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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOSE AVALOS, Defendant and Appellant.	B264295 (Los Angeles County Super. Ct. No. BA405947)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura F. Priver, Judge. Affirmed with directions.

Jonathan P. Milberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Jose Avalos of attempted willful, deliberate, and premeditated murder (Pen. Code, §§ 664, 187, subd. (a)),[1] attempted robbery (§§ 664, 211), and mayhem (§ 203). The jury found true allegations that defendant personally used and discharged a firearm and caused great bodily injury. (§ 12022.53, subds. (b), (c) & (d).) The court sentenced him to prison for a total of 51 years to life.

Defendant contends that the evidence is insufficient to support the finding that his attempted murder was premeditated, and that his sentence is unconstitutionally cruel and unusual. Defendant further contends, and the Attorney General agrees, that the court erred in imposing a sentence for a gang enhancement allegation that was never tried to the jury. We agree with this last contention and will modify the judgment accordingly. We reject the defendant's other contentions and affirm the judgment as modified.

STATEMENT OF FACTS

About 1:00 o'clock in the morning of December 9, 2012, Jessica, Jasmine, Alexandria, and Fernando were walking home from a birthday party in Los Angeles.[2] Jasmine and Alexandria were walking a few feet in front of Jessica and Fernando. As they approached the intersection of Vernon Avenue and Central Avenue, three individuals rode bicycles past them.

Shortly afterward, defendant, then 17 years old, walked up to the group from behind and asked "where you coming from?" Fernando and the others stopped and turned around. Two of the bicyclists, who appeared to be defendant's companions, were nearby and watching.

Defendant then began patting Fernando's pockets with both hands as he asked Fernando what he had on him. Fernando believed he was being robbed, raised his hands

[1] Statutory references are to the Penal Code.

[2] Because Jessica, Jasmine, and Alexandria are or were minors at the time of the incident, and are usually referred to by their first names in the record and in the parties' briefs on appeal, we will use their first names. To be consistent, we will also use Fernando's first name. We intend no disrespect.

in the air, and said he did not have anything. Defendant again asked what Fernando had on him, and continued to check Fernando's pockets.

Jasmine (Jessica's sister) told Jessica, "Let's go," to which Jessica responded, "wait," or "hold on." Jessica then told defendant that Fernando said he did not have anything, and to leave Fernando alone. Defendant looked to his right and his left, lifted up his sweatshirt, and pulled out a gun from his pants or a sweatshirt pocket.[3] He pointed the gun at Jessica and, without saying anything, shot her in the face from about two feet away. Jessica did not have time to step away or put her hands in front of her face. Defendant and his companions fled without saying a word. Jasmine called 911. A surveillance video recording of the incident that corroborated the witnesses' testimony was played at trial.

As a result of the shooting, Jessica suffered a permanent brain injury and has been unable to move, feed herself, or breathe without the aid of a ventilator.

Defendant was arrested nine days after the shooting. Around that time, Fernando and Alexandria separately identified defendant as the shooter in six-pack photo lineups. They and Jasmine identified defendant as the shooter at trial. The gun was never recovered.

The defense introduced the testimony of a firearms expert who opined that guns may have a "hair trigger" for a variety of reasons, and that guns can be discharged by accident.

DISCUSSION

I. Sufficiency of the Evidence of Premeditation

Defendant contends that the evidence is insufficient to support the jury's finding that his attempted murder was premeditated. We disagree.

[3] Fernando testified that the gun did not have a magazine or clip attached to it, and it appeared to be a revolver. A police officer testified that the shell casing from a bullet fired from a revolver remains in the gun, and no shell casings were found at the scene of the shooting. Alexandria said the gun looked like a "toy gun" or a "clown gun."

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Lee* (2003) 31 Cal.4th 613, 623.) An attempted murder is "premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse." (*People v. Pearson* (2013) 56 Cal.4th 393, 443.)

To determine whether the evidence is sufficient to support a finding that murder or attempted murder was premeditated, we consider the "evidence presented and all logical inferences from that evidence." (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.) We "review the entire record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—from which a reasonable trier of fact could find that the defendant premeditated and deliberated beyond a reasonable doubt." (*Ibid.*)

In *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*), our Supreme Court identified three factors to consider in determining whether the evidence is sufficient to support a finding of premeditation: "(1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing—what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)." (*Id.* at pp. 26-27.)

The Court has subsequently cautioned, however, that "'[u]nreflective reliance on *Anderson* for a definition of premeditation is inappropriate. The *Anderson* analysis was

intended as a framework to assist reviewing courts in assessing whether the evidence supports an inference that the killing [or attempted killing] resulted from preexisting reflection and weighing of considerations. . . .'" [Citation.] In other words, the *Anderson* guidelines are descriptive, not normative. 'The *Anderson* factors, while helpful for purposes of review, are not a sine qua non to finding [premeditation], nor are they exclusive.'" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1081.)

Here, there is ample evidence from which jurors could reasonably infer premeditation. Defendant armed himself with a loaded gun as he and companions roamed the streets at 1:00 o'clock in the morning looking for a robbery target. In attempting to rob Fernando, defendant did not need the gun because Fernando raised his hands in the air and offered no resistance. When, however, Jessica, a 14-year-old girl, verbally confronted him, defendant decided to use the gun. Before pulling the gun from under his sweatshirt, he looked to his right and his left. According to the Attorney General, he did this "to determine if his associates were watching what was happening." Another reasonable inference is that he was looking to see if potential witnesses or police were in the area. Whatever reason he had for looking around him, the actions indicate that he gave some thought to what he was about to do.

He had a motive for shooting Jessica. The girl had challenged him in front of his friends. Such conspicuous disrespect could not be tolerated and required an immediate, harsh, and equally conspicuous response: He would pull a gun and shoot the insolent child in front of his friends and hers. (See *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 295 [desire to retaliate is evidence of motive supporting premeditated and deliberation].)

The manner of defendant's response – shooting Jessica in the face at close range – also supports an inference of a premeditated attempt to kill. Defendant decided not to merely intimidate or frighten her, which he could have accomplished by brandishing the gun or shooting it in the air, or to merely wound her by, for example, shooting her in a foot or leg. By shooting Jessica in the face at close range, the jury could reasonably

conclude, defendant had decided to kill her. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 768.)

Although the actions defendant took after Jessica's verbal challenge – looking to his right and left, lifting his sweatshirt, pulling out a gun, pointing it at Jessica's face, and pulling the trigger – took place in a matter of seconds, the required preexisting thought and reflection "'"does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .'"'" (*People v. Houston* (2012) 54 Cal.4th 1186, 1216.) Here, the series of acts that defendant undertook before shooting Jessica, although all taking place in a short period of time, support a reasonable inference that the shooting was the result of preexisting thought and reflection and, therefore, premeditation.

Defendant relies on *People v. Boatman* (2013) 221 Cal.App.4th 1253 (*Boatman*). In *Boatman* the defendant picked up his girlfriend, Rebecca Marth, and drove her to his house, where he lived with several family members. They smoked marijuana and watched a movie. Later, while the defendant was weighing marijuana and counting money, Marth picked up a gun that the defendant had in his room and waved it or pointed it at the defendant. The defendant took the gun away from Marth, pointed it at her "jokingly," and cocked the hammer back. (*Id.* at p. 1263.) He knew the gun was loaded. He later explained, he was "[j]ust kind of being stupid." (*Id.* at p. 1260.) When Marth tried to slap the gun away, he squeezed it to keep from dropping it and "'it went off.'" (*Ibid.*) The defendant tried to give Marth mouth-to-mouth resuscitation and told his brother to call the police. (*Id.* at p. 1261.) He then brought Marth outside "'to get her help.'" (*Ibid.*) As a police officer drove the defendant to the police station, the defendant asked the officer if he knew whether Marth was ok, and said: "'I can't lose her. I would do anything for her. How is someone supposed to go on with their life when they see something like that? We were just going to watch a movie.'" (*Id.* at p. 1259.) The officer stated that the defendant "was crying with his head down for most of the trip." (*Ibid.*)

A jury found the defendant in *Boatman* guilty of first degree premeditated murder. The Court of Appeal reversed, and held that the evidence was sufficient to support second degree murder based on implied malice, but not premeditated first degree murder.[4] The *Boatman* court explained that there was no evidence of planning and, other than evidence that the two had recently argued, no evidence of motive. (*Boatman*, *supra*, 221 Cal.App.4th at pp. 1267-1268.) Although the defendant shot Marth at close range to her face, there was no evidence to suggest it was an execution-style killing. Although the gun held several bullets, the defendant fired only once, which did not instantly kill Marth. Significantly, the defendant immediately tried to resuscitate Marth, directed his brother call the police, and brought Marth outside to get help. The defendant's behavior, the court observed, was "of someone horrified and distraught about what he had done, not someone who had just fulfilled a preconceived plan." (*Id.* at p. 1267.)

Boatman is easily distinguished. Although the defendant in each case shot the victim once at close range in the face, the two cases otherwise reflect strikingly different situations. *Boatman* involved "stupid" gun play between the defendant and his girlfriend where others were present in the house. There was no evidence of planning and little, if any, evidence of motive. He "squeezed" the gun to keep from dropping it, causing it to fire and hit Marth. He then tried to save Marth and appeared "horrified and distraught" about what he had done. He did not flee the scene. In our case, the defendant packed a gun while attempting to rob a stranger on the street at 1:00 o'clock in the morning and, when challenged by a teenage girl in front of his companions, pulled his gun, shot her, and immediately fled. In contrast to the defendant in *Boatman*, there was no evidence that he appeared surprised by the results of his gun use, let alone horrified or distraught. *Boatman*, therefore, is not controlling.

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[4] The evidence was sufficient to support second degree murder, the court explained, because the jury could have easily concluded that pointing a loaded gun at someone and pulling the hammer back is an intentional act, the natural consequences of which are dangerous to human life, and that defendant deliberately did so with knowledge of such danger and with conscious disregard for Marth's life, even if, as defendant said, "'it was just all in play.'" (*Boatman*, *supra*, at p. 1263.)

II. Cruel and Unusual Punishment

Defendant contends that his sentence of 51 years to life constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. Although his argument may have had merit at the time he filed his opening brief, we reject the argument as moot based on our Supreme Court's recent decision in *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*).

To understand *Franklin*, we first review the recent decisions and legislative action that led to that decision.

The United States Supreme Court has applied the Eighth Amendment to the sentencing of juveniles by prohibiting: (1) execution for an offense committed when the offender was a juvenile (*Roper v. Simmons* (2005) 543 U.S. 551, 578); (2) life without the possibility of parole (LWOP) sentences for juveniles who commit a nonhomicide offense (*Graham v. Florida* (2010) 560 U.S. 48, 74 (*Graham*)); and (3) automatic LWOP sentences for juveniles who commit a homicide offense (*Miller v. Alabama* (2012) 132 S.Ct. 2455, 2460 (*Miller*)).

In *Graham*, *supra*, 560 U.S. 48, the Supreme Court, in holding that a nonhomicide juvenile offender may not be sentenced to LWOP, explained that juveniles, compared to adults, "have a '"lack of maturity and an underdeveloped sense of responsibility"'; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'" "Accordingly, 'juvenile offenders cannot with reliability be classified among the worst offenders.' [Citation.] A juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.'" (*Id.* at p. 68.) Moreover, the traditional penological goals of retribution, deterrence, incapacitation, and rehabilitation cannot justify LWOP sentences for juveniles. (*Id.* at pp. 71-74.) The state, the court concluded, must give juvenile offenders "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Id.* at p. 75.)

In *Miller*, *supra*, 132 S.Ct. 2455, the Supreme Court prohibited sentencing a juvenile homicide offender to *mandatory* LWOP. (*Id.* at p. 2469.) The sentencing court,

the high court explained, must "have the ability to consider the 'mitigating qualities of youth'" and "take into account how children are different." (*Id.* at pp. 2467, 2469.) These qualities of youth include: (1) the offender's age and its hallmark features such as "immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) the offender's family and home environment; and (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him." (*Id.* at pp. 2467-2468, 2475.)

In *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*), the California Supreme Court extended *Graham*'s prohibition of LWOP sentences for juvenile nonhomicide offenders to sentences that are "the functional equivalent of a life without parole," that is, to "a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy." (*Id.* at p. 268.) The Court explained that "[a]lthough proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future." (*Ibid.*) "[T]he sentencing court must consider all mitigating circumstances attendant in the juvenile's crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board." (*Id.* at pp. 268-269.)

In 2013, our state legislature enacted Senate Bill No. 260 (Senate Bill 260) to establish section 3051 and other statutes in response to *Graham*, *Miller*, and *Caballero*. Section 1 of Senate Bill 260 states in relevant part: "The Legislature finds and declares that, as stated by the United States Supreme Court in [*Miller*], 'only a relatively small proportion of adolescents' who engage in illegal activity 'develop entrenched patterns of problem behavior,' and that 'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,' including 'parts of the brain involved in behavior control.' The Legislature recognizes that youthfulness both

lessens a juvenile's moral culpability and enhances the prospect that, as a youth matures into an adult and neurological development occurs, these individuals can become contributing members of society. The purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with the decision of the California Supreme Court in [*Caballero*] and the decisions of the United States Supreme Court in [*Graham*] and [*Miller*]." (Stats. 2013, ch. 312, § 1.) The Legislature declared its intent "to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established." (*Ibid.*)

Section 3051 provides in pertinent part that, subject to exceptions inapplicable here, "[a] person who was convicted of a controlling offense that was committed before the person had attained 23 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the [Board of Parole Hearings (Board)] during his or her 25th year of incarceration at a youth offender parole hearing . . . ."[5] (§ 3051, subds. (b)(3), (h).) The "[B]oard shall conduct a youth offender parole hearing," which "shall provide for a meaningful opportunity to obtain release." (§ 3051, subds. (d) & (e).) The Board shall "take into consideration" and "give great weight to the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (§§ 3051, subd. (f)(1); 4801, subd. (c).)

In *Franklin*, our Supreme Court stated that section 3051 "effectively reforms the parole eligibility date of a juvenile offender's original sentence so that the longest possible term of incarceration before parole eligibility is 25 years." (*Franklin*, *supra*, 63 Cal.4th at p. 281.) The statute "thus superseded the statutorily mandated sentences of

[5] A "controlling offense" is defined as "the offense or enhancement for which any sentencing court imposed the longest term of imprisonment." (§ 3051, subd. (a)(2)(B).)

inmates who . . . committed their controlling offense before the age of 18."[6] (*Id.* at p. 278.) Because under section 3051, such inmates are "by operation of law, . . . entitled to a parole hearing and possible release after 25 years of incarceration" they are "not serving an LWOP sentence or its functional equivalent." (*Id.* at pp. 281-282.) The defendant's constitutional challenge to his sentence was therefore moot. (*Id.* at p. 268, 276-277.)

The *Franklin* court went on to state that the newly enacted statutes "contemplate that information regarding the juvenile offender's characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board's consideration"—his or her cognitive ability, character, and social and family background at the time of the offense. (*Franklin*, *supra*, 63 Cal.4th at pp. 269, 283.) Developing and assembling that information, the Court observed, is typically a task more easily done at or near the time of the juvenile's offense rather than decades later. (*Id.* at pp. 283-284.) Because the Supreme Court could not determine whether the defendant had a sufficient opportunity to put such information on the record, the Court remanded the matter for the limited purpose of determining "whether [the defendant] was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Id*. at p. 284.)

We will remand the matter for a similar determination. If the trial court determines that defendant had an insufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing, the court "may receive submissions and, if appropriate, testimony pursuant to procedures set forth in section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence. [Defendant] may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing,

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[6] Section 3051 originally applied to persons who committed a controlling offense before the person was 18 years old. (Former section 3051; Stats. 2013, ch. 312, § 4.) The Legislature amended the statute in 2015 to include persons under 23 years of age. (Stats. 2015, ch. 471, § 1.)

and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors. The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors (§ 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law' [citation]." (*Franklin, supra,* 63 Cal.4th at p. 284.)

III. Imposition of Sentence on Gang Enhancement Allegation.

The information alleged that defendant committed the charged crimes for the benefit of, at the direction of, and in association with a criminal street gang, and with the intent to promote, further, and assist in criminal conduct by gang members. (§ 186.22, subd. (b)(1)(C).) At the outset of the trial, the court granted the People's motion to bifurcate the trial of the gang allegations. Consequently, the People did not introduce any evidence pertaining to the gang allegation, the jury was never informed of or instructed on the allegation, and the jury made no finding as to the allegations.

At sentencing, the court imposed a 10-year sentence on the gang allegation, stayed that sentence pursuant to section 654. The stayed sentence is reflected on the abstract of judgment.

Defendant contends that the sentence on the gang enhancement must be stricken because the gang allegation was never tried to jury, and the jury made no finding on the allegation. The Attorney General agrees. We also agree and will direct the court accordingly.

DISPOSITION

The judgment is modified by striking the imposition of a sentence under section 186.22, subdivision (b)(1)(C). The court is directed to issue a minute order reflecting this modification of the judgment and to prepare an amended abstract of judgment that omits any reference to the imposition of sentence under that section and subdivision. The court

shall send a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed, and the matter is remanded to the trial court for the limited purpose of determining whether defendant was afforded an adequate opportunity to make a record of information that will be relevant to the Board as it fulfills its statutory obligations under sections 3051 and 4801.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

JOHNSON, J.

LUI, J.