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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOSE NUNEZ, Defendant and Appellant.	B284222 (Los Angeles County Super. Ct. No. VA139753)

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

Matthew Alger, 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, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

It is undisputed that defendant Jose Nunez fatally shot his brother-in-law in the chest and head. At trial, defendant argued that he did not harbor malice because he unreasonably believed that he acted in self-defense. Defendant was convicted of first degree murder, and firearm enhancements were found true. On appeal, defendant argues that the court failed to give sua sponte an instruction limiting evidence obtained in violation of *Miranda v. Arizona*[1] for impeachment purposes. In the alternative, defendant contends that his counsel was ineffective for failing to request the instruction. These arguments lack merit and we affirm the conviction. We remand for resentencing because the law now affords a trial court discretion to strike a firearm enhancement under Penal Code section 12022.53, and the record does not reveal how the trial court would have exercised its discretion.[2]

BACKGROUND

1. Information

On September 7, 2016, defendant was charged with one count of murder with malice aforethought. It was further alleged that defendant personally and intentionally discharged a firearm causing great bodily injury and death within the meaning of section 12022.53, subdivisions (b), (c), and (d). Two prior serious or violent felonies were alleged.

2. Defendant's Pretrial Custodial Interviews

Deputy sheriffs interviewed defendant prior to trial. At the onset, a deputy gave defendant the *Miranda* warning, after which-defendant said that he did not want to speak and that he

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1 *Miranda v. Arizona* (1966) 384 U.S. 436.

2 Undesignated statutory references are to the Penal Code.

wanted to talk to a lawyer. Ignoring defendant's request for an attorney, deputy sheriffs continued to interview defendant. A second interview occurred the next day.

Defendant revealed the following during his custodial interviews. Defendant first told deputies that a stranger shot his brother-in-law Joe Nava (Joe) and then ran out the back of the house. According to defendant: "[S]omebody was running back out through the back." Defendant claimed to have been in the bathroom at the time of the shooting. "All I know is that I came out and somebody was going out the back, and the rifle was on the porch." Defendant stated that he had used methamphetamine a few days before the shooting.

In the second interview, defendant said that he was drunk and high at the time of the shooting. He drank a six pack the day of the shooting, and did not "remember anything." He acknowledged that his drinking upset his family.

After a deputy sheriff said that it was "obvious" defendant shot Joe, defendant said that he was afraid of Joe. Defendant said that Joe told him: "I'm tired of this mother fucker" and defendant "got scared." Joe "walked out and he went to his room, and I thought he was going to do something to me. I was afraid." Defendant explained that he "felt like he [Joe] threatened my life." Defendant said he went to Joe's room with his rifle, and the gun fired when Joe tried to grab the weapon from defendant.

3. Trial

Defendant's wife Deborah Nava and children V.N., J.N., A.N., and E.N. testified for the prosecution.[3] On August 1, 2015, defendant, Deborah, and the children lived with Deborah's brother Joe. At the time defendant had relapsed, and was using

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[3] V.N. testified that defendant was her step-father.

both drugs and alcohol. His relapse caused strain in his relationship with his wife.

On the morning of August 1, 2015, Deborah and E.N. were in the living room when they heard a gunshot. V.N., who was in the shower, and J.N., who was in front of the house, also heard a gunshot. A.N. awoke when he heard screaming.

Immediately after the shooting, Deborah and E.N. ran to the back of the house. Deborah saw defendant holding a rifle. She ran to Joe's room, where he lay on the floor, unresponsive. When E.N. saw her uncle, she called 911 and reported that her dad "did it." She said that her dad shot her uncle.

Although defendant was reluctant to relinquish the weapon, J.N. was able to take the rifle from his father. J.N. threw the rifle into the pool in the backyard. A.N. saw J.N. and defendant fighting over defendant's rifle.

No one saw a stranger in the house.

J.N. testified that defendant was mourning the death of his brother and that he appeared depressed. J.N. saw defendant drinking the day before the shooting. E.N. testified that drinking alcohol caused her father to exhibit paranoia.

Joe died of multiple gunshot wounds. One entered the back of his head and the other entered his chest. The bullet that entered the back of Joe's head, hit his skull, and split in two parts. The other bullet entered the left upper chest, penetrated the aorta causing bleeding, and hit both Joe's lung and liver. The fact that there was no soot or stippling indicated that the rifle was at least a foot or two away from Joe when it was fired. Joe had no defensive wounds. Defendant had no wounds on his hands.

Defendant testified in his defense. He stated that he felt culpable for what happened to Joe. He explained that he started drinking shortly before the killing because he suffered depression following his brother's death. He drank heavily the night before the shooting and started drinking again the morning of the shooting. He said that he was intoxicated.

According to defendant, shortly before the shooting, Joe entered his bedroom without knocking, and defendant asked him to knock the next time he entered. Joe became angry, looked "belligerent," and "ball[ed] his fists." Joe then told defendant: " 'You ain't running shit here, you know, you need [to] get your shit and get the fuck out.' " Joe told defendant "'If you don't get out of here, I'm going to put a green light on you,' " meaning he would have defendant killed. When Joe left defendant's bedroom, defendant believed that Joe "was going to get a gun and kill me." Defendant believed this because Joe appeared angry and "was acting belligerent." Defendant heard a door slam.

According to defendant he "grabbed [his] rifle to protect [himself]." He walked from his bedroom to Joe's bedroom with the rifle in hand and told Joe that he "didn't want any problems." Defendant testified that Joe reached to grab the rifle, and when Joe "yanked on it," the rifle discharged. Defendant admitted that he lied when the police interviewed him after the incident. Specifically his statement that a stranger shot Joe was not true.

During cross-examination defendant was not able to recall several details from his pretrial interviews. He testified that he remembered telling deputy sheriffs that he felt threatened and afraid for his life. Defendant testified Joe had never assaulted him. When asked how Joe was shot in the back of his head,

defendant responded "I can't answer that question because I don't know the answer to it."

J.N. testified as part of defendant's defense. J.N. had sent a text message stating that when defendant drinks it sometimes takes him a while to return to reality.

In rebuttal, defendant's pretrial interviews were played for jurors. Additionally, Deputy Sheriff Everett Maldonado testified that when deputy sheriffs arrived at the scene of the shooting, defendant said that the shooter ran out the back door.

4. Judgment and Sentence

Jurors found defendant guilty of first degree murder, and that defendant personally and intentionally discharged a firearm, causing great bodily injury and death within the meaning of section 12022.53, subdivisions (b),(c), and (d).

At the prosecutor's request, the trial court ordered the prior conviction allegations stricken.

The court sentenced defendant to 25 years to life for the first degree murder and 25 years to life for the firearm enhancement pursuant to section 12022.53, subdivision (d). The court imposed and stayed enhancements under section 12022.53, subdivisions (b) and (c).

The abstract of judgment contained an enhancement under section 12022.5, which the People did not allege and jurors did not find true.

5. Probation Report

The probation report indicated that defendant was born in 1971. In 1988, a juvenile petition was sustained finding that defendant committed two assaults with a semiautomatic firearm. Defendant subsequently was convicted of several misdemeanors, felony burglary (in 1993), and possession of a firearm by a felon

(in 2009). His misdemeanor convictions included battery (in 1995 and 2002) and domestic violence (in 2007). Defendant was employed as a welder in the construction trade.

DISCUSSION

As we shall explain, defendant's claim of instructional error and related contention of ineffective assistance of counsel lack merit. Defendant, however, persuasively shows that the case must be remanded for resentencing because of a change in the law since defendant's sentence was imposed. The amendment to section 12022.53 potentially lessens the punishment, and as respondent concedes, is applied retroactively to non-final judgments. (See *People v. Francis* (1969) 71 Cal.2d 66, 75-76 citing *In re Estrada* (1965) 63 Cal.2d 740, 750.)

1. Defendant Demonstrates No Instructional Error

Jurors were instructed as follows pursuant to CALJIC No. 2.13: "Evidence that at some other time a witness made a statement or statements that is or are inconsistent or consistent with his or her testimony in this trial, may be considered by you not only for the purpose of testing the credibility of the witness, but also as evidence of the truth of the facts as stated by the witness on that former occasion.

"If you disbelieve a witness' testimony that he or she no longer remembers a certain event, that testimony is inconsistent with a prior statement or statements by him or her describing that event."

Defendant argues that because defendant's out-of-court statements to interrogating officers were obtained in violation of his *Miranda* rights the jury should have been instructed that it could only consider the out-of-court statements for impeachment

purposes and not for the truth.[4] Defendant did not request such an instruction. Our Supreme Court has held that the trial court is not required to sua sponte give that instruction. (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1078.) As our high court stated: "Defendant failed to request a limiting instruction, and the trial court had no obligation to issue one sua sponte." (*Ibid*.)

2. Defendant Fails to Show He Received Ineffective Assistance of Counsel

Defendant next argues that his counsel rendered ineffective assistance by failing to request the instruction that his out-of-court statements were admissible only for impeachment purposes. He argues that he was prejudiced because, according to him, if jurors considered the evidence only for impeachment, it is reasonably probable jurors would have concluded he acted in unreasonable self-defense.[5] Defendant emphasizes the following

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[4] CALJIC No. 2.13.1, which defendant claims should have been given provides: "If you find that a defendant, following arrest, made [a statement] [or] [statements] to a law enforcement officer or officers, inconsistent with [that] defendant's trial testimony, the out-of-court [statement] [or] [statements] should be considered by you only for the purpose of testing [that] defendant's credibility as a witness. You must not consider the statement as evidence of guilt. [¶] [Evidence of an oral out-of-court statement of the defendant ought to be viewed with caution.]"

[5] Jurors were instructed on unreasonable self-defense as follows: "A person who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same

from his trial testimony: While "standing over" defendant, Joe told defendant, " 'You ain't running shit here, you know, you need [to] get your shit and get the fuck out.' " And, " 'If you don't get out of here, I'm going to put a green light on you,' " meaning he would have defendant killed. Defendant testified that Joe tried to take the rifle from him and the rifle discharged when Joe yanked on it.

An appellant claiming ineffective assistance of counsel has the burden to show both (1) that his counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) that the deficient conduct resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 692; *People v. Ledesma* (1987) 43 Cal.3d 171, 216 -218.) "If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails. Moreover, ' "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.' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.)

A brief review of unreasonable self-defense is necessary to analyze defendant's argument. "Unreasonable self-defense is 'not a true defense; rather, it is a shorthand description of one form of voluntary manslaughter.' " (*People v. Elmore* (2014) 59 Cal.4th 121, 134.) " '[O]ne who holds an honest but unreasonable belief

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situation seeing and knowing the same facts would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of voluntary manslaughter. [¶] As used in this instruction, an 'imminent' peril or danger means one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer."

in the necessity to defend against imminent peril to life or great bodily injury does not harbor malice and commits no greater offense than manslaughter.' " (*Ibid.*) Unreasonable self-defense "involves a misperception of objective circumstances . . . ." (*Id.* at p. 135.) The defendant must have the actual albeit unreasonable belief that he is in imminent danger of death or great bodily injury. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.)

The first deficiency in defendant's argument that he suffered prejudice is his emphasis on a future threat. Defendant argues that his in-court testimony that Joe threatened to put a "green light" on defendant. By green light, defendant meant that Joe would have him killed. Defendant then argues that because he did not mention this threat in his pretrial interviews jurors were less likely to believe his testimony. But, defendant's assumption that this testimony supported his claim of unreasonable self-defense lacks merit because the testimony demonstrates only a future threat that Joe would have defendant killed not a present threat that Joe intended to immediately kill defendant. As our Supreme Court has explained: " 'Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant's fear must be of imminent danger to life or great bodily injury. " ' "[T]he peril must appear to the defendant as immediate and present and not prospective or even in the near future. An imminent peril is one that, from appearances, must be instantly dealt with." ' " (*People v. Manriquez*, *supra*, 37 Cal.4th at p. 581.)

Defendant's only testimony supportive of his claim of imminent danger was defendant's testimony that "I was thinking that he was going to get a gun and kill me." Defendant

reiterated, "I thought he was going to go over there and get a gun." Defendant identifies no inadmissible out-of-court statement undermining this testimony other than his identification of a stranger as the shooter. But other admissible evidence (unchallenged on appeal) showed defendant used the stranger-shooter theory right after the shooting, and his repetition of it in his pretrial interview did not prejudice him.

Defendant's claim of unreasonable self-defense was particularly weak and his own testimony as well as other evidence undermined it. When asked how Joe was shot in the back of his head, defendant responded: "I can't answer that question because I don't know the answer to it." Defendant admitted that he lied to deputy sheriffs immediately after the shooting and told them that a stranger shot Joe. Further, defendant testified that Joe had not previously assaulted him. The forensic evidence showed that Joe died of multiple gunshot wounds, and more significantly he had no defensive wounds and no soot or stippling, all suggesting the shooting did not occur during a struggle.

Unreasonable self-defense requires defendant's actual belief that he was in danger of great bodily injury. On this critical issue, defendant's pretrial interview statements actually assisted him and defense counsel emphasized these statements during closing argument. In his interview, defendant told officers: "I felt like he threatened my life." Defendant's counsel emphasized this statement during closing argument, arguing: "Well let's look at the recording back in 2015, two years ago. . . . Mr. Nunez says 'I felt like he threatened my life.' [¶] That's the same thing he told you. [¶] This is not the first time he said it. [¶] He said it. It was recorded. You heard it.'"

Finally, defendant's argument narrowly focuses on his own testimony and ignores the great bulk of evidence in the record. Defendant's daughter called 911, telling the operator that her father had shot her uncle. Defendant was found holding the weapon, which his son J.N. had to wrestle from him. Joe was shot in the back of his head, which was inconsistent with any of defendant's theories. Jurors found that the murder was premeditated, which required them to find that defendant "weigh[ed] and consider[ed] the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill." Given the overwhelming evidence against defendant, it was not reasonably probable that instructing jurors to consider his out-of-court statements only for impeachment would have led to a more favorable verdict under any standard of review. Because defendant cannot demonstrate prejudice, he cannot show he received ineffective assistance of counsel.

3. Resentencing is Required Because of a Change in the Law

Effective January 1, 2018, Senate Bill No. 620 affords a trial court discretion to strike or dismiss a section 12022.53 enhancement in the interest of justice. "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.53, subd. (h).)

When the trial court sentenced defendant, it had no discretion, and the record is silent as to whether the court would have struck the enhancement if it had had that authority.

Defendant argues the case must be remanded for resentencing based on the new statute.

Citing *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896, respondent argues that no remand is required. In *Gutierrez*, the appellate court considered whether resentencing was required following the Supreme Court's decision in *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. The Supreme Court held in *Romero* that a trial court has discretion to strike a prior conviction pursuant to the Three Strikes law in furtherance of justice. (*Gutierrez,* at p. 1896.) The Supreme Court issued its *Romero* decision while the *Gutierrez* appeal was pending. But in an apparently prescient statement at sentencing, the *Gutierrez* trial court stated: " 'this is a situation where I do agree with [the prosecutor], there really isn't any good cause to strike it. There are a lot of reasons not to, and this is the kind of individual the law was intended to keep off the street as long as possible.' " (*Ibid.*) The *Gutierrez* appellate court concluded that remand was not necessary because the trial court made clear at sentencing that it would not have exercised its discretion to strike a prior. (*Ibid.*)

The People's reliance on *Gutierrez* is somewhat overstated. In the present case, the trial court was silent on whether it would or would not have stricken the enhancement. That is not the only measure, and we agree with respondent that if no reasonable court could strike the enhancement, we need not remand. (See *People v. DeGuzman* (1996) 49 Cal.App.4th 1049.) Acknowledging this issue is a close one, we cannot say on this record that it would necessarily be an abuse of discretion for the trial court to strike the section 12022.53 subdivision (d) enhancement as part of its sentencing options.

As the People correctly point out defendant's criminal history is "horrendous." He had two sustained juvenile petitions that qualified as strikes, and at least 16 separate criminal convictions. On the other hand, a sentencing court might have looked favorably on defendant's testimony that he felt responsible for Joe's death. He also remained free from conviction for any offense for five years, and he was intoxicated at the time of the killing. The trial court also struck the two prior juvenile strikes. Finally, defendant was 46 years old when he was sentenced. The trial court could reasonably conclude that striking the 25 year enhancement would still result in defendant not being released from custody until he was 71 years old. And, of course, the court could impose either the subdivision (b) or (c) enhancement that it had previously stayed which would add either 10 or 20 years to the sentence.

Because the record does not clearly demonstrate that striking the enhancement would be error, and in keeping with traditional notions of appellate jurisprudence, we believe the trial court should decide the issue in the first instance.[6]

DISPOSITION

The judgment of conviction is affirmed. The trial court is directed to amend the abstract to delete the section 12022.5 enhancement which was neither pled nor proved. The case is remanded for the trial court to exercise its decision whether to strike the section 12022.53, subdivision (d) enhancement pursuant to section 12022.53, subdivision

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[6] Although in his opening brief, defendant argued that his presentence custody credit was miscalculated, he concedes in his reply that he received the correct credits.

(h). If the trial court strikes the section 12022.53 subdivision (d) enhancement, it may reconsider its decision to stay the subdivision (b) and (c) enhancements.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

HALL, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.