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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

OSCAR CEDANO,

Defendant and Appellant.

B282530

(Los Angeles County  
Super. Ct. No. BA431347)

APPEAL from a judgment of the Superior Court of Los Angeles County. Sam Ohta, Judge. Affirmed with directions.

Jeralyn Keller, 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, Joseph P. Lee and Jaime L. Fuster, Deputy Attorneys General, for Plaintiff and Respondent.

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As charged by the Los Angeles County District Attorney's Office, a jury convicted defendant and appellant Oscar Cedano of first degree murder (Pen. Code, § 187, subd. (a))<sup>1</sup> and found true that defendant personally discharged a firearm causing the victim's death (§ 12022.53, subds. (b)-(d)), that the murder was carried out for financial gain (§ 190.2, subd. (a)(1)), and that defendant intentionally killed the victim while lying in wait (§ 190.2, subd. (a)(15)). The trial court denied probation and imposed a term of life in prison without the possibility of parole, plus 25 years to life for the firearm enhancement. The trial court also imposed various fines, fees, and restitution, and awarded defendant 909 days of presentence custody credit.

Defendant timely appealed. He argues: (1) The evidence was insufficient to support the true finding on the lying-in-wait special circumstance; (2) The trial court improperly imposed a double sentence for a single homicide; and (3) The matter should be remanded to the trial court to allow it to consider its newly-granted discretion to strike a section 12022.53 enhancement.

We agree with defendant that the minute order issued at the sentencing hearing erroneously indicates that a double sentence was imposed for the single homicide that defendant was charged with and for which he was found guilty. We therefore direct the clerk of the court to correct the May 8, 2017, minute order. In all other respects, we affirm.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

## FACTUAL BACKGROUND

### I. *Prosecution's Evidence*

#### A. Defendant's relationship with Sonia Soto (Soto)

Torribia Garcia (Garcia) was Soto's mother. Israel Soto (Israel) was Soto's younger brother. Garcia and Israel testified at trial.

When Soto was only 14 years old, she began dating defendant, who lived on the same block. She was 16 years old when she became pregnant for the first time. She moved into defendant's family home before giving birth to her son, Leo. Soto, then 19 years old, was still living with defendant and his family when she gave birth to her daughter, Desaree.

During her stay in defendant's family home, Soto temporarily moved back to her family's home many times when she had "problems" with defendant. On at least one occasion, Soto had a bruise on her back. The "problems" arose from defendant's jealousy. In 2012, Soto's relationship with defendant ended, and she went to live with her sister in Bell. She later moved into her own apartment. In 2013, she moved back into her family's home. Soto and defendant never married.

In around 2008, defendant showed Israel a chrome .38-caliber revolver with a short barrel. The handle was wooden. The gun was still in its case.

From 2012 to 2014, Garcia never saw defendant give money to Soto for child support. During this period of time, Garcia's daughter-in-law was the primary caretaker of Leo and Desaree after school while Soto was at work. Defendant never visited Garcia's home to spend time with his children. Gracie Corley (Corley), who lived directly across the street from Soto's family, never saw defendant playing with his children. Garcia and Israel

never saw defendant in Soto's car after Soto moved out of his home in 2012.

In around December 2013, defendant visited Soto's family home and became upset when he saw writing on Soto's bedroom wall that said, "I love you" with the name "Rigo" on it. Rigo was Soto's boyfriend at around this time.

On January 13, 2014, Hope Kalmus (Kalmus), an attorney with the Los Angeles County Child Support Services Department, met with Soto and defendant in connection with Soto's November 2013 request for Medi-Cal health insurance as well as child support from defendant. In that written request, Soto declared that she was struggling financially and that defendant had refused to provide child support. At the meeting, Kalmus calculated a total of \$918 in child support per month. Soto did not ask for a court order setting a specific amount of child support. Instead, she requested that defendant pay her the \$918 per month directly and signed an affidavit to close the case. Defendant was also required to provide health insurance. Since there was no court order, this agreement was not enforceable.

That same day, Soto picked up her vehicle after it had been serviced and hand-washed with soap and spot-free water.

#### B. Soto's Murder

On January 17, 2014, Soto left work at around 8:00 p.m. At 9:30 p.m., Corley saw Soto's vehicle still parked on the street between Soto's home and the house to the right. Leo and Desaree were with defendant, who had agreed to take care of them that night. It was unusual for defendant to have the children with him on a Friday night. When Israel asked Soto where she was going, she told him not to worry in a "funny way." At around

9:45 p.m., Soto left her home to go out. She appeared happy at the time.

After 10:30 p.m., Luciana Kim (Kim) and Rodrigo Zayas (Zayas) left a bar near the 6th Street bridge. They drove underneath the bridge near a tunnel that went down to the river, parked, and went for a walk. They noticed a car that was parked in front of the tunnel. The engine was running, but the headlights were off. After Kim and Zayas talked for about 15 minutes, they decided to approach the vehicle to see if anybody was inside. The doors and windows of the vehicle were closed. Kim knocked on the passenger side window; there was no response. She then shined her cell phone flashlight inside the vehicle and saw a woman's hair. She knocked on the driver's side window, and there was no response. She shined her flashlight inside and noticed blood on Soto's face. Soto was leaning back away from the steering wheel. Her arms were resting on her lap.

Kim was scared and left the scene with Zayas. They called 911, and an operator transferred the call to a paramedic. The paramedic asked Kim to return to the car to see if the woman was dead. Kim and Zayas returned to the vehicle; they opened the unlocked driver's side door, and the interior lights went on. There was music playing inside the car. Soto had her seatbelt on. When paramedics arrived, they determined that Soto was deceased.

### C. Police Investigation and Forensic Evidence

Los Angeles Police Detective Sergio Ortiz responded to the crime scene. The scene was about seven to eight minutes away in moderate traffic from Soto's home. Detective Ortiz did not find any bullet holes or damage outside or inside Soto's vehicle. But he did find a binder with documents about a child support case.

A palm print was lifted from the top of the right rear door chrome trim. It was later determined that it belonged to defendant's left hand. The print was probably created by defendant's sweat and would not have survived a manual car wash or even the weather.

Detective Ortiz and his partner went to Soto's home and notified her family of her death. In light of the child support documents found in her vehicle, the detectives were then interested in speaking with defendant, who lived across the street.

When Detective Ortiz informed defendant that Soto was dead, he replied that he would not do that. Before being told that Soto was deceased, defendant was acting nervously and breathing heavily. He asked very few questions about the circumstances of Soto's death. He did not cry.

Soto's autopsy confirmed that she had died from a gunshot wound to the neck; the entry point was behind the right ear. There were no other injuries to her body or any other signs of a physical altercation.

A medium-caliber bullet (.38-caliber hollow point bullet) was recovered from Soto's left shoulder area.

In the course of his investigation, Detective Ortiz obtained access to Soto's cellphone and the text message history between Soto and defendant for the period of December 29, 2013, to January 17, 2014. Some of their daily communications were friendly; others were acrimonious.

#### D. Defendant's Statements After His Arrest

Defendant was arrested on November 7, 2014. After his arrest, he was booked and placed in a cell with a paid informant. Defendant engaged in conversation with the informant, during which time defendant commented that he made "one f\*\*\*in'

mistake” for which he was facing so many years in prison. But, he did not regret what he had done. He told the informant that he did not know why he was charged with kidnapping because he “never did [a] kidnap.” When the informant asked defendant if the victim had scratched or tried to attack him, defendant replied that “none of that s\*\*\* happened” and that the police would not find his DNA at the crime scene. He added that he got rid of everything, including gloves. He also assured the informant that the police were not going to find any shell casings and that he personally got rid of everything long ago.

## *II. Defense*

Defendant testified that he did not own any guns. He was not jealous of Soto having other boyfriends after their breakup. He stated that he was giving Soto money, albeit not consistently, but she was demanding more. After finding out that she was going to seek child support, defendant started to send more loving and friendly text messages to her and acting more affectionately towards her. He said that he and Soto had reached an agreement whereby he would give her more money each month. At this time, they had a good relationship and he loved her.

Defendant testified that he was watching the children the night that Soto was killed; he did not murder her.

The following day, he was shocked and nervous to be confronted by police officers at his home. He cried when he was alone.

He claimed that he had made certain statements to the informant because the informant told him to “start thinking like a criminal” and he did so.

Defendant's neighbor testified that on January 8, 2014, he saw Soto parked in the street and defendant leaning into the car through the window.

Defendant's mother testified that she had never seen a gun in her home. She saw the children with defendant in her home on the night that Soto was killed. She did not see defendant leave the home after 9:30 p.m. She saw defendant crying after he learned of Soto's death.

## DISCUSSION

### *I. Substantial evidence supports the lying-in-wait special circumstance*

Defendant argues that insufficient evidence supports the lying-in-wait special circumstance.<sup>2</sup>

#### A. Applicable Law

As the parties agree, we review the record in the light most favorable to the judgment and determine whether it discloses substantial evidence that defendant was guilty beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138; *People v. Stevens* (2007) 41 Cal.4th 182, 201 (*Stevens*).) To affirm the jury's lying-in-wait special circumstance finding (§ 190.2, subd. (a)(15)), we must find substantial evidence that defendant committed an intentional murder with (1) concealment of purpose, (2) a substantial period of watching and waiting for an

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<sup>2</sup> As pointed out by the People, defendant does not challenge the special circumstance finding of financial gain. Arguably, defendant's challenge to the lying-in-wait special circumstance is therefore moot; even if we were to reverse the jury's finding on the lying-in-wait special circumstance, defendant's sentence of life without the possibility of parole would remain unchanged. (*People v. Nelson* (2016) 1 Cal.5th 513, 552.) For the sake of completeness, we address defendant's challenge.



opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. (*Stevens, supra*, at p. 201; see also *People v. Combs* (2004) 34 Cal.4th 821, 853; *People v. Jurado* (2006) 38 Cal.4th 72, 119–120; *People v. Morales* (1989) 48 Cal.3d 527, 554–555, disapproved in part on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

The element of concealment is satisfied by evidence that a defendant’s true intent and purpose were concealed by his actions or conduct. There is no requirement that the defendant be literally “concealed” from view before he attacks the victim. (*Stevens, supra*, 41 Cal.4th at p. 202.) As for the watching and waiting period, although that period of time must be substantial, there is no fixed time limit on this requirement. In other words, the precise period of time is not critical. (*Ibid.*) “The factors of concealing murderous intent, and striking from a position of advantage and surprise, ‘are the hallmark of a murder by lying in wait.’” (*Ibid.*)

#### B. Analysis

The evidence here amply supports the lying-in-wait special circumstance finding. On January 17, 2014, in an unusual turn of events, defendant volunteered to take care of his children so that Soto could go out. From his home, he could observe Soto’s home and her car while waiting for her to leave. Soto had no reason to fear defendant, who had been sending her friendly text messages and acting more affectionately towards her for the prior month. Defendant left his palm print on top of the car’s right rear door trim. She had no physical injuries aside from the gunshot wounds, and there were no signs of a struggle in her car. Defendant told the informant that he did not need to kidnap Soto

and that she did not need to defend herself. Soto's vehicle arrived alone at a crime scene that was more than three miles away from her home.

1. *Concealment of purpose*

Based upon this evidence, the jury could reasonably conclude that defendant employed some type of ruse to conceal his plan to kill Soto when he met her outside her home; he was allowed entry into the front passenger side of her car and was driven away by Soto. (*People v. Morales, supra*, 48 Cal.3d at pp. 554–555.)

2. *Period of watching and waiting*

And, as for the element of watching and waiting, the evidence supports the reasonable inference that defendant watched and waited for Soto to exit her home so that he could intercept her at her car and leave the scene with her. He knew that she was going out that night and he could see her home and car from his property. The evidence also shows that Soto drove from her neighborhood to a darker and more secluded location—this trip lasted between eight and ten minutes. During this time, as Soto's passenger, defendant had ample time to watch and wait for the opportune time to shoot Soto. In sum, there was a substantial period of watching and waiting. (*People v. Jurado, supra*, 38 Cal.4th at p. 120.)

3. *Surprise*

As for the element of surprise, the appellate record shows that there were no signs of struggle inside Soto's car; she died from a single gunshot wound behind her right ear; she had no physical or defensive injuries (aside from the gunshot wounds); and defendant told the informant that Soto did not defend herself. In addition, when she was shot, Soto had her seatbelt on,

her foot on the brake pedal, the car engine was still running, and the music was on. This evidence supports a finding that, once they stopped under the bridge, defendant immediately ambushed his vulnerable and unsuspecting victim from a position of advantage inside her car and shot her before she could escape or defend herself. (*People v. Jurado, supra*, 38 Cal.4th at p. 120.)

II. *The minute order of the sentencing hearing must be corrected to reflect the trial court's imposition of sentence of life without the possibility of parole (LWOP) for defendant's murder conviction*

Defendant argues that the trial court erred in imposing two sentences (25 years to life and LWOP) on his murder conviction. The People agree, as do we. The trial court's comments at the sentencing hearing and the abstract of judgment correctly reflect as the sole sentence the prescribed term of LWOP. Only the minute order of the sentencing hearing incorrectly sets forth the sentence as 25 years to life enhanced by a term of LWOP. As the trial court's oral pronouncement controls over the clerical error (*People v Contreras* (2015) 237 Cal.App.4th 868, 880), we remand this matter to the trial court to correct the May 8, 2017, minute order to reflect the correct sentence orally imposed at the sentencing hearing—LWOP. (*People v. Contreras, supra*, at pp. 880–881.)

III. *The matter is not remanded for a hearing on whether the trial court should strike the firearm enhancement*

Defendant asks that we remand the matter to the trial court to exercise its discretion to strike the section 12022.53 firearm enhancement.

Although defendant correctly points out that the newly amended section 12022.53, subdivision (h), which allows a trial court discretion to strike or dismiss an enhancement at

sentencing, applies to him and this case, we decline to remand this case for resentencing; the appellate record shows that there is no reasonable possibility that the trial court would exercise its discretion to lessen the sentence. (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.)

The trial court imposed the maximum available sentence and told defendant it was doing so without any regret. In fact, the trial court imposed a term of LWOP in addition to the firearm enhancement. Thus, any discretionary relief as to the firearm enhancement would have no practical effect on the aggregate sentence, under which defendant is not entitled to parole. It follows that there is no purpose in remanding the matter for reconsideration. (*People v. Gutierrez, supra*, 48 Cal.App.4th at p. 1896.)

#### **DISPOSITION**

The judgment is affirmed. The clerk of the court is directed to correct the May 8, 2017, minute order to reflect the sentence orally imposed at the sentencing hearing—LWOP.

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\_\_\_\_\_, Acting P. J.  
ASHMANN-GERST

We concur:

\_\_\_\_\_, J.  
CHAVEZ

\_\_\_\_\_, J.  
HOFFSTADT