Filed 5/8/17 P. v. Florence CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. BRANDON FLORENCE, Defendant and Appellant.	B265512 (Los Angeles County Super. Ct. No. TA131669)

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

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and appellant.

Xavier Becerra, Attorney General and Kamala Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and David E. Madeo, Deputy Attorney General, for Plaintiff and Respondent.

Brandon Florence was convicted of first degree murder and other crimes. On appeal, he argues the trial court erred in instructing the jury on the elements of second degree murder. We affirm his conviction, but reverse the trial court's stay of two Penal Code section 186.22 enhancements and remand for resentencing.

FACTUAL BACKGROUND

A. Summary of Charged Crimes

In April of 2014, the district attorney for the County of Los Angeles filed an information charging Brandon Florence with murder (Pen. Code, § 187, subd. (a)),[1] assault with a firearm (§ 245, subd. (a)(2)) and assault with a deadly weapon. (§ 245, subd. (a)(1).) The murder count alleged Florence shot and killed Kent Sewell on December 21, 2013. The assault counts alleged that during an altercation on December 13, 2013, Florence threatened Darryl Butler with a firearm, and then hit him with a lamp.

The information also included special allegations asserting that Florence had personally discharged a firearm during the commission of the murder (§ 12022.53, subd. (d)), and that all three offenses had been committed for the benefit of a criminal street gang. (§ 186.22, subd. (b).)[2]

B. Summary of the Evidence Presented at Trial

1. Evidence regarding the assault counts

On December 16, 2013, Darryl Butler was at his neighbor's house with his wife, Misty Florence (Misty), and his brother-in-law, defendant Brandon

---

[1] Unless otherwise noted, all further statutory citations are to the Penal Code.

[2] The information also included special allegations asserting Florence had suffered one prior serious felony conviction and two prior prison term felony convictions. (§ 667.5, subd. (b).)

Florence (Florence).[3] At about 10:00 p.m., Butler and Misty returned to their home. Misty went outside to talk to Florence. She came back into the house approximately one hour later, and got into an argument with Butler. After the argument had ended, Florence came to the house with two or three other men who Butler believed to be gang members. Misty threw a drink in Butler's face, and told him he should fight Florence.

Florence then pulled Butler's shirt and punched him, causing Butler to fall to the ground. Florence and the other men began kicking and punching Butler, as he yelled "why [am I] being jumped?" One of the men with Florence pointed a gun at Butler, and repeatedly said "let me shoot him." Florence hit Butler on the head with a lampshade, causing a "gush wound." As Florence was leaving the house he yelled "T Flats," a reference to a gang based in Compton, California.

Los Angeles County Sherriff's Department (LASD) Detective David Duran testified for the prosecution as a gang expert. Duran stated that the "Compton Varrio Tortilla Flats" (CVTF) was a criminal street gang, and that its primary activities included thefts, assaults, shootings, murders and witness intimidation. Duran also stated that he believed Florence was a CVTF member based on field identification contacts in which Florence had admitted his membership in the gang. Duran also described various CVTF-related tattoos that Florence had on his head, neck and arm. Given a hypothetical based on the evidence presented at trial, Duran opined that the attack was committed "at the direction of the Tortilla Flats Gang." In support of this assertion, Duran noted that multiple gang members had participated in the assault, Florence had yelled out the gang's name and one of the attackers had used a firearm.

---

[3] Our factual summary is based on witness testimony and other evidence that was presented at two separate trials. At the first trial, the jury found Florence guilty of the assault charges, but was unable to reach a verdict on the murder charge. Florence was then re-tried on the murder count, and found guilty.

2. Evidence related to the murder count

On the night of December 21, 2013, Adrian Lamas rode his bicycle to a liquor store located in an area of Compton, California that was claimed by a gang named "Compton Varrio 155." Lamas had a "C.V. 155" tattoo on his arm and wrist. While Lamas was standing in line at the store, Florence approached him and asked: "Are you from this area?" Lamas responded, "Yeah. This is my neighborhood." Lamas started to feel "uncomfortable" about Florence, and left the store. As Lamas was exiting, he saw his friend Kent Sewell, an affiliate of a Watts gang known as "Bounty Hunters," walking toward the entrance of the store, and said hello to him. Florence followed Lamas outside the store and began talking to Sewell. Lamas heard Sewell ask Florence "where he was from," and use the phrase "catching a fade," meaning to fight. Sewell start taking his sweater off, which Lamas took as a sign that he was preparing to fight. Lamas then saw Florence punch Sewell, causing Sewell to move backward. At that point, Lamas turned away from Sewell and Florence, walked about five or six steps and heard a gunshot. Lamas turned back around, and saw Sewell on the ground, bleeding from his face. Lamas got onto his bike and left the area.

Ronald Fairbanks drove to the liquor store with Sewell on the night of December 21, 2013. As Fairbanks was entering the store, he saw Lamas and Florence walking toward the exit. Fairbanks then noticed that Sewell was no longer with him, and left the store to find him. Fairbanks saw Sewell speaking with Lamas and Florence near the liquor store entrance. Their conversation initially sounded like a "regular talk," but started to become about "gangs" and fighting. Fairbanks heard Florence tell Sewell "' Well, you know, if that's how you feel,' or 'you want to fight or what not, we can step around the side of the store because there is a cameras right here in the front.'" During this conversation, Sewell and Florence were standing about five feet from each other. Fairbanks began looking at Lamas because he was uncertain whether Lamas was a "threat to [him]." While focusing on Lamas, Fairbanks heard a gunshot and saw "a flash." Fairbanks immediately turned his head, and saw Florence with his arm extended outward. Sewell was on the ground. Fairbanks kneeled down to speak to Sewell, who was

unresponsive. Fairbanks then ran into the liquor store, and requested that someone call the police.

On the night of the shooting, LASD Deputy Steven Kaniewski received a report of a gunshot at the liquor store. When he arrived at the store, he saw Sewell on the ground with what appeared to be a gunshot wound on his face. Kaniewski found a hat near Sewell's body that contained an expended bullet. A medical examiner concluded Sewell had died of a gunshot wound to the head. Based on physical markings found on Sewell's body, the examiner believed the barrel of the firearm was between one and five feet from Sewell's face at the time of the shooting.

Deputy Duran, again testifying as a gang expert, repeated his prior testimony that CVTF was a criminal street gang which regularly engaged in numerous criminal activities, and that Florence belonged to the gang. He also testified that CVTF had rivalries with all "black gangs within the City of Compton," including "all Blood gangs." Duran explained that about a week before Sewell had been shot, a member of CVTF had been killed in the gang's territory by a rival gang, setting off an "active war . . . between the two gangs." Given a hypothetical based on the trial evidence, Duran concluded that the shooting had been "done for the benefit of the gang." In support, Duran noted that: (1) the victim had been wearing a hat with a "B," indicating he was affiliated with a "Blood" gang; (2) the victim had asked the shooter "where he was from"; and (3) the shooter shot the victim in the face, thereby "rais[ing] his own reputation in the gang."

C. Summary of Jury Instructions and Jury Questions

1. Summary of jury instructions on the murder court

The trial court provided the jury three instructions related to the murder count. The first instruction, modeled on CALCRIM No. 500 and entitled "Homicide: General Principles," stated: "Homicide is the killing of one human being by another. Murder is a type of homicide. The defendant is charged with murder." The second instruction, modeled on CALCRIM No. 520 and entitled "First or Second Degree Murder with Malice," informed the jury that the defendant had been "charged in Count 1 with murder in

violation of Penal Code section 187." The instruction described the two elements necessary to prove that Florence was guilty of murder (that he had committed an act causing the death of another person, and that he had acted with malice aforethought), and also provided definitions of express malice and implied malice. The final sentence of the instruction stated: "If you decide that the defendant committed murder, you must then decide whether it is murder of the first or second degree."

The third instruction, modeled on CALCRIM No. 521 and entitled "First Degree Murder," stated, in relevant part: "The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation." After defining each of those three terms, the instruction further informed the jury: "The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder."

The court also provided the jury with two verdict forms related to the murder count. One form was to be filled out if the jury found Florence guilty of murder, and the other was to be filled out if it found him not guilty. The "Guilty" verdict form included the following language: "We, the Jury . . . find [the defendant] guilty of the crime of MURDER . . . upon KENT SEWELL, . . . as charged in Count 1 of the information.
We find sad MURDER to be in the ___ degree. (1st or 2nd)"

2. Jury questions regarding second degree murder

During deliberations, the jury submitted a note to the court stating: "Where in the jury instruction is count 2 (2nd degree) described?" In response, the court provided a handwritten note stating: "I assume you meant 2nd degree murder. If so, please refer to jury instructions 500, 521 & 522 [sic]. If not, please advise. Refer to pages 26, 27, 28, and 29 [of the jury instructions that the court provided to you]."[4]

---

[4] Although the court's note erroneously referred to jury instruction number "522," which the jury had not been given, and omitted reference to instruction number 520, which the jury had been given, the page numbers

The jury subsequently submitted a second note to the court stating: "We only find the words 'second degree' on page 28. We don't understand 'second degree.' Please clarify." The language the jury referred to in its note, set forth on page 28 of the jury instructions, stated: "If you decide that the defendant committed murder, you must then decide whether it is murder of the first or second degree."

After receiving the jury's second note, the court called the jurors into the courtroom and informed them that it was going to "read the entire [CALCRIM] 500 series, which deals with these issues you [have asked] about." The court then re-read the same versions of the CALCRIM 500 and 521 instructions it had previously provided to the jury. The court, however, provided a slightly modified version of the CALCRIM No. 520 instruction. Although the instruction contained the same language regarding the elements of murder and malice that had appeared in the original version of the instruction, it also contained new language regarding second degree murder versus first degree murder: "If you decide that the defendant committed murder, it is murder of the second degree unless the people have proved beyond a reasonable doubt that it is murder of the first degree as defined in CALCRIM number 521."

D. Verdict and Sentencing

The jury found Florence guilty on all counts, and also returned true findings on all of the firearm and criminal gang allegations. On the murder count, the jury's verdict form stated, in relevant part: "We find said MURDER to be in the _1st_ degree. (1st or 2nd)." After the jury had returned its verdict, the district attorney filed an amended information alleging Florence had suffered a prior strike conviction. (See §§ 667, subds. (b)-(j), 1170.12.) Following a bench trial, the court found the prior strike allegation to be true.

At sentencing, the court ordered Florence to serve an indeterminate term of 75 years to life in prison on the murder count, which was comprised

---

the trial court provided in its note correctly corresponded to the CALCRIM Nos. 500, 520 and 521 set forth in the instruction packet.

of the following: 25 years to life in prison for the first degree murder charge, doubled to 50 years to life based on the prior strike offense, plus an additional 25 year minimum jail term for the firearm enhancement under section 12022.53, subdivision (d). The court explained that although the jury had also returned a true finding on the section 186.22 "gang allegation," that enhancement was "stayed pursuant to Penal Code section 654 since its less than the 12022.53(d)."

On the remaining assault counts, the court sentenced Florence to a total determinate term of 13 years in prison. On the assault with a firearm count (§ 245, subd. (a)(2)), the court imposed the mid-term of three years in prison, which it doubled to six years for the prior strike. The court also added a five year enhancement for the true finding on the section 186.22 allegation. On the assault with a deadly weapon count, which the court described as a "subordinate term," it imposed a sentence of one year in prison (one third the three year mid-term), which the court then doubled to two years based on the prior strike conviction. Although the court acknowledged the jury had also found true a section 186.22 allegation with respect to the assault with a deadly weapon count, the court elected to "stay[]" the enhancement "pursuant to Penal Code section 654."

DISCUSSION

Florence argues that the trial court committed two errors in instructing the jury on the murder count. First, he asserts the court erroneously omitted language from the standard version of CALCRIM No. 521 that would have informed the jury that "all murders that are not in the first degree are instead second degree." Second, he contends that when the jury sought clarification regarding the meaning of second degree murder, the court failed to provide an adequate response, and merely "refer[ed] the jury back to the same instructions that the jury already found inadequate to answer their questions. . . ."

A. The Trial Court Did Not Err in Instructing the Jury on Second Degree Murder

1. Summary of applicable legal principles

"The trial court has a sua sponte duty to instruct the jury on the general principles of law relevant to the issues raised by the evidence. [Citation.] This sua sponte duty encompasses instructions on lesser included offenses that are supported by the evidence. [Citation.] Additionally, even if the court has no sua sponte duty to instruct on a particular legal point, when it does choose to instruct, it must do so correctly. [Citation.]" (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1331.) A trial court, however, "has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation], and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal." (*People v. Lee* (2011) 51 Cal.4th 620, 638.) """"[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction."""" [Citations.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1202.)

2. The court did not err in instructing the jury with respect to second degree murder

Florence argues the trial court erred by omitting language from its murder instructions clarifying that "all murders that are not in the first degree are instead second degree." As summarized above, the court's charge to the jury included instructions modeled on CALCRIM Nos. 520 and 521. The court's CALCRIM No. 520 instruction explained the two elements of "murder" (an act that caused the death of another person, and malice aforethought), and provided the definitions of express and implied malice. The instruction further directed the jury: "If you decide that the defendant committed murder, you must then decide whether it is murder of the first or second degree."

The court's instruction modeled on CALCRIM No. 521 then defined the elements of "First Degree Murder," explaining that the prosecution was required to prove beyond a reasonable doubt that the defendant "acted willfully, deliberately, and with premeditation." The instruction then defined

the meaning of each of those three terms, and further instructed: "The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder." The final sentence of the court's instruction omitted a clause from the standard version of CALCRIM No. 521 clarifying that if the prosecution failed to prove each element of first degree murder, the jury must find the defendant not guilty of first degree murder "*and the murder is second degree murder*." (CALCRIM No. 521 [emphasis added.].) Florence contends that by omitting the phrase "and the murder is second degree murder," the court failed to adequately instruct the jury "how to reach a verdict of second degree murder," and "left the jurors with an all or nothing position: they could convict appellant of first degree murder or they could acquit him." Stated more simply, Florence contends the court's modified version of CALCRIM No. 521 eliminated second degree murder as a verdict option.[5]

Florence overlooks, however that the trial court provided additional instruction regarding second degree murder in response to the jury's inquiry. As discussed above, during deliberations, the jury asked the court to identify what part of the instructions defined second degree murder. In response, the court initially directed the jury to re-read the CALCRIM 500, 520 and 521 instructions it had previously provided. When the jury sought further clarification regarding the meaning of second degree murder, the court called the jurors back into the courtroom and read them a version of CALCRIM No. 520 that included language the court had not previously provided. The new

---

[5] The Attorney General argues that any possible confusion caused by the court's CALCRIM No. 521 instruction was remedied by language in its CALCRIM No. 520 instruction informing the jury: "If you decide that the defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in CACRIM No. 521." In support of this argument, however, the Attorney General mistakenly cites to the CALCRIM No. 520 instruction that the trial court provided to the jury in Florence's first trial, which resulted in a hung jury on the murder court. The record shows that in Florence's second trial, which resulted in a conviction on the murder count, the trial court did not provide the language that the Attorney General cites.

language explained: "If you decide that the defendant committed murder, it is murder of the second degree unless the people have proved beyond a reasonable doubt that it is murder of the first degree as defined in CALCRIM number 521." The court then re-read the same version of the CALCRIM 521 instruction it had previously given, which described the elements of first degree murder, and directed the jury that it must find the defendant not guilty of first degree murder if it determined the prosecution had not proven each of those elements beyond a reasonable doubt.

Thus, the record shows that the court's instructions did not eliminate second degree murder as a verdict option, nor did the instructions "fail[] to instruct the jury that all murders that are not in the first degree are instead second degree." Indeed, when confronted with a request for clarification regarding second degree murder, the court specifically told the jurors that if it found Florence had committed murder, the murder "was of the second degree" unless the prosecution proved first degree murder, as that term was defined in CALCRIM 521.

3. The trial court adequately responded to the jury's inquires

Florence next contends that the trial court failed to adequately respond to the jury's questions regarding the meaning of second degree murder. "Under Penal Code 'section 1138 the court must attempt "to clear up any instructional confusion expressed by the jury." [Citation.]' [Citation.]" (*People v. Yarbrough* (2008) 169 Cal.App.4th 303, 316.) Florence argues that in this case, the court failed to discharge these duties by "repeatedly referring the jury back to the same instructions that the jury already found inadequate to answer their questions regarding second degree murder." According to Florence, "simply re-reading instructions" that the court had previously provided to the jury "did nothing to remedy the confusion and uncertainty some or all of the jurors were experiencing."

Contrary to Florence's assertions, however, the record shows the court did not simply re-read the same instructions it had previously provided to the jury. Rather, as discussed above, after the jury's second inquiry regarding the meaning of second degree murder, the court provided a different version

of CALCRIM 520. This language provided an adequate response to the jury's inquiry.

B. The Trial Court Erred in Staying the Section 186.22 Enhancements on the Murder and Assault with a Deadly Weapon Counts

Although no party has raised the issue, the transcript from the sentencing hearing shows that the trial court erred in applying Penal Code section 654 to stay the section 186.22 enhancements on counts one (murder) and four (assault with a deadly weapon).[6] (See generally *People v. Perez* (1979) 23 Cal.3d 545, 549, fn. 3 ["Errors in the applicability of section 654 are corrected on appeal regardless of whether the point was raised by objection in the trial court or assigned as error on appeal"]; *People v. Rodriguez* (2015) 235 Cal.App.4th 1000, 1004 ["'[i]t is well settled . . . that [a] court acts in "excess of its jurisdiction" and imposes an "unauthorized" sentence when it erroneously stays or fails to stay execution of a sentence under section 654'"].)

On Florence's murder count, the court imposed an indeterminate sentence of 75 years to life in prison. Regarding the jury's true finding on the gang enhancement allegation under section 186.22, the trial court correctly noted that because Florence was convicted of first degree murder, he was not subject to a sentence enhancement under section 186.22, subdivision (b)(1), but rather was subject to a 15-year minimum eligible parole term under section 186.22, subdivision (b)(5). (See *People v. Lopez* (2005) 34 Cal.4th 1002, 1006 (*Lopez*) ["a first degree murder committed for the benefit of a gang is . . . governed . . . by the 15-year minimum parole eligibility term in section 186.22(b)(5)"].) The court further explained, however, that it was "stay[ing]" application of the section 186.22 alternative penalty provision[7] under "Penal Code section 654 since it's less than the 12022.53(d) [firearm enhancement]."

---

6 We requested supplemental briefing on this issue from the parties.

7 Our Supreme Court has explained that the penalty set forth in section 186.22, subdivision (b)(5) is not technically a sentence enhancement, but rather is "properly characterized as an alternate penalty provision." (*People v. Montes* (2003) 31 Cal.4th 350, 353, fn. 3.)

The trial court had no authority to stay application of the section 186.22 alternative penalty provision based on the fact that Florence had also received a 25-year firearm enhancement under section 12022.53, subdivision (d). Section 12022.53, subdivision (e)(2) specifically provides that "[a] defendant who personally uses or discharges a firearm in the commission of a gang-related offense is subject to both the increased punishment provided for in section 186.22 and the increased punishment provided for in section 12022.53." (*People v. Robinson* (2012) 208 Cal.App.4th 232, 258.) Our Supreme Court has explained that when a sentencing statute sets forth "whether multiple enhancements can be imposed. . . .[,] recourse to section 654 [is] unnecessary because a specific statute prevails over a more general one relating to the same subject. [Citation.] The court should simply apply the answer found in the specific statutes and not consider the more general section 654." (*People v. Ahmed* (2011) 53 Cal.4th 156, 163.) In this case, section 12022.53, subdivision (e)(2) did not give the court authority to apply section 654 to stay the penalty provision that Florence was subject to under section 186.22, subdivision (b)(5).[8]

On Florence's remaining counts, the court sentenced him to 11 years in prison for assault with a firearm, which included a five-year enhancement under section 186.22, subdivision (b)(1). On the assault with a deadly weapon count, which involved striking the victim in the head with a lamp, however, the court stayed the section 186.22, subdivision (b)(1) enhancement "pursuant to Penal Code section 654." Thus, although the court found the assault with a firearm and the assault with a deadly weapon were separately punishable acts that were not subject to section 654, it nonetheless concluded

---

[8] Given the nature of Florence's offense, the 15-year minimum parole eligibility term in section 186.22, subdivision (b)(5) will have no effect on his overall minimum parole eligibility term. (See *Lopez, supra*, 34 Cal.4th at p. 1009 [acknowledging that section 186.22(b)(5)'s penalty provision would have "no practical effect for first degree murderers, who . . . have a minimum parole eligibility term of 25 years," but noting that "a true finding under section 186.22, subdivision (b)(5)" could nonetheless "be a factor to be weighed by the Board of Prison Terms in setting a defendant's release date from prison, even if it does not extend the minimum parole date per se.' [Citation.]"].)

that section 654 barred imposition of a separate section 186.22 enhancement for each assault. The court provided no explanation for this conclusion.

Our courts have previously held that that when two underlying offenses are separately punishable, section 654 does not preclude separate "gang enhancements pursuant to section 186.22, subdivision (b)(1)" for each such offense. (See *People v. Akins* (1997) 56 Cal.App.4th 331, 340 ["Since the underlying offenses, robbery and assault, were not subject to section 654 because [there is] evidence that defendant's criminal intent was multiple, the two gang enhancements pursuant to section 186.22, subdivision (b)(1) are also not subject to section 654"].) As explained by our colleagues in District Three: "When the criminal acts forming the basis for convictions of multiple substantive offenses are divisible – i.e., reflecting separate intents, objectives, or events – then section 654 has been held inapplicable. [Citation.] Thus, it follows that if section 654 does not bar punishment for two crimes, then it cannot bar punishment for the same enhancements attached to those separate substantive offenses. This is true even if the same type of sentence enhancement is applied to the underlying offenses." *(People v. Wooten* (2013) 214 Cal.App.4th 121, 130.) Applying those authorities here, we conclude that section 654 provides no legal basis to stay the section 186.22 enhancement with respect to the assault with a deadly firearm count.

DISPOSITION

The convictions are affirmed. The trial court's stay of the section 186.22, subdivision (b) penalty provisions with respect to the murder and assault with a deadly weapon counts are reversed, and the sentence is vacated. The matter is remanded for re-sentencing.

ZELON, J.

We concur:

PERLUSS, P. J. SMALL, J.*

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