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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. JOHN PAUL LUNA et al., Defendants and Appellants.	2d Crim. No. B232651 (Super. Ct. No. VA114885-01, -02) (Los Angeles County)

John Paul Luna and Anastacio Lopez appeal judgments following their convictions of attempted murder of Isidro Polanco and Rene Polanco (Pen. Code, §§ 664, 187, subd. (a), 189) (counts 1 and 2), with jury findings that the crimes were committed willfully, deliberately and with premeditation; assault with a semiautomatic firearm on Isidro Polanco and Rene Polanco (§ 245, subd. (b)) (counts 3 and 4); and attempted second degree robbery of Isidro Polanco (§§ 664, 211) (count 5), with findings that the offenses in counts 1 to 5 were committed for the benefit, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)).[1]

For Lopez, the jury found that for the offenses in counts 1, 2 and 5, a principal personally and intentionally discharged a firearm. (§ 12022.53, subd. (c).)[2]

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

[2] References to sections 12022.5, 12022.53, and 12034 are to versions in effect prior to repeal effective January 1, 2012.

The jury also found Luna guilty of shooting from a motor vehicle (§ 12034, subd. (c)) (count 11), with findings that this offense was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(B)). It found that in committing the offense in counts 1, 2 and 5, Luna personally used and intentionally discharged a firearm (§ 12022.53, subds. (b) & (c)), and for counts 3 and 4, he personally used a firearm (§ 12022.5, subds. (a) & (d)). The trial court sentenced Lopez to an aggregate prison term of life plus 40 years, and sentenced Luna to life plus 70 years. For each defendant it imposed consecutive life sentences for counts 1 and 2--attempted premeditated murder.

We conclude, among other things, that: 1) substantial evidence supports the convictions for attempted premeditated murder, 2) the evidence was sufficient to convict appellants of attempted robbery, 3) the trial court did not err in admitting evidence by a gang expert, 4) it did not abuse its discretion by admitting evidence of a 911 call, 5) it did not commit reversible error by not issuing a sua sponte instruction on attempted voluntary manslaughter, and 6) imposing consecutive life sentences on counts 1 and 2--attempted premeditated murder--did not constitute sentencing error. We affirm.

FACTS

Sometime after 1:00 a.m. on March 28, 2010, Rene Polanco and his girlfriend Gloria Loya were at the 5 Star Liquor store in Bellflower, California, along with Isidro Polanco, Rene's brother, and Isidro's wife, Vanessa Flores.

Isidro purchased a 24-pack of Corona beer. Lopez, Luna and Dexter Luckett were members of the 18th Street gang. They approached Rene and Isidro.

Luckett said, "What's green?" Rene testified that Luckett said that in a manner as if he were "trying to start something." Luckett told Isidro and Rene, "[T]hat fucking beer is going to go in my trunk." Luna "threw up the gang signs," and shouted "18th Street," and "[t]his is 18th Street." Isidro knew that "18th Street" referred to a gang and he was "very nervous."

Isidro responded that "the beer wasn't going in [Luckett's] trunk." Isidro put the beer in his truck and tried to get in the vehicle to drive away, but Luckett hit him

in the face. Lopez approached Isidro and they began to fight; Luckett fought with Rene. During the scuffle, Luckett yelled to Luna and Lopez, "Get it, get it, get it."

Flores called 911 and told the dispatcher that "two Hispanics" and an "African American" [Luckett] were trying to take beer from her husband. She was crying and screaming.

Lopez and Luckett retreated and ran away from Rene and Isidro. Luckett, Lopez and Luna got into a car. Lopez was in the driver's seat and Luna was in the passenger seat. As Lopez drove away, the tire of his vehicle ran over Rene's foot.

Lopez drove out of the liquor store driveway "into the street" and turned right. Luna saw Isidro and Rene; he was in the front passenger seat. Luna held a gun in his right hand, which was "fully extended," and began firing his weapon at Isidro and Rene. Rene testified that Luna fired eight to nine shots and the gun was pointed "right at [him] and [his] brother." Lopez drove away.

Sheriff detectives located the car that Lopez drove across the street from his home. In a "center console" near the front seat, they found a semi-automatic .40 caliber handgun.

Gang Expert Testimony

Sheriff Detective Dan Leicht opined that the shooting and the attempted robbery were crimes "committed in association with the 18th Street gang." The gang's "primary activities" include committing assaults, robberies, terrorist threats, and other offenses "all the way up to murder." Its income is derived from narcotics sales and extortion. The area where the crimes occurred falls within the gang's territory. For predicate offenses, Leicht testified that Omar Cardenas was an 18th Street gang member who was convicted of murder. The prosecution submitted certified court records to document that conviction. Leicht said Richard Alvarez was an 18th Street gang member convicted of assault with a deadly weapon. Leicht worked on that case.

Leicht testified that Lopez, Luna and Luckett were 18th Street gang members. Luna told Leicht that he had been a member of the gang since he was 18 years old. His gang moniker is "Daze." During a search of Lopez's home, Leicht found gang

graffiti in a "dresser." This included symbols "XV3" and "ST," which stand for the 18th Street gang, and "B," which refers to "Bellflower, 18th Street." In a jail roll-call sheet, Lopez identified himself as an 18th Street gang member. Lopez's gang monikers are "Nacho" and "Gadget."

Appellants did not testify at trial.

DISCUSSION

Substantial Evidence for Attempted Premeditated Murder

Appellants claim the evidence is insufficient to support a conviction for attempted premeditated murder. They claim the prosecution presented no evidence to prove an "intent to kill or premeditation and deliberation."

In deciding the sufficiency of the evidence, "we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Smith* (2005) 37 Cal.4th 733, 739.)

"'[A]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.'" (*People v. Smith*, *supra*, 37 Cal.4th at p. 739.) "[I]t is well settled that intent to kill or express malice, the mental state required to convict a defendant of attempted murder, may in many cases be inferred from the defendant's acts and the circumstances of the crime." (*Id*. at p. 741.)

Luna claims the evidence only shows that he was "shooting wildly from a car that was speeding away." (Boldface & capitalization omitted.) But there was evidence from which the jury could reasonably find that the shooting was directed specifically at Rene and Isidro. Rene testified that Luna "[s]tarted shooting his gun at us" and he fired "eight or nine" shots. He said the gun was pointed "[r]ight at me and my brother" and that he could see "the muzzle flashes." Isidro testified, "[W]e were being fired upon." He said the gun "was pointed toward our direction." Isidro tried to get Rene to the ground and he was "trying to get out of the angle of the gun."

From this evidence, the jury could reasonably find an intent to kill. "'The act of firing toward a victim at a close . . . range "in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill . . . ."'" (*People v. Smith*, *supra*, 37 Cal.4th at p. 741.) Such conduct "generally gives rise to an inference that the shooter acted with express malice." (*Id*. at p. 742.) Moreover, the jury could reasonably infer that appellants acted in a calculated fashion and had ample opportunity to reflect on their actions before the shooting. "'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.'"'" (*People v. Sanchez* (2001) 26 Cal.4th 834, 849.)

Sheriff Detective Leicht testified that store surveillance videos and photographs showed that Lopez got into the driver's seat. Lopez then "appeared to . . . look down towards the gear shift," and "with his right hand he grabbed what appears to be a firearm and [handed] it to Mr. Luna." The act of handling the weapon to Luna before the shooting supports an inference of prior planning. (*People v. Villegas* (2001) 92 Cal.App.4th 1217, 1224.) This, coupled with Luna's act of pointing the weapon at the victims and firing multiple shots, "is consistent with a preexisting intent to kill." (*People v. Mayfield* (1997) 14 Cal.4th 668, 768.)

There also was evidence showing a motive for the shooting. Leicht testified that this was a "gang crime" for the benefit of the 18th Street gang. Rene testified that during the incident Luna "threw up the gang signs," said it was "his neighborhood," and "[t]his is 18th Street." But Rene and Isidro successfully resisted the effort by the gang members to take the beer. This was a humiliating retreat by gang members on their own turf. Leicht testified the gang would expect its members to respond with violence if a person "successfully fought off . . . an attempted robbery" by its members. Gang members who would ignore this and not respond with violence would be "disrespected." The evidence is sufficient.

Sufficiency of the Evidence for Attempted Robbery

Appellants contend the evidence at trial only shows that Luckett attempted to commit robbery; they were not involved. Consequently, they claim their convictions for this offense must be reversed for insufficient evidence.

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) A person who aids another in committing a crime may be found to be "'equally guilty' of that crime." (*People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118; *People v. Middleton* (1969) 276 Cal.App.2d 566, 570 ["all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense or instead aid or abet its commission, are liable as principals for the crime"].)

The People contend that appellants have ignored the evidence in the record and note that the prosecution introduced evidence showing that both appellants assisted Luckett in the attempted robbery and the three of them jointly committed this crime for the benefit of their gang. We agree.

Leicht testified that the attempted robbery was a crime "committed in association with the 18th Street gang." He said appellants and Luckett were 18th Street gang members. Luna flashed gang signs and told Isidro that "[t]his is 18th Street." Jurors could draw the reasonable inference that Luna mentioned his gang affiliation to intimidate Isidro. They could also reasonably find that appellants and Luckett initiated the crime together. Loya testified that she saw Luna, Lopez and Luckett approach Rene and Isidro. The 911 call is also evidence that the crime was initiated by the three gang members acting in concert. After Luckett struck Isidro, Lopez moved toward Isidro and fought with him. During the scuffle, Luckett yelled to appellants, "Get it, get it, get it." The jury could reasonably infer this was a signal to his gang associates to take the beer. The three of them fled together after the Polancos resisted. Lopez facilitated their escape by driving the get-away car. The evidence is sufficient.

Gang Expert Testimony

Appellants contend the trial court erred by admitting the testimony of gang expert Leicht because he relied, in part, on hearsay. The People claim this issue was waived because appellants did not raise it at trial when Leicht testified. The People are correct. (*People v. Tafoya* (2007) 42 Cal.4th 147, 166.) But even on the merits, the result is the same.

The trial court has wide discretion to admit or exclude expert testimony. (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512.) In cases where a gang enhancement is alleged, a gang expert's testimony is properly admitted to assist the jury in an area well beyond their "common experience." (*Ibid*.)

Appellants contend the gang expert's testimony was inadmissible because he relied on hearsay. They also claim *Crawford v. Washington* (2004) 541 U.S. 36 precludes gang experts from basing their opinions on statements and documents prepared by others who do not testify at trial.

But "[e]xpert testimony may be founded on material that is not admitted into evidence and on evidence that is ordinarily inadmissible, such as hearsay, as long as the material is reliable and of a type reasonably relied upon by experts in the particular field in forming opinions." (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1463.) Moreover, "*Crawford* does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions." (*People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427.)

Appellants have not shown that the sources of information used by the gang expert to reach his opinions were unreliable. They claim Leicht relied on "records" to establish the "predicate acts" to prove that 18th Street gang members had committed various violent criminal offenses. They argue this contravenes *Crawford* because the expert did not rely totally on his own personal knowledge.

But official records "prepared to document acts and events relating to convictions and imprisonments" do not constitute testimonial hearsay. (*People v. Taulton*

(2005) 129 Cal.App.4th 1218, 1225.) "Therefore, these records are beyond the scope of *Crawford* . . . ." (*Ibid.*) The prosecution introduced court records to document Cardenas's murder conviction as predicate gang evidence. These records are highly reliable evidence and gang experts may rely on them to document the violent offenses committed by members of criminal street gangs. (*People v. Duran*, *supra*, 97 Cal.App.4th at p. 1460 ["Evidence Code section 452.5, subdivision (b) creates a hearsay exception allowing admission of qualifying court records to prove not only the fact of conviction, but also that the offense reflected in the record occurred"].)

Leicht obtained other information about Cardenas from the homicide detective who handled the murder case. A gang expert may rely on information from gang members, "colleagues and other law enforcement agencies." (*People v. Duran*, *supra*, 97 Cal.App.4th at p. 1463.) Leicht had personal knowledge about Alvarez. He worked on his criminal case and Alvarez told Leicht he was an 18th Street gang member. Luna told him he was an 18th Street gang member and Lopez listed that gang affiliation on his jail roll-call sheet. These admissions constituted strong proof of gang membership. Moreover, Leicht had personal knowledge about the 18th Street gang. He had handled numerous criminal cases involving 18th Street gang members. He knew the gang monikers and symbols used by members of that gang. Appellants have not shown error.

Admitting Evidence of a 911 Call

Appellants contend the trial court committed reversible error by allowing the prosecution to play the 911 call Flores made to police. They claim the court should have sustained a defense objection under Evidence Code section 352 because the call was unduly prejudicial as Flores was crying and screaming during that call. They assert that this evidence also was cumulative.

During the call, Flores told police that "two Hispanics" and an "African American" were trying to take beer from her husband. The portion of the call the trial court admitted was very short. The transcript of the call is only two pages long.

The People do not contest the fact that Flores was crying and screaming during that call. They claim, however, that it was highly probative evidence for the prosecution's case, and consequently there was no abuse of discretion by the trial court. We agree.

The trial court may exclude relevant evidence where its probative value is substantially outweighed by its prejudicial impact. (Evid. Code, § 352.) But "[a]trial court's exercise of discretion under Evidence Code section 352 will not be reversed unless it 'exceeds the bounds of reason, all of the circumstances being considered.'" (*People v. Tran* (1996) 47 Cal.App.4th 759, 771.)

Here the credibility of the prosecution's witnesses was an important issue. The 911 call was highly probative contemporaneous evidence that corroborated Flores's testimony that the defendants were attempting to commit robbery. Flores's statements during the call were made under stress and excitement because the crime was occurring as she was speaking. Such excited utterances "are considered reliable because their spontaneity ensures that the declarant has not had time to reflect and fabricate." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1266.) This is "a valuable form of evidence 'that cannot be replicated, even if the declarant testifies to the same matters in court,' and are therefore 'usually irreplaceable as substantive evidence . . . .'" (*People v. Hughey* (1987) 194 Cal.App.3d 1383, 1393.) The call was relevant because it fortified the prosecution's claim that all three gang members were attempting to take beer from the victim, and it refuted a defense claim that only Luckett was involved. Appellants have not shown an abuse of discretion.

Not Instructing on Attempted Voluntary Manslaughter

Appellants claim "the trial court erred in refusing to instruct the jury as to the lesser included offense of voluntary manslaughter . . . ." (Boldface & capitalization omitted.)

A trial court has a sua sponte duty to instruct on lesser included offenses where there is substantial evidence that would "absolve the defendant of guilt of the greater offense but not of the lesser." (*People v. Blair* (2005) 36 Cal.4th 686, 745.)

"Where an intentional and unlawful killing occurs 'upon a sudden quarrel or heat of passion' (§ 192, subd. (a)), the malice aforethought required for murder is negated, and the offense is reduced to voluntary manslaughter--a lesser included offense of murder." (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306.)

But "[s]uch heat of passion exists only where 'the killer's reason was actually obscured as the result of a strong passion aroused by a "provocation" sufficient to cause an "'ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.'"'" (*People v. Carasi*, *supra*, 44 Cal.4th at p. 1306.) "To satisfy this test, the victim must taunt the defendant or otherwise initiate the provocation." (*Ibid.*)

The People argue the trial court was not required to give a voluntary manslaughter instruction. There was no substantial evidence that the victims provoked appellants. The People argue the evidence shows appellants "provoked the entire incident and escalated the level of violence." We agree.

Appellants note that the victims fought with them. But this fight occurred after appellants provoked this incident by attempting to rob Isidro. Moreover, the shooting did not occur during that fight. It took place after appellants drove away from the scene.

Appellants suggest that the victims' resistance to their attempted robbery constituted a provocation and that removed this case from the attempted murder category. We disagree.

"The claim of provocation cannot be based on events for which the defendant is culpably responsible." (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 83.) "'If the defendant causes the victim to commit an act which the defendant could claim provoked him, he cannot kill the victim and claim that he was provoked. In such case, he is deemed to have acted with malice and would be guilty of murder.'" (*People v. Johnston* (2003) 113 Cal.App.4th 1299, 1312, quoting from 2 Wharton's Criminal Law (15th ed. 1994) § 157, p. 352.)

In *Johnston*, the Court of Appeal reversed a new trial order that had reduced a second degree murder conviction to voluntary manslaughter. It held the defendant who killed the victim was not entitled to have his conviction reduced based on a sudden quarrel or heat of passion claim because he provoked the fight. The court said the defendant "instigated the fight with [the victim] . . . . Having done that, he cannot be heard to assert that *he* was provoked when [the victim] took him up on the challenge." (*People v. Johnston*, *supra*, 113 Cal.App.4th at p. 1313.)

Even where the defendant acts "in the heat of passion," the "question is whether the claimed provocation for his impassioned state of mind is sufficient, i.e., the provocation was sufficient to arouse such passion in an ordinarily reasonable person and the provocation was not based on events for which appellant was responsible." (*People v. Oropeza*, *supra*, 151 Cal.App.4th at p. 83.) Here appellants did not testify and they presented no evidence on heat of passion or provocation. Most critically, they did not present evidence on provocation by the victims for the shooting. That the fight occurred during the attempted robbery is significant because the victims resisted the commission of appellants' felony. '"[P]redictable conduct by a resisting victim' of a felony cannot 'constitute the kind of provocation sufficient to reduce a murder charge to voluntary manslaughter.'" (*People v. Balderas* (1985) 41 Cal.3d 144, 197.)

Appellants suggest the shooting was the logical extension of mutual combat between them and the robbery victims.

The People respond that the use of the gun after the fight was an escalation of violence against unarmed victims. They claim this constituted an "undue advantage," which removed this case from the voluntary manslaughter category. We agree.

In *People v. Lee* (1999) 20 Cal.4th 47, 60, footnote 6, our Supreme Court cited to its earlier decision in *People v. Sanchez* (1864) 24 Cal. 17, and stated, "A defendant who kills during the mutual combat contemplated by this type of voluntary manslaughter may not take undue advantage." It noted that the fight in the *Lee* case involved unarmed mutual combat of pushing and shoving. Consequently, when the defendant decided to use a gun to shoot his victim, this "was necessarily an undue

advantage." (*Lee*, at p. 60, fn. 6.) "[I]n case of mutual combat, in order to reduce the offense from murder to manslaughter, it must appear that the contest was waged upon equal terms, and no undue advantage was sought or taken by either side; for, if such was the case, malice may be inferred, and the killing amount to murder." (*People v. Sanchez*, *supra*, 24 Cal. at p. 27.) Here there was both a lack of provocation by the victims and the undue advantage by the use of a gun directed at unarmed victims from a car fleeing the scene.

Moreover, the jury's special findings show that even had the trial court been given a voluntary manslaughter instruction, the result would not change. The court instructed jurors that "[a] decision to kill made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate and premeditated." Defense counsel argued to the jury that this was "a wild-type shooting " to "warn someone [not to] chase us." But the jury rejected this claim. It found the shooting was deliberate and premeditated attempted murder. This finding "is manifestly inconsistent with having acted under the heat of passion." (*People v. Wharton* (1991) 53 Cal.3d 522, 572.)

Sentencing

The trial court sentenced Lopez to an aggregate prison term of life plus 40 years. It sentenced Luna to life plus 70 years.

Appellants note that the trial court imposed consecutive life sentences for counts 1 and 2--attempted premeditated murder. (*People v. Lee* (2003) 31 Cal.4th 613, 621 ["'*if the crime attempted is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole*'"]; see also § 664, subd. (a).) They claim the court erred because it should have run these counts concurrently instead of consecutively.

But a trial court has "broad discretion to impose consecutive sentences when a person is convicted of two or more crimes." (*People v. Shaw* (2004) 122 Cal.App.4th 453, 458.) "Only one criterion or factor in aggravation is necessary to

support a consecutive sentence." (*People v. Davis* (1995) 10 Cal.4th 463, 552.) "[T]he court may impose consecutive terms of imprisonment where the criminal act is an act of violence against separate individuals . . . ." (*Shaw*, at p. 459.)

Here there were multiple shots fired at Isidro and Rene. Consequently, there were two victims and each had an individual reaction to being targeted for murder. In sentencing, the trial court found these offenses were "totally unprovoked," "showed a complete lack of regard for human life," and involved "great violence." In separate counts, the jury found a premeditated intent to kill each victim. Appellants have not shown that any of these findings are unsupported by the record. They have not established error or any abuse of discretion in sentencing.

We have reviewed appellants' remaining contentions and conclude they have not shown error.

The judgments are affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

John A. Torribio, Judge

Superior Court County of Los Angeles

The Defenders Law Group, Paul Richard Peters, Lawrence R. Young for Defendant and Appellant John Paul Luna.

Charles Kelly Kilgore for Defendant and Appellant Anastacio Lopez.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Eric J. Kohm, Deputy Attorney General, for Plaintiff and Respondent.