Filed 8/14/13 P. v. Villalobos CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JOHNNY VILLALOBOS, Defendant and Appellant.	B239739 (Los Angeles County Super. Ct. No. MA040107)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Blanchard, Judge. Reversed and remanded for further proceedings.

Laura S. Kelley, under appointment by the Court of Appeal for Defendant and Appellant.

Kamala D. Harris, Attorney General; Dane R. Gillette, Chief Assistant Attorney General; Lance E. Winters, Senior Assistant Attorney General; Susan Sullivan Pithey, Supervising Deputy Attorney General; and Rene Judkiewicz, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Johnny Villalobos was charged with the murder of Juan Valdez. At trial, Villalobos admitted he aimed a pistol toward Valdez's chest and fired a single shot. He testified, however, that he shot Valdez because he had been attacked and was in fear for his life. The jury convicted Villalobos of first degree murder and found true special allegations related to firearm and gang enhancements.

On appeal, Villalobos argues that the trial court's use of the 1996 versions of CALJIC numbers 8.71 and 8.72, which instructed the jury on deciding between greater and lesser offenses, violated his due process rights and his right to jury by trial. He further asserts that there was insufficient evidence to support a true finding on the gang enhancement. We reverse the judgment and remand for further proceedings, concluding that the gang enhancement was not supported by substantial evidence.

BACKGROUND

A. Events Preceding Trial

On October 13, 2007, Anthony Sanchez attended a party and was attacked by a group of men. Sanchez's friend, Juan Valdez, attempted to help him. Multiple witnesses heard gun shots and saw several individuals run out of the party. Valdez sustained gunshot wounds and died from his injuries.

Two months after the shooting, appellant Johnny Villalobos, who identified himself as a member of the gang "Down As Fuck" (DAF), met with police officers and admitted he shot Valdez. During a recorded interview, Villalobos told police he was providing "security" at the party, which involved "patting [people] down" before they entered the premises. While engaged in these duties, Villalobos "travel[ed] back and forth [to drink] at the Tequila Place."

Approximately one hour after arriving at the party, Villalobos saw his friend, Freddie Prado, in a fight with "some . . . guys." Villalobos went to help Prado and saw two men "starting to come in . . . like they [were] gonna jump in . . . against Freddy."

Villalobos began fighting with one of the men and was struck in the head by Juan Valdez, who started "kicking his ass." Villalobos felt dizzy and was afraid he was going to get knocked out. While standing a foot and a half away from Valdez, Villalobos pulled a .380 pistol from his pocket and fired once toward Valdez's chest. After discharging the weapon, Villalobos ran out of the party and threw the pistol into a friend's car and told him to "get rid of it."

Villalobos stated that he "did not mean for [the shooting] to happen," explaining that he "wasn't thinking right" and had fired his weapon in self-defense. He also stated that he "wasn't at a stage clear of mind" because he was "pretty drunk" and had been "smoking weed." When officers asked Villalobos why he had a gun at the party, he stated that he was "a gang member" and did not know "where his rivals were," adding: "[t]here are gangs that hate us–gangs that hate me."

B. Trial Court Proceedings

On June 25, 2008, the Los Angeles District Attorney filed an information charging Villalobos and Freddie Prado with a single count of murder (Penal Code, § 187, subdivision (a)[1]) and charging Prado with possession of a firearm by a felon. (§ 12021, subd. (a) (1).) The information also included special allegations of firearm (§ 12022.53, subds. (b),(c),(d) and (e)) and gang enhancements. (§ 186.22, subdivision (b).)

1. Testimony at trial

a. The prosecution's witnesses

The prosecution called several witness to testify at trial, including: Anthony Sanchez, who was Valdez's friend; Xochitil Chavez, who was a friend of Sanchez's girlfriend; Jancie Ayala, who owned the property where the party was held; Los Angeles County Deputy Sherriff Elizabeth Smith, who investigated the shooting; and Los Angeles County Sherriff's Department Detective William Pickett, who testified as a gang expert.

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1 All further statutory citations are to the Penal Code unless indicated otherwise.

Anthony Sanchez testified that, on the night of October 13, 2007, he attended an outdoor party near Lancaster, California. After paying an admission fee, Sanchez saw his friend, Juan Valdez, and his then-girlfriend, Sanita Morales. Morales complained to Sanchez that she had been hit on by someone at the party and Sanchez hugged her. While Sanchez had his arm around Morales, a male approached, who began cursing at Sanchez and pushing him. The assailant eventually "started throwing punches." Seconds later, three or four more individuals began punching and kicking Sanchez, who tried to fight back. Sanchez eventually fell to the ground and lost consciousness. Upon regaining consciousness, Sanchez heard gunfire and then saw Valdez lying near the entrance. Sanchez had no memory of the identity of his attackers.

Xochitil Chavez testified that she attended the party with Morales, who Chavez described as a friend. After entering the party, Chavez saw several Hispanic individuals who she believed to be gang members based on their clothing and bald heads. She also saw that one of the individuals – who she later identified as defendant Freddie Prado–had a tattoo of the letters "DAF" on his arm, which she recognized as a symbol for the gang "Down As Fuck."

Chavez stated that before Sanchez had arrived at the party, Prado tried to "hit on" Morales. According to Chavez, Morales looked "annoy[ed]" at Prado because she "didn't want to talk to him." When Sanchez arrived, Morales informed him that someone had been hitting on her and Sanchez got mad. Shorty thereafter, Prado approached Sanchez and they started arguing about "how those guys were bothering [Morales]." An individual with Prado then started attacking Sanchez. Although the fight was initially "one-on-one," Prado and several other individuals that Chavez believed to be gang members quickly joined "into it and . . . were all beating on Sanchez."

Chavez testified that Juan Valdez tried to help Sanchez by pushing away the assailants. The group of assailants then "started beating on [Valdez]," who fell to the ground. While Valdez was on the ground, Chavez heard two or three gunshots. After the shots were fired, Chavez saw the people that she believed to be gang members run out of the party and get into a car. She then saw Valdez laying on the ground with gunshot

wounds. Although Chavez did not see who shot Valdez, she identified Prado as one of the individuals who was involved in the beating of both Sanchez and Valdez.

Janice Ayala, who owned the house where the party was held, testified that she saw a girl "interacting with a [Hispanic] male" who "look[ed] very angry." Ayala stated that the girl "looked like she was just trying to get away from a situation she didn't want to be a part of; like being hit on maybe . . ." After this interaction, a group of males approached the female and the male she was standing with and started arguing. Initially, a few individuals started pushing the male around, and then a whole group of six or seven males who "all seemed to know each other" joined in. Ayala stated that Valdez "came in to help" Sanchez and that the assailants "immediately starting attacking him too." Ayala then heard two "pop[s]," which she believed to be gunshots, and saw Valdez "drop" to the ground. Ayala was unable to determine whether Prado or Villalobos had been involved in the fights with Sanchez and Valdez.

Los Angeles County Deputy Sherriff Elizabeth Smith investigated Valdez's death and testified that two .380 caliber bullet casings were found at the scene of the party, one of which was found underneath Valdez's body. The casings appeared to have been "recently used" with "gun powder still on them." Smith stated that, during an interview, Villalobos admitted he had fired his weapon once toward Valdez's chest. Smith further testified that Valdez had suffered gunshot wounds to the "front abdomen, . . . the back, and . . . the arm." The coroner report stated that the shots to the back and abdomen were "rapidly fatal" and that Valdez displayed blunt force trauma, head injuries, laceration to the lips and abrasions to the right side of the face that were "consistent with being assaulted by hands and feet."

Los Angeles County Sherriff's Department Detective William Pickett, who the prosecution called as a gang expert, testified that DAF was a "violent" Hispanic criminal street gang in the Palmdale area whose primary activities involved crimes ranging from vandalism to murder. According to Pickett, a large percentage of the DAF cases he had investigated were "violen[t] in nature, either stabbing or shooting." Pickett also testified

that he had reviewed several field investigation cards indicating that Prado and Villalobos were members of DAF.

The prosecutor asked Pickett to review two minute orders pertaining to two individuals named Robert Ramirez and Santiago Nungaray. After reviewing the orders, Pickett testified that the documents indicated Ramirez and Nungaray had been charged with "discharge of a firearm at a residence, vehicle, and occupied dwelling." Pickett further testified that, based on other cases he had investigated, he knew that Ramirez and Nungaray were active members of DAF at the time they were charged with their crimes, which occurred in August of 2006.

Pickett also testified that when gang members are involved in an altercation, a simple fight can frequently escalate into more violent behavior, including shootings. Pickett explained that gang members were expected to back each other up and that coming to the defense of a fellow gang member was "required" unless the gang member who began the altercation instructed otherwise. Pickett testified that, on the night Valdez was shot, at least five DAF members were present at the party, which included Prado, Villalobos and three other DAF members who had been involved in prior firearms incidents.

b. Testimony of Johnny Villalobos

The only witness for the defense was Johnny Villalobos, who admitted he was a member of DAF. Villalobos testified that he drank alcohol before attending the party and had a "pretty good buzz on" when he arrived. While conducting pat down searches near the entrance to the party, Villalobos saw Prado in a fight and ran over "to help." As Villalobos moved toward Prado, two other men approached the fight. Villalobos and two of his friends began fighting with one of the men. The other man–Juan Valdez–came from behind Villalobos and started punching him in the back of the head. Villalobos stated that he was "taking a beating" because Valdez was "bigger" and "had more power." Villalobos believed his "life and safety was in danger," "shot once and ran to the car."

Villalobos stated that although he knew the gun was pointed toward the general area of Valdez's chest when he pulled the trigger, he had not specifically intended to aim at Valdez's chest. When asked whether he could recall what he was thinking at the time of the incident, Villalobos stated "I was drunk. I really didn't–it was more of a reaction than a thought because I was not in a clear state of mind. I was drunk, terribly drunk off alcohol. I had been smoke [sic] marijuana as well that night as well." He later added that he fired the weapon because he was "scared" and "afraid" of Valdez "kick[ing] his ass."

During cross-examination, Villalobos reiterated that he had fired the weapon to "protect[]" his "life and . . . safety," explaining that the "alcohol and weed" had made it difficult to defend himself. He admitted, however, that despite his intoxication, he was not stumbling, he was able to determine that Prado was in a fight, he was aware he had a gun, he knew how to use the gun and was aware he "shot the guy who assaulted [him]." Villalobos also admitted that he was about an "arm length" away from Valdez when he pulled the trigger and that he knew shooting someone in the chest area might result in death. He maintained, however, that he had not aimed the weapon, but had just "pulled out [the] gun, and [] shot."

2. Verdict and sentencing

The jury convicted Villalobos of first degree murder. It also found true special allegations that: (1) Villalobos had personally and intentionally discharged a firearm, causing great bodily injury and death within the meaning of section 12022.53, subdivision (d); and (2) Villalobos committed the murder for the benefit of a street gang within the meaning of section 186.22, subdivision (b).[2]

The court sentenced Villalobos to a term of 60 years to life in prison: a 25 years to life term for first degree murder; a consecutive 25 years to life term for the firearm enhancement (§12022.53, subd. (d)); and a consecutive 10-year term for the gang

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[2] The jury convicted Prado of second degree murder, possession of a firearm by a felon and found true special allegations pertaining to a firearm and gang enhancement. Prado filed a separate appeal and we affirmed his conviction and sentence in a prior unpublished opinion.

enhancement pursuant to section 186.22, subdivision (b)(1)(C). Villalobos filed a timely appeal.

DISCUSSION

Villalobos argues that the trial court erred in: (1) instructing the jury on deciding between greater and lesser offenses; and (2) imposing a ten-year gang enhancement.

A. The Trial Court Did Not Err In Instructing the Jury on Greater and Lesser Offenses

Villalobos argues that the trial court erred when instructing the jury on how to decide the degree of murder or, alternatively, whether the unlawful killing was murder or voluntary manslaughter. More specifically, he contends that the trial court's use of the 1996 versions of CALJIC Nos. 8.71 and 8.72, which have since been amended, violated his constitutional rights by effectively skewing the jury toward the greater offense.

1. Summary of jury instructions at trial

The trial court instructed the jury on three types of unlawful killings: first degree murder, second degree murder and voluntary manslaughter based on an unreasonable belief in the necessity to defend. The jurors were further instructed that if they found Villalobos guilty of an unlawful killing, they had to "unanimously agree as to whether he [wa]s guilty of murder of the first degree or murder of the second degree or voluntary manslaughter."

The court also provided an instruction patterned on the then-current version of CALJIC No. 8.71 (6th ed. 1996) regarding the choice between second and first degree murder: "If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree." The court provided a similar instruction regarding the choice between murder versus manslaughter, which was patterned on the then-current version of

CALJIC No. 8.72 (6th ed. 1996): "If you are convinced beyond a reasonable doubt and unanimously agree that the killing was unlawful, but you unanimously agree that you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of that doubt and find it to be manslaughter rather than murder."

The trial court also instructed the jury under CALJIC No. 8.75, which "concerns the so-called 'acquittal-first' rule for lesser-included offenses." (*People v. Bacon* (2010) 50 Cal.4th 1082, 1109). As given, the instruction informed the jury that if it unanimously found that Villalobos had not committed first degree murder, it could convict him of the lesser included offenses of second degree murder or voluntary manslaughter. The instruction further stated that the jurors would receive separate guilty and not guilty verdict forms for each of those three offenses and that it had the discretion to consider the offenses in whatever order it chose.

The instruction also provided detailed guidelines to aid the jury in filling out the verdict forms, explaining: (1) if the jury unanimously found the defendant guilty of first degree murder, it should sign the corresponding guilty verdict form on first degree murder and leave all other verdict forms unsigned; (2) if the jury was unable to reach a unanimous verdict as to first degree murder, it was to report its disagreement to the court without signing any of the verdict forms; (3) if the jury unanimously found the defendant not guilty of first degree murder, but guilty of second degree murder, it should sign the corresponding verdict forms on first and second degree murder and leave all other verdict forms unsigned; (4) if the jury unanimously found the defendant not guilty of first degree murder, but was unable to reach a unanimous verdict on second degree murder, it should sign the corresponding not guilty verdict form on first degree murder, report its disagreement on second degree murder to the court and leave all other verdict forms unsigned; (5) if the jury unanimously found the defendant not guilty of first degree murder, not guilty of second degree murder and guilty of manslaughter, it should sign each of the corresponding verdict forms and leave the remaining verdict forms unsigned; (6) if the jury unanimously found the defendant not guilty of first degree murder and second degree murder, but was unable to reach a unanimous verdict on manslaughter, it

should sign the corresponding not guilty verdict forms on first and second degree murder, report its disagreement on manslaughter to the court and leave the remaining the verdict forms unsigned; (7) if it unanimously found the defendant not guilty of first degree murder, second degree murder or manslaughter, it should sign the corresponding not guilty verdict forms and leave the remaining verdict forms unsigned.

The trial court also provided the jury instructions patterned on CALJIC No. 8.50, which explained the difference between murder and manslaughter, and CALJIC 17.40, which explained the jurors' duty to provide their own individual opinion and not decide any issue based on the views of other jurors. The court also informed the jury that it should consider the instructions "as a whole and each in light of all the others" (CALJIC 1.01) and that every part of each instruction was of equal importance. (CALJIC 17.45.)

2. The jury's findings demonstrate there is no reasonable likelihood that it was confused by CALJIC Nos. 8.71 or 8.72

Villalobos argues that the 1996 version of CALJIC No. 8.71 violated his due process rights and right to jury trial by suggesting to jurors that if they unanimously found the crime of murder had been committed, they were required to return a verdict of first degree murder unless every juror found there was a reasonable doubt as to whether the murder was of the first or of the second degree. Thus, according to Villalobos, "first degree murder was the default verdict . . .[,] applying unless the jurors *unanimously* agreed that they had a reasonable doubt about the degree of murder."

He raises the same argument with respect to the 1996 version of CALJIC No. 8.72, asserting that the instruction created the impression that if the jury unanimously agreed he had committed an unlawful killing, it was required to return a verdict of murder unless every juror found there was a reasonable doubt as to whether the unlawful killing constituted murder or manslaughter.

a. Standard of review

"We determine whether a jury instruction correctly states the law under the independent or de novo standard of review. [Citation.] Review of the adequacy of

instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' [Citation.] '"In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." [Citation.]' [Citation.] 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

In assessing whether an instructional error occurred, the test is not whether a "'reasonable juror' *could* have misapplied the [instruction] as the defendant asserts, but rather under the more tolerant test of whether there is a 'reasonable likelihood' that the jury actually misconstrued the law in light of the instructions given, the entire trial record and the arguments of counsel." (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 276 (*Dieguez*); see also *People v. Mayfield* (1997) 14 Cal.4th 668, 777.)

b. Summary of relevant case law

Three prior decisions have analyzed whether the 1996 versions of CALJIC Nos. 8.71 and 8.72 violate a defendant's due process rights and right to fair trial.[3] In *People v. Pescador* (2004) 119 Cal.App.4th 252 (*Pescador*), the defendant argued that CALJIC No. 8.71 (6th ed. 1996) "eliminate[d] the presumption that murder is of the second degree by stating that a defendant is entitled to the benefit of the doubt as to degree only if the

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[3] Prior to 1996, CALJIC Nos. 8.71 and 8.72 did not contain the "unanimity" language at issue here. The prior version of CALJIC No. 8.71 (5th ed. 1988) "stated: 'If you are convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, *but you have a reasonable doubt* whether such murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree.' (Italics added.) Similarly, CALJIC No. 8.72 (5th ed. 1988) stated: 'If you are satisfied beyond a reasonable doubt that the killing was unlawful, *but you have a reasonable doubt* whether the crime is murder or manslaughter, you must give the defendant the benefit of such doubt and find it to be manslaughter rather than murder.' (Italics added.)" (*People v. Moore* (2011) 51 Cal.4th 386, 409 fn. 7 (*Moore*).)

jury unanimously agrees there is reasonable doubt in the first place." (*Id*. at p. 256.) The defendant raised an identical argument regarding CALJIC No. 8.72 (6th ed. 1996), asserting that it effectively created a presumption of murder rather than manslaughter.

The Third District rejected both arguments, concluding that, in light of other instructions given at trial, 8.71 and 8.72 were not likely to cause the jury to believe it could only return a verdict on the lesser offense if every juror had a reasonable doubt as to whether the greater or lesser offense had been committed. The court explained that any potential confusion from CALJIC No. 8.71 had been remedied by CALJIC No. 17.11, which was a parallel instruction on choosing the the degree of murder that contained no reference to unanimity: "If you find the defendant guilty of the crime of murder, but have a reasonable doubt as to whether it is of the first or second degree, you must find him guilty of that crime in the second degree." The court also explained that the trial court had provided CALJIC No. 17.40, which instructed jurors that they had a duty to decide the case for themselves and not "decide any question in a particular way because a majority of the jurors, or any of them, favor that decision." (*Pescador, supra,* 119 Cal.App.4th at p. 257.) According to the court, these two additional instructions "fl[ew] in the face" of defendant's assertion that CALJIC No. 8.71 might cause jurors to believe they could not give the defendant the benefit of reasonable doubt unless every juror agreed that such a doubt existed.

The court also held that any potential confusion caused by the unanimity language in CALJIC No. 8.72 had been remedied by CALJIC No. 8.50, which, as given, stated: "'To establish that a killing is murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder . . .'" (*Pescador, supra*, 119 Cal.App.4th at p. 258.) According to the court, "CALJIC No. 8.72, when considered in context with CALJIC Nos. 8.50, 17.11, and 17.40, did not instruct the jury that it had to make a unanimous finding that they had a reasonable doubt as to whether the crime was murder or manslaughter in order for defendant to receive the benefit of the doubt." (*Id*. at p. 258.)

In *People v. Gunder* (2007) 151 Cal.App.4th 412 (*Gunder*), the Third District extended the holding of *Pescador*, ruling that CALJIC No. 8.71 was not likely to confuse jurors where the trial court had given CALJIC No. 17.40, but had failed to provide the parallel instruction in CALJIC No. 17.11: "In the present case, the court did not instruct the jury with [CALJIC No. 17.11]. . . . We disagree this is a crucial distinction. . . . What is crucial in determining the reasonable likelihood of defendant's posited interpretation is the express reminder that each juror is not bound to follow the remainder in decision making. Once this principle is articulated in the instructions, a reasonable juror will view the statement about unanimity in its proper context of the procedure for returning verdicts, as indeed elsewhere the jurors are told they cannot return any verdict absent unanimity and cannot return the lesser verdict of second degree murder until the jury unanimously agrees that the defendant is not guilty of first degree murder." (*Gunder, supra*, 151 Cal.App.4th at p. 425.)

Most recently, in *Moore, supra,* 51 Cal.4th 386, the California Supreme Court considered the defendant's argument that the 1996 versions of CALJIC Nos. 8.71 and 8.72 "violated his constitutional due process and jury trial rights by suggesting to jurors that they must return a verdict on the greater offense unless they unanimously doubted whether it had been proven." (*Id*. at p. 410.) The Supreme Court summarized the holdings in *Pescador* and *Gunder*, noting that the trial court in the case before it had not provided CALJIC Nos. 17.11 or 8.50.

The Court acknowledged that the 1996 versions of CALJIC Nos. 8.71 and 8.72 were potentially confusing: "We conclude the better practice is not to use the 1996 revised versions of CALJIC Nos. 8.71 and 8.72, as the instructions carry at least some potential for confusing jurors about the role of their individual judgments in deciding between first and second degree murder, and between murder and manslaughter. The references to unanimity in these instructions were presumably added to convey the principle that the jury as a whole may not return a verdict for a lesser included offense unless it first reaches an acquittal on the charged greater offense. [Citation.] But inserting this language into CALJIC Nos. 8.71 and 8.72, which address the role of

reasonable doubt in choosing between greater and lesser homicide offenses, was unnecessary, as CALJIC No. 8.75 fully explains that the jury must unanimously agree to not guilty verdicts on the greater homicide offenses before the jury as a whole may return verdicts on the lesser." (*Moore, supra*, 51 Cal.4th at pp. 411-412.)

The Court ruled, however, that it need not "decide . . . whether *Gunder* was correct that the possibility of confusion is adequately dispelled by instruction with CALJIC No. 17.40" (*Moore, supra*, 51 Cal.4th at p. 412) because the jury's findings demonstrated any conceivable error was harmless: "[The jury returned] true findings on . . . burglary-murder and robbery-murder special circumstances. Having found defendant killed [the victim] in the commission of robbery and burglary, the jury must also have found him guilty of first degree murder on those same felony-murder theories. The lesser offenses of second degree murder and manslaughter were not legally available verdicts if defendant killed [the victim] in the commission of burglary and robbery, as the jury unanimously determined he had. Any confusion generated by the challenged instructions, therefore, could not have affected the jury's verdicts."[4] (*Id.* at p. 412.)

After *Moore* was decided, CALJIC Nos. 8.71 and 8.72 were amended to remove the potentially confusing unanimity language. The current version of CALJIC No. 8.71 states: "If any juror is convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but has a reasonable doubt whether the murder was of the first or of the second degree, that juror must give defendant the benefit of that doubt and find that the murder is of the second degree." The current version of CALJIC No. 8.72 states: "If any juror is convinced beyond a reasonable doubt that the killing was unlawful, but that juror has a reasonable doubt whether the crime is murder or

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4 Villalobos contends that the instructional error alleged here–providing the 1996 versions of CALJIC Nos. 8.71 and 8.72–was structural in nature and therefore not subject to harmless error analysis. *Moore*, which was expressly decided on harmless error grounds, implicitly rejects that argument.

manslaughter, that juror must give the defendant the benefit of that doubt and find it to be manslaughter rather than murder."

c. Under the circumstances of this case, it is not reasonably likely that the jurors were confused by the 1996 versions of CALJIC Nos. 8.71 or 8.72

Villalobos contends that, in light of the Supreme Court's decision in *Moore*, we should reject *Gunder's* holding that CALJIC No. 17.40 is sufficient to remedy potential juror confusion from the 1996 version of CALJIC No. 8.71. He further asserts that we should reject *Pescador* to the extent it held that CALJIC No. 8.50 is sufficient to remedy potential juror confusion from the 1996 version of CALJIC No. 8.72.

Moore, however, contains no language endorsing or rejecting the holdings in *Gunder* or *Pescador*. The Supreme Court merely summarized those two cases and acknowledged that the 1996 versions of CALJIC Nos. 8.71 and 8.72 should be avoided because they "carry at least some potential for confusing jurors." (*Moore, supra*, 51 Cal.4th at p. 411.) The Court did not decide whether the instructions were "reasonably likely" to confuse jurors (*Dieguez, supra,* 89 Cal.App.4th at p. 276 [proper test in assessing instructional error is "whether there is a 'reasonable likelihood' that the jury actually misconstrued the law"]) and declined to decide whether the additional instructions identified in *Gunder* and *Pescador* were sufficient to negate any such confusion.

As in *Moore*, given the specific facts of this case, we need not address the holdings in *Gunder* or *Pescador*. We conclude that the trial court's instruction under CALJIC No. 8.75 (which was not directly addressed in *Gunder* or *Pescador*), considered in conjunction with the jury's findings, demonstrate there is no reasonable likelihood that the jury was confused by either 8.71 or 8.72.

As discussed above, pursuant to CALJIC No. 8.71, the trial court instructed the jury that it should return a verdict of second degree murder if it unanimously found that the crime of murder had been committed and unanimously found there was a reasonable doubt as whether it was a murder of the first or second degree. The instruction, however,

contained no language informing the jury what it should do if some, but not all, jurors found a reasonable doubt as to whether murder was of the first or the second degree. Villalobos contends that this silence, considered with the other language in the instruction, may have caused the jury to believe that any disagreement as to the degree of murder should result in a verdict of first degree murder.

Villalobos's argument overlooks the fact that, under CALJIC No. 8.75, the jury was specifically instructed on the very issue not addressed in No. 8.71: what the jury should do in the event it could not reach unanimous agreement on the degree of murder. The instruction stated, in part, that: (1) if the jury unanimously found Villalobos guilty of first degree murder, it should return the verdict form on that charge; and (2) if the jurors could not unanimously agree on first degree murder, they should inform the trial court of the disagreement. We must assume that the jury understood and followed this portion of CALJIC No. 8.75 (*People v. Rhodes* (2005) 129 Cal.App.4th 1339, 1348 ["we assume jurors understand and follow jury instructions"]), which does not conflict with any information provided in CALJIC No. 8.71.

The record, in turn, indicates that the jury returned a unanimous verdict on first degree murder without ever advising the court of any disagreement on the issue. In light of the instruction under CALJIC No 8.75, we must assume the jurors did not disagree on the issue of first degree murder. Therefore, there is no reasonable possibility that the jury was affected by the potentially confusing aspect of CALJIC No. 8.71, which allegedly created the impression that jurors should return a verdict of first degree murder in the event that they disagreed as to whether the defendant committed first or second degree murder.

The same analysis applies to Villalobos's argument regarding CALJIC No. 8.72, which instructed the jury that if it unanimously found an unlawful killing had occurred and unanimously found there was a reasonable doubt as to whether the killing constituted murder or manslaughter, it was required to return a verdict of manslaughter. As with No. 8.71, the instruction did not inform the jury what to do in the event it unanimously found that an unlawful killing occurred, but disagreed as to whether it constituted murder or

manslaughter. Under CALJIC No. 8.75, however, the jury was instructed to report any disagreement as to either the degree of murder or the form of the unlawful killing (murder versus manslaughter) to the court. Because the jury unanimously found Villalobos guilty of first degree murder without ever reporting any disagreement, there is no likelihood that the jury had cause to consider the allegedly confusing aspect of CALJIC No. 8.72 or that it had any disagreement as to whether the unlawful killing was murder or manslaughter.

B. The Trial Court Erred in Imposing a 10-Year Sentence Enhancement Pursuant to Section 186.22, Subdivision (b)(1)(C)

Villalobos raises two issues regarding the trial court's decision to impose a consecutive ten-year term for the gang enhancement under to section 186.22, subdivision (b)(1)(C). First, Villalobos argues that, to the extent substantial evidence supported the section 186.22 gang allegation, he should have received the 15-year minimum parole eligibility term described in section 186.22, subdivision (b)(5), and not the 10-year prison term described in subdivision (b)(1)(C). Second, he contends that the jury's true finding on the section 186.22 allegation was not supported by substantial evidence.

The Attorney General does not dispute the first issue. (*See People v. Lopez* (2005) 34 Cal.4th 1002 [defendant convicted of committing a gang-related first degree murder punishable by a term of 25 years to life in prison is subject to the minimum parole eligibility term described in subdivision (b)(5), rather than the 10-year sentence enhancement described in subdivision (b)(1)(C)].) It does dispute, however, whether substantial evidence supports the jury's true finding on the gang allegation. To prove a section 186.22 allegation, the People must establish, among other things, that members of the gang either individually or collectively have engaged in a "pattern of criminal gang activity" by committing two or more "predicate" offenses enumerated in 186.22, subdivision (e) within a statutorily-defined time period. (§ 186.22, subd. (e); *People v. Hernandez* (2004) 33 Cal.4th 1040, 1047.) Villalobos asserts that the prosecution failed to make that showing here.

The People disagree, arguing that it introduced evidence establishing that two DAF members–Robert Ramirez and Santiago Nungaray–committed the predicate offense described in subdivision (e)(5): "Shooting at an inhabited dwelling or occupied motor vehicle, as defined in Section 246." (§ 186.22, subd. (e)(5).) Penal Code section 246, in turn, states: "Any person who shall maliciously and willfully discharge a firearm at an inhabited dwelling house, occupied building, occupied motor vehicle, occupied aircraft, inhabited housecar . . . or inhabited camper . . . is guilty of a felony." As the Attorney General acknowledges, the language of subdivision (e)(5) makes clear that not every violation of section 246 qualifies as a predicate offense for the purposes of the gang-enhancement statute. Rather, a section 246 violation qualifies as a predicate offense only if it involved discharging a firearm at an inhabited dwelling or occupied motor vehicle, rather than at an occupied building, occupied aircraft, inhabited housecar or inhabited camper.

The parties agree that the only evidence offered to establish that DAF members had engaged in pattern of criminal activity within the meaning of section 186.22 consisted of: (1) two superior court minute orders regarding Ramirez and Nungaray, and (2) testimony from Detective William Pickett (the gang expert) related to those orders.

The minute orders, which were introduced at trial as exhibits 17 and 18, state that, on August 14, 2006, Ramirez and Nungaray were each charged with violating Penal Code sections 246, 246.3 and 247, subdivision (b). The minute orders further state that the crimes occurred on August 9, 2006 and that, on November 20, 2006, each defendant pleaded no contest to a single count of violating section 246. They provide no information as to the specific conduct underlying the charges.

At trial, the prosecutor asked Pickett to discuss the content of the minute orders, beginning with the order related to Ramirez:

PEOPLE: Let's start with People's 17. This appears to be a certified court minute order for a case of MA035889. Do you see that?

PICKETT: Yes.

PEOPLE: And is the defendant for that case Robert Ramirez?

PICKETT: Yes, it is.

PEOPLE: Does it indicate that the crimes that he is charged with was committed on or about August 9th of 2006 in Los Angeles County?

PICKETT: That's correct.

PEOPLE: And does it indicate that the counts that he's charged with are discharge of a firearm?

PICKETT: Discharge of a firearm at a resident, vehicle and occupied dwelling.

PEOPLE: Okay. Now when this crime was committed on or about August 9th of 2006, was Robert Ramirez a gang member of D-A-F?

PICKETT: Yes, he was.

PEOPLE: How do you know that?

PICKETT: He was the individual that was part of our caseload that I worked cases on and had contacts prior to.

PEOPLE: And did he–and how do you know that he was a D-A-F member?

PICKETT: He was in association and also self-admitted

PEOPLE: When you say "self admit", did he personally tell you or other deputies that he was a member of D-A-F?

PICKETT: Yes.

Pickett provided similar testimony regarding the minute order related to Nungaray:

PEOPLE: Ok. On the same–I'm going to show you people's 18 now. This, again, appears to be a certified court minute order for the same case number, MA0358889. On here, there's a person by the name of Santiago Nungaray; is that correct?

PICKETT: That is correct.

PEOPLE: Okay. And, again, that's for the same crimes: shooting at an inhabited dwelling, shooting at a vehicle as a negligent discharge; Is that correct?

PICKETT: That is correct.

PEOPLE: And that was again on or about August 9th of 2006.

PICKETT: That's correct sir.

PEOPLE: And do you know that when these crimes were committed whether the defendant, Mr. Nungaray, was a member of D-A-F?

PICKETT: Yes, he was.

PEOPLE: How do you know that?

PICKETT: I also had cases I've investigated with him and know him personally. Mr. Santiago Nungaray was an active D-A-F gang member by the name of—goes by the gang name of Sleepy or Huero.

Villalobos argues that although this evidence was sufficient to show that two DAF members violated section 246 within the statutorily-prescribed time period, it was not sufficient to prove that they violated section 246 in a manner that would qualify as a predicate offense under section 186.22, subdivision (e). More specifically, Villalobos argues that Pickett's testimony did not show that Ramirez or Nungaray discharged a firearm at an inhabited dwelling or occupied motor vehicle (which would qualify as a predicate offense), rather than at a building, aircraft, housecar or camper (which would not qualify as a predicate offense.) Villalobos asserts that the transcript shows Pickett was merely "questioned about what the minute orders reflected–not about his personal knowledge of the crimes regarding which the minute orders show guilty pleas."

The People, however, contend that Pickett's testimony does qualify as substantial evidence that Ramirez and Nungaray committed predicate offenses, arguing: "Detective Pickett testified that Ramirez was charged with and committed '[*d*]*ischarge of firearm at a residence, vehicle, and occupied dwelling*,' that Nungaray was charged with and committed the same crimes, '*shooting at an inhabited dwelling, shooting at a vehicle as a negligent discharge*.' Moreover, Pickett testified that he personally knew Ramirez and Nungaray, that both were members of DAF, that Ramirez was part of his caseload, and that he had investigated Nungaray." (Emphasis in original).

Based on the trial transcript, the only reasonable interpretation of Pickett's statement "Discharge of a firearm at a resident, vehicle and occupied dwelling" is that he was providing an informal description of the information provided in the minute orders, rather than relaying personal knowledge about the specific conduct underlying Ramirez and Nungaray's no contest pleas. After asking several questions about the content of the minute orders, the prosecutor asked Pickett whether those orders "indicate[d]" that Ramirez and Nungaray had been charged with discharging a firearm. Pickett did not give any indication that his response was intended to go beyond the question asked by the prosecutor (i.e., what the minute orders indicated) or that he had any personal knowledge of the conduct underlying the violations listed in the minute orders.

The transcript also demonstrates that the prosecution only asked Pickett what the minute orders indicated Ramirez and Nungaray had been "charged with"; the prosecutor did not ask Pickett what crimes Ramirez or Nungaray had been convicted of nor did he ask Pickett whether he had any personal knowledge as to whether they had committed the conduct alleged in the information. Thus, the only evidence regarding what conduct Ramirez and Nungaray actually committed is in the minute orders themselves, which states nothing other than that the defendants pleaded no contest to a violation of section 246.

The additional evidence the Attorney General cites relates to statements Pickett made when explaining how he knew Ramirez and Nungaray were members of DAF. Pickett said he knew Ramirez was in DAF because he was "part of [the] caseload that

[Pickett] worked cases on" and that he knew Nungaray was in DAF because he knew him "personally" and had "cases [he] had investigated with [Nungaray]." These statements do not show that Ramirez or Nungaray committed a predicate offense within the statutorily-defined period.

Because there is no substantial evidence supporting the jury's true finding on the section 186.22 gang enhancement allegation, we reverse and remand for further proceedings on that issue. On remand, the prosecution may, at its discretion, elect to retry the section 186.22 gang enhancement.[5]

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[5] In *Alleyne v. United States* (2013) __ U.S. __ [133 S.Ct. 2151] (*Alleyne*), the United States Supreme Court held that, under the principles articulated in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), any "[f]acts that increase [a defendant's] mandatory minimum sentence are . . . elements [of the offense] and must be submitted to the jury and found beyond a reasonable doubt." (*Id.* at p. 2158.) Our own Supreme Court has extended the reasoning of *Apprendi* to federal double jeopardy protections, concluding that any factual allegation that constitutes an element of the offense (including sentence enhancement allegations) may not be retried following the equivalent of an acquittal. (See *People v. Seel* (2004) 34 Cal.4th 535, 548-549 [double jeopardy clause bars retrial of a sentencing enhancement after an appellate finding of evidentiary insufficiency]; *People v. Anderson* (2009) 47 Cal.4th 92, 116 (*Anderson*) ["although *Apprendi* itself was 'not grounded on principles of federal double jeopardy protection' [citation], we have extended its reasoning to bar retrial of a penalty allegation after the equivalent of an acquittal under the federal double jeopardy clause"].) The Court recently held, however, that *Apprendi* and *Alleyne* do not apply to a section 186.22 enhancement if the underlying crime was for first degree murder, "which is punishable by death, imprisonment for life with the possibility of parole or by a prison term of '25 years to life' (§ 190, subd. (a)) . . . ." (*People v. Nunez* (2013) 57 Cal.4th 1, 39, fn. 6.) The Court explained that, under such circumstances, the finding of a gang enhancement subjects the defendant to a 15-year mandatory minimum parole eligibility term (see § 186.22, subd. (b)(5)), which does "not increase the statutory minimum sentenced for the murder[]." (*Ibid*.) Given that Villalobos is currently subject to consecutive 25 years to life sentences (one for first degree murder and one for the section 12022.53, subdivision (d) firearm enhancement), retrial of the gang allegation would seem to serve little purpose. Nonetheless, the Attorney General is not precluded from doing so.

DISPOSITION

The trial court's judgment is reversed and the matter is remanded for further proceedings consistent with this opinion.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.