was harmless beyond a reasonable doubt because it was undisputed that the shooter shot "at a person," and defendants were not prevented from arguing otherwise.

We agree with defendants that the evidence presented in this case—in which it was alleged that the shooter fired a single bullet—was not sufficient to support three convictions under section 26100, subdivision (c). We therefore reverse the convictions in counts 8 and 9 as to both defendants.

FACTS[3]

This incident began when two eighth graders, Angel and Daniel, Corrales's younger brother, arranged through messages exchanged on social media to meet at a park and fight. Angel waited at the park with Francisco and Carlos, two fellow eighth graders. Daniel arrived in a gray Honda

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[3] We limit our recitation of the facts to those relevant to resolution of the issues on appeal. In particular, the offenses charged in counts 4 and 5 occurred in a separate incident in which only Gutierrez was involved and are not challenged on appeal, so it is unnecessary to recount the underlying facts of those counts here.

Civic driven by Corrales. Corrales got out of the car and asked if Angel planned to fight Daniel. When Angel said he did, Corrales grabbed a baseball hat Carlos had been wearing and refused to give it back. Angel and Corrales engaged in a physical fight. They were well-matched and it was not clear who was the victor. Corrales got back in the car.

Angel, Francisco, and Carlos walked toward the apartment complex where Carlos lived. Corrales drove alongside them as they walked and tipped the baseball hat at them repeatedly. At the apartment complex, Corrales got out of his car and yelled that he would kill "all of [Angel's] homies with a Glock." Carlos ran to the apartment to get some friends to help, but Corrales drove away.

The three boys stood in front of the apartments for about 10 to 20 minutes with some other friends from the neighborhood. Angel continued to send text messages to Daniel, challenging Daniel to fight him and telling Daniel where he was. Soon afterward, the same gray Honda Civic drove up the street toward the apartment complex. As it approached, Gutierrez stood up through the sunroof holding a revolver.[4] Gutierrez had his arm extended and it appeared to Angel that he was aiming where Angel was standing. At that moment, Francisco was right behind Angel, and Carlos was a little further to his left. Gutierrez fired a single shot

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[4] It is uncontested that Gutierrez was convicted as the shooter, and Corrales was convicted on an aiding and abetting theory of liability as the driver of the vehicle.

and yelled, "Fuck R.C.A." No one was hit, and there was no evidence that a bullet was ever recovered.

DISCUSSION

Defendants contend their multiple convictions for shooting at another person from a motor vehicle under section 26100, subdivision (c) in counts 7–9 must be reduced to single convictions of the lesser included offense of shooting from a motor vehicle under section 26100, subdivision (d), because the trial court failed to instruct the jury that it must find Gutierrez shot "at another person," which is an element of the offense. We agree the trial court erred, but conclude that the error was harmless beyond a reasonable doubt because it was undisputed that the shooter shot "at a person," and defendants were not prevented from arguing otherwise.

Section 26100, Subdivisions (c) and (d)

Defendants were charged and sentenced in counts 7 through 9 in accordance with section 26100, subdivision (c). Pursuant to that subdivision, "[a]ny person who willfully and maliciously discharges a firearm from a motor vehicle *at another person* other than an occupant of a motor vehicle is guilty of a felony punishable by imprisonment in state prison for three, five, or seven years." (Italics added.) Section 26100 also prohibits willfully and maliciously shooting from

a vehicle where the shooter is not shooting "at another person" under subdivision (d), which bears the lesser penalty of "imprisonment in the county jail for not more than one year or in the state prison."

Proceedings

Pretrial

Before reading the charges, the court preinstructed the jury that they were to follow its instructions over any contrary statements of law.

The next day, after stating that the jury had been preinstructed, the trial court read the charges—which included the "at another person" requirement of section 26100, subdivision (c) in counts 7 through 9—to the jury.[5] The court clarified that it was reading from the information

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[5] Although listed in the information as counts 7 through 9, the court renumbered them for presentation to the jury as counts 4 through 6. The three counts read identically, but for the name of the victim. Count 7 (presented to jury as Count 4) stated: "On or about April 16th, 2016 . . . the crime of shooting from a motor vehicle, in violation of Penal Code section 26100(c), a felony, was committed by Paulo Corrales and Ramiro Gutierrez, who did willfully, unlawfully, and maliciously discharge a firearm from a motor vehicle at Angel Doe." Count 8 identified Carlos Doe as the victim. Count 9 identified Francisco Doe as the victim.

and explained that the information was "simply a statement of the charges."

Evidence

At trial, Angel testified that the shooter aimed "[t]owards where I was." Francisco was "right behind" him, and Carlos was "a little more further to the left." Angel was approximately 22 feet away from the shooter, but he may have been further away. He saw the gun when Gutierrez extended his arm. A second or two after Gutierrez extended his arm, Angel heard a shot and ran.

Carlos testified he saw the gun and knew it had been fired after he heard the shot. On cross-examination defense counsel asked, "Someone is pointing a gun in your direction from a car, right?" Carlos responded, "Yes."

Francisco testified that he saw the shooter pull out a gun, but was not asked whether the shooter aimed or shot at him.

A video recording of the incident that was played for the jury shows a car driving by a group of people in front of an apartment complex. There is a person protruding through the sunroof of the car. The person's arm is extended and is pointed in the direction of the group as the car passes. The group disperses rapidly as the car is passing by.

Instructions

The jury was instructed under a modified version of CALJIC No. 9.06, which is the appropriate instruction when the defendant is charged with the lesser offense of willfully and maliciously discharging a firearm from a motor vehicle under section 26100, subdivision (d). The modification, as drafted by the prosecutor, substituted "subdivision (c)" for "subdivision (d)" in two instances. The modified instruction read as follows:

"The defendants are accused in Counts 4, 5, and 6 of having violated section 26100, subdivision (c) of the Penal Code, a crime.

"Every person who willfully and maliciously discharges a firearm from a motor vehicle is guilty of a violation of Penal Code section 26100, subdivision (c), a crime.

"A firearm includes any device designed to be used as a weapon from which a projectile may be expelled by the force of an explosion or other form of combustion.

"In order to prove this crime, each of the following elements must be proved:

"1. A person discharged a firearm from a motor vehicle; and

"2. The discharge of the firearm was willful and malicious."

None of the parties objected to the instruction.[6] The court instructed the jury prior to the parties' closing arguments.

Closing Argument

In closing argument, the prosecutor systematically set forth and discussed the elements of each crime consistent with instructions that had been given by the court. She identified the crimes in counts 7 through 9 (presented to the jury as counts 4 through 6) as "shooting from a vehicle," and stated: "And what I have to prove beyond a reasonable

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[6] Although the Attorney General frames the court's alleged error as choosing to give a deficient CALJIC instruction rather than giving the corresponding CALCRIM instruction that includes all elements of the subdivision (c) offense, the problem was not the choice of a CALJIC instruction, but rather the choice of the *wrong* CALJIC instruction. The appropriate CALJIC instruction in a case where the defendant is charged with willfully and maliciously discharging a firearm from a motor vehicle at another person under section 26100, subdivision (c), is CALJIC No. 9.05, which states in pertinent part:

"In order to prove this crime, each of the following elements must be proved:

"1. A person within a vehicle [unlawfully] discharged a firearm *at another person* who was not an occupant of a motor vehicle; and

"2. The discharge of the firearm was willful and malicious." (Italics added.)

doubt is that a person discharged a firearm from a vehicle, and the discharge was willful and malicious. . . . [¶] . . . All that's required is that he did it on purpose, it wasn't some accidental shooting, and that he intended to do a wrongful act, which certainly he intended that he was going to shoot his gun from that vehicle." She did not list the requirement that Gutierrez must have shot "at another person" or specifically argue that he shot "at" the victims.

Defense counsel did not correct the prosecutor's recitation of the elements or specifically argue that Gutierrez did not shoot "at another person." Corrales admitted to driving the vehicle from which the shooter shot, but argued that he did not know what the shooter planned to do and therefore lacked the requisite intent. Gutierrez argued that he was mistakenly identified and was not involved in the crime.

Verdicts

The verdict forms provided to the jury set forth the elements of a section 26100, subdivision (d) violation, omitting the additional "at another person" requirement contained in section 26100, subdivision (c).[7] Individual verdict forms were prepared for each of the three counts for

[7] The respondent's brief inaccurately states that "the jury verdicts specifically required the jury to find as to counts 4, 5, and 6 that the perpetrator shot 'at' each of the victims . . . ."

both defendants. Each victim's name was included in parentheses following the elements of the offense in the count for which the individual was alleged to be the victim. The verdict forms stated that the section violated was section 26100, subdivision (c).[8] All parties approved the verdict forms.

The jury found each defendant guilty in counts 7 through 9 (numbered 4 through 6 on the verdict forms), and made no specific finding that a defendant shot "at another person" in any of those counts.

Sentencing

Without objection, the trial court sentenced defendants in accordance with the terms prescribed by section 26100, subdivision (c), as the minute order and abstracts of judgment reflect.

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[8] For example, the verdict form for Count 4 reads: "We, the Jury in the above-entitled action, find the Defendant, RAMIRO GUTIERREZ, GUILTY, of the crime of SHOOTING FROM A MOTOR VEHICLE, (victim Angel Doe), in violation of PENAL CODE SECTION 26100(c), a Felony."

Analysis

Error

"[T]he prosecution has the burden of proving beyond a reasonable doubt each essential element of the crime." (*People v. Flood* (1998) 18 Cal.4th 470, 481.) Trial courts have a sua sponte duty to instruct on the relevant law, including the elements of the offenses charged. (*Ibid.*) "[I]nstructional error relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense violates the defendant's rights under both the United States and California Constitutions." (*Id.* at pp. 479–480.) Where, as here, the defendant's substantial rights are affected, we review the claim of instructional error despite the lack of objection below. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1087.)

The elements of willful and malicious discharge of a firearm from a motor vehicle at another person are: "(1) acting willfully and maliciously, and (2) shooting from a motor vehicle at a person outside a motor vehicle." (*People v. Hernandez* (2010) 181 Cal.App.4th 1494, 1501 (*Hernandez*).)

Without citation to authority, the Attorney General argues that although the "at another person" requirement was omitted from the instructions provided to the jury during deliberations, the jurors were properly "preinstructed" with respect to this element because the trial court read the charges in the information before trial.

Defendants counter, and we agree, that the reading of charges is not a substitute for proper instruction.

The information is an accusatory pleading filed by the District Attorney and may contain facts that are not elements of the crimes charged. Instructions, on the other hand, are correct and unbiased statements of the law to which both parties may object, and which require judicial approval. The two are not interchangeable. The court's reading of the information was expressly separated from the pre-instructions given before the taking of evidence, and not part of instructing the jury at all. The court explained that the information (which was read to the jury the day after they were pre-instructed) was "simply a statement of the charges," and gave no indication the jury should look to it as a source of instruction on the law. Before deliberations, the court instructed the jury that it "must apply the law that I state to you" and that it must follow the court's instructions on the law over any conflicting statement made by the attorneys. Moreover, the court provided to the jury for deliberations a written copy of the court's instructions, which did not include the information.

Under these circumstances, even if the jury had recalled during deliberations that, in the information read to the jury by the court at the outset of trial, the District Attorney had alleged defendants "discharged a firearm at [the victims]," the jury would not reasonably have concluded that there was an additional element of the crime beyond the elements given in the court's actual instructions. It is

undisputed that the "at another person" element was omitted from the formal instructions given to the jury for deliberation. We conclude that the trial court erred when it failed to instruct the jury that it must find defendants shot "at another person."

Prejudice

"'When the jury is "misinstructed on an element of the offense . . . reversal . . . is required unless we are able to conclude that the error was harmless beyond a reasonable doubt." (*People v. Hayes* (1990) 52 Cal.3d 577, 628 [misinstruction on "immediate presence" element of robbery required reversal under *Chapman* [*v. California* (1967) 386 U.S. 18, 24] standard]; see *People v. Harris* (1994) 9 Cal.4th 407 [misinstruction on "immediate presence" element of robbery was harmless beyond a reasonable doubt].)' (*People v. Wilkins* (2013) 56 Cal.4th 333, 348.)" (*People v. Sanchez* (2013) 221 Cal.App.4th 1012, 1026–1027.) The omission of an element of the offense "will be deemed harmless only in unusual circumstances." (*People v. Merritt* (2017) 2 Cal.5th 819, 828.) Error may be found harmless where an instruction omits some elements of the offense or allegation, but "[the] element was undisputed, the defense was not prevented from contesting . . . the omitted element[], and overwhelming evidence supports the omitted element." (*Ibid.*)

In this case, the error was harmless beyond a reasonable doubt. Defendants were properly charged with shooting at another person from a motor vehicle under section 26100, subdivision (c), and do not argue that they lacked the opportunity to contest the "at another person" element. Neither defendant argued that the shooter did not, in fact, shoot at another person. Corrales relied on lack of intent to aid in a shooting as a defense, and Gutierrez claimed mistaken identity.

All of the evidence presented supported a finding that the shooter shot "at another person." The video recording of the incident depicted the shooter standing up through the sunroof of a car holding a firearm and aiming it at a crowd of people as the car passed. Both Angel and Carlos saw the shooter aiming the gun. Angel testified the shooter aimed "[t]owards where I was." Carlos indicated that the shooter was pointing a gun in his direction from the car.

Finally, the prosecution presented strong evidence that the perpetrators had a motive to shoot at the boys as well. Corrales and Angel fought just before the drive-by shooting, and Corrales threatened that he would kill all of Angel's "homies with a Glock." Gutierrez yelled "Fuck R.C.A." as he shot, indicating that there was a gang motive for the crime.

In light of these facts, we conclude that the error was harmless beyond a reasonable doubt.

Sufficiency of the Evidence to Support Three Convictions

Defendants argue that even if they were not prejudiced by instructional error, Gutierrez's single discharge from a firearm cannot support three separate convictions. We agree. On the evidence presented at trial, the single gunshot fired constitutes only a single crime. (See *In re Sergio R.* (1991) 228 Cal.App.3d 588, 598 ["The discharge of a firearm from a motor vehicle finding [under former section 12034, subd. (c)] . . . was not victim specific; rather, it pertained to all the victims"].) Thus, only one conviction under section 26100, subdivision (c) may stand. We therefore reverse the convictions in counts 8 and 9 as to both defendants.

DISPOSITION

We reverse defendants' convictions for shooting from a motor vehicle at another person under section 26100, subdivision (c) in counts 8 and 9. In all other respects, the judgment is affirmed.

MOOR, J.

We concur:

BAKER, Acting P.J.

JASKOL, 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.