Filed 3/20/18 P. v. Cunningham CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. EUGENE EVERETTE CUNNINGHAM, Defendant and Appellant.	B280495 (Los Angeles County Super. Ct. No. TA138500)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kelvin D. Filer, Judge. Affirmed in part, reversed in part and remanded.

Adrian K. Panton, 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, Senior Assistant Attorney General, Blythe J. Leszkay, Scott A. Taryle and Shawn McGahey Webb, Deputy Attorneys General, for Plaintiff and Respondent.

Eugene E. Cunningham appeals from a judgment following his conviction for attempted voluntary manslaughter, shooting at an occupied motor vehicle, and possession of a firearm by a felon. He contends his conviction for shooting at an occupied motor vehicle should be reversed because the trial court erred in failing to instruct the jury about the lesser included offense of grossly negligent discharge of a firearm. In addition, Cunningham seeks remand to allow the trial court the opportunity to exercise its discretion under recently amended Penal Code section 12022.5[1] to strike or dismiss the firearm enhancements attendant to his attempted voluntary manslaughter convictions. We remand to allow the trial court to exercise its discretion under section 12022.5 and correct the abstract of judgment for a clerical error. We otherwise affirm the judgment.

FACTS

Cunningham is a Carver Park Compton Crips (CPCC) gang member. At the time of the offense, CPCC was involved in a feud with the Athens Miller Bloods, a gang that claims territory adjacent to CPCC's. On August 9, 2015, Cunningham shot at a dark-colored BMW just outside of George Washington Carver Park (Carver Park) within CPCC's territory.[2] Occupants in the BMW purportedly shouted, "West Side Athens Miller Gangster Bloods."

---

[1] All further section references are to the Penal Code unless otherwise specified.

[2] On February 2, 2018, the Attorney General requested that People's Exhibit 17, an aerial photograph of the area, be transmitted to this court for its review in connection with the pending appeal. The request is denied as it is unnecessary to our analysis.

Cunningham was charged in the shooting as follows: attempted premeditated murder (counts 1–2; §§ 664/187, subd. (a)); shooting at an occupied motor vehicle (count 5; § 246); and possession of a firearm by a felon (count 6; § 29800, subd. (a)(1)). It was further alleged as to counts 1 and 2 that Cunningham personally used a firearm. (§ 12022.53, subds. (b)–(c).) As to all counts, it was alleged that Cunningham committed the offenses to benefit a criminal street gang (§ 186.22, subd. (b)(1)), and that he had a prior serious felony conviction (§ 667, subd. (a)(1)), and a strike under the Three Strikes Law (§ 667, subds. (b)–(j)).

The Prosecution Evidence

At trial, the People presented evidence that Cunningham was at Carver Park at the time of the shooting. Among other things, the evidence demonstrated that Cunningham's mobile phone made several calls from the Carver Park area and that Cunningham told his friend approximately 30 minutes before the shooting that he was headed to the park.

The People also presented testimony from L.B., who was reclining in the back seat of her car on the south side of 118th Street bordering Carver Park when she heard gunshots and a car "burning rubber." L.B. did not hear anyone yell anything before, during, or after the shots. She believed some of the shots hit houses located across the street, on the north side of 118th Street.

L.B. sat up and observed a black BMW going east on 118th Street, with its windows rolled up. She also saw an African-American man wearing black shooting a gun with his hands clasped straight in front of him and low to the middle of his stomach. The man was directly to her right. Afterwards, the

shooter got into a faded tan car driven by another person. They appeared to drive after the BMW. L.B. confirmed that surveillance video accurately showed events after the shooting and the video was shown to the jury.

D.B. testified a bullet hit his house, which was located on the north side of 118th Street, across from Carver Park. He was napping on the porch and saw a dark car speeding east on 118th Street that day. Bullet holes were found in two houses directly across from Carver Park on 118th Street. Sheriff's deputies found eight bullet casings in the parking lot of Carver Park. They were determined to have been fired from the same gun.

Detective Marc Boisvert, the People's gang expert, testified there were approximately 170 members in CPCC and their primary activities included vandalism, car theft, drug sales, gun possession, burglary, assault, and murder. He opined that Cunningham was a well respected member of CPCC and was a mentor to the younger members. He also testified to the ways in which Cunningham identified with CPCC, including the numerous tattoos on his body which depicted images or language important to CPCC.

The Defense Evidence

Cunningham testified on his own behalf. He admitted he was a member of CPCC, but denied he was an active participant in the gang at the time of the shooting. Cunningham also confessed he shot at the BMW on August 9, but claimed he did so in self-defense because he believed its occupants were threatening him, his friends, and their families.

Cunningham explained that CPCC members had been targeted by Athens Miller. In November 2014, Cunningham witnessed one of his friends, a fellow gang member, gunned down

by rival gangs, including Athens Miller. He knew other CPCC members had been targeted by Athens Miller as well. In addition, someone had posted a warning on social media that a dark colored BMW 745 was driving through CPCC's territory "trying to catch people slipping" or unprotected. As a result, Cunningham brought along a .357 Glock with him for protection whenever he was in the area, despite knowing he was not allowed to have a firearm due to a prior burglary conviction.

Cunningham testified that on August 9, he attended a "peace game" between the Mona Park gang and CPCC at the Mona Park gymnasium.[3] After the game, the CPCC gang members went back to George Washington Carver Park to allow their children to play. At approximately 5:00 p.m., Cunningham prepared to leave and walked to the parking lot with his friends and fellow gang members. He heard someone yell, "Watch out." Cunningham saw a man hanging out of the front passenger window of a black or blue BMW, bracing himself with his left hand, yelling, "West Side Athens Miller Gangster Bloods."

Cunningham believed the man to be "clutching," which meant he wanted to let everyone know he had a gun, but he was not actually displaying the gun. Cunningham immediately pulled his gun out of his pocket while the other CPCC members ran to their families. The car came to a complete stop and Cunningham aimed and shot his gun "towards their direction" four times. The man fell back in the car and it drove down the street. When it slowed, Cunningham fired four more times. He did not believe he hit anyone in the car.

---

[3] Cunningham explained a peace game is a basketball game between somewhat friendly gangs to squash any personal tension between individual gang members to prevent future violence.

After the second round of shots, the BMW sped away, going eastbound down 118th Street. Cunningham testified he drove off in his champagne colored Lexus sedan, but did not follow the BMW. Instead, he headed toward the Willowbrook Green apartments, which are known by CPCC members as the Acorns and is close to Carver Park. As he approached the Acorns, Cunningham saw the BMW drive past him, but he did not feel threatened by them, so he did nothing. Once at the Acorns, he hid the gun in the bushes located in the back parking lot. When he returned weeks later to retrieve the gun, it was gone.

As Cunningham sat outside the Acorns on the day of the shooting, he received a call at 5:21 p.m. from Kenneth Hammond, a CPCC gang member also known as Baby Chico.[4] Hammond told Cunningham he followed the BMW to Athens Miller territory. Cunningham told Hammond that he "put that shit up cuz it got hot fool I'm in Acorns." Cunningham explained at trial that meant he hid the firearm due to law enforcement activity. Hammond advised Cunningham, "I think you hit one of them niggas cuz . . . [¶] 'cause nigga you hit one of them, 'cause it took a long time to go up that eight cuz, you hit one of them niggas cuz. 'Cause when the nigga was out the window like nigga Antwerp boom boom boom boom boom boom boom . . . ." Cunningham laughed in response.

---

[4] At that time, there was an authorized wiretap on Hammond's cellphone as a product of a separate investigation. As a result, the conversation was recorded and transcribed. The transcription was admitted into evidence at trial.

At 5:41 p.m., Cunningham sent a text that said, "Just cracced on the Athens Millers."[5] The person whom he was texting responded, "Watchu mean?" Cunningham responded, "I'll tell you later."

Days after the shooting, Cunningham spoke with Nehemiah Robinson, another CPCC member who was in prison, about the shooting. That call was recorded. After Cunningham described how the Athens Millers "rolled by the park" and "yelled out the window, 'Westside Athens Millers,' " Robinson suggested, "a nigga should have threw a rock at his bitch ass." Cunningham responded, he "threw a thousand rocks at his bitch ass." At trial, Cunningham explained "throwing a rock" was a euphemism for shooting a gun.

During cross-examination, Cunningham expressed frustration that innocent people were getting shot and murdered. He explained, "If younger guys are gonna be going up there and starting trouble, kicking up dust, then they should protect they area from people coming back over there kicking up dust." Cunningham stated in a May 2015 Instagram post, which was admitted into evidence, that "[m]ost of these young gang members (Yea, I said gang members cuz yaw sho aint gang bangers) these days is gay and embarrassin. Sometimes I feel as I have failed as your teacher. Den I think about and be like U niccas failed as learners cuz I was active as a muthafucca. Idk where yaw get dis bitch ass shit from!! 8."

Cunningham was arrested on October 22, 2015. He initially denied involvement in the shooting during interviews with the police. He acknowledged during cross-examination at

---

[5] Cunningham explained that CCPC members often substituted "cc" in place of "ck" in homage to their gang.

trial that he never told the police he shot at the BMW in self-defense.

The Verdict and Sentence

The jury found Cunningham guilty of attempted voluntary manslaughter as to counts 1 and 2, a lesser included offense of attempted murder. The jury further found Cunningham guilty of the remaining counts, as alleged, for shooting at an occupied motor vehicle and possession of a firearm by a felon, and found true the gang and firearm enhancement allegations.

Cunningham admitted he was previously convicted of a prior serious felony. The trial court granted Cunningham's motion to dismiss the "strike" pursuant to *People v. Superior Court (Romero*) (1996) 13 Cal.4th 497. Using count 5 as the base count, it sentenced him to life in prison with a minimum parole eligibility of 15 years, plus a five-year determinate term under section 667, subdivision (a)(1), to run consecutively. It stayed the sentences on the remaining counts pursuant to section 654. Cunningham timely appealed.

DISCUSSION

Cunningham contends on appeal that the trial court erred in failing to instruct the jury about grossly negligent discharge of a firearm as a lesser included offense of shooting at an occupied motor vehicle. He further contends the abstract of judgment needs to be corrected to reflect that he was sentenced to a gang enhancement under subdivision (b)(1)(A) of section 186.22 instead of subdivision (b)(1)(C). In supplemental briefing, Cunningham requests we remand for further sentencing to allow the trial court the opportunity to exercise its discretion under newly amended section 12022.5. There is no merit to Cunningham's first argument, but we agree remand is required

to allow the trial court to exercise its discretion under section 12022.5. We also agree the abstract of judgment contains a clerical error which should be corrected.

I. The Trial Court had No Duty to Instruct On Discharge of a Firearm in a Grossly Negligent Manner

Cunningham was charged with shooting at an occupied motor vehicle in violation of section 246. He argues the trial court should have sua sponte instructed the jury on discharge of a firearm in a grossly negligent manner in violation of section 246.3, which is a lesser included offense. (*People v. Ramirez* (2009) 45 Cal.4th 980, 990 (*Ramirez*).) According to Cunningham, there was no evidence he fired at the BMW, rather than shooting "haphazardly to get the car to leave the area." The record demonstrates otherwise.

A. Applicable Law and Standard of Review

Under section 246, the offense of shooting at an occupied motor vehicle requires that a defendant act willfully and maliciously while shooting at an occupied motor vehicle. (*Ramirez, supra,* 45 Cal.4th at p. 985.) Courts have held that "section 246 is not limited to the act of shooting directly 'at' an inhabited or occupied target. Rather, the act of shooting 'at' a proscribed target is also committed when the defendant shoots in such close proximity to the target that he shows a conscious indifference to the probable consequence that one or more bullets will strike the target or persons in or around it." (*People v. Overman* (2005) 126 Cal.App.4th 1344, 1356, fn. omitted (*Overman).*) Section 246.3, subdivision (a), describes the elements of discharging a firearm in a grossly negligent manner as: "(1) the defendant unlawfully discharged a firearm; (2) the

defendant did so intentionally; (3) the defendant did so in a grossly negligent manner which could result in the injury or death of a person." (*People v. Alonzo* (1993) 13 Cal.App.4th 535, 538.)

The California Supreme Court has explained that "section 246.3(a) is a necessarily included lesser offense of section 246. Both offenses require that the defendant willfully fire a gun. Although the mens rea requirements are somewhat differently described, both are general intent crimes. The high probability of human death or personal injury in section 246 is similar to, although greater than, the formulation of likelihood in section 246.3(a), which requires that injury or death 'could result.' The only other difference between the two, and the basis for the more serious treatment of a section 246 offense, is that the greater offense requires that an inhabited dwelling or other specified object be within the defendant's firing range. All the elements of section 246.3(a) are necessarily included in the more stringent requirements of section 246." (*Ramirez, supra,* 45 Cal.4th at p. 990; *Overman, supra,* 126 Cal.App.4th at p. 1362.)

A trial court has a sua sponte duty to instruct on a lesser included offense when there is substantial evidence the defendant is guilty only of the lesser offense and not the greater. (*People v. Shockley* (2013) 58 Cal.4th 400, 403–404.) In other words, a court need instruct the jury on a lesser included offense only "[w]hen there is substantial evidence that an element of the charged offense is missing, but that the accused is guilty of" the lesser offense. (*People v. Webster* (1991) 54 Cal.3d 411, 443.) We review de novo a trial court's failure to instruct on a lesser included offense. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

B. Analysis

Cunningham argues that substantial evidence demonstrates an element of the charged offense is missing—whether the BMW was within his firing range. He claims evidence presented at trial shows at least two bullets hit houses across the street while there is no evidence anyone in the car or the car itself was hit. According to Cunningham, these facts tend to show he did not fire at the BMW. He also claims his belief that he needed to defend himself and his friends tends to establish he was not aiming at the BMW, but merely firing haphazardly to force the BMW to leave the area.

In support of his argument, Cunningham relies on *Overman, supra,* 126 Cal.App.4th at page 1362. We find *Overman* instructive, but not supportive of Cunningham's position. There, the appellate court found the trial court erred in failing to instruct the jury on grossly negligent discharge of a firearm because there was evidence that the defendant violated that section and not section 246. (*Ibid.*) At trial, neither the victim nor any other witnesses saw where the defendant was pointing his rifle at the time he fired it. Additionally, no bullet holes or points of impact were found on the occupied building. The evidence showed defendant was an excellent marksman using a high powered rifle, which suggested that he would have hit anything he was aiming at. The court concluded the jury had reason to infer that the defendant fired his rifle away from the general vicinity or range of the occupied office building. (*Ibid.*) In short, there was no evidence in *Overman* that the defendant was aiming at the occupied building and instead, the evidence seemed to indicate he was aiming away from the building.

By contrast, Cunningham admitted at trial he "aimed" "towards [the victim's] general direction" when he fired his first four shots at the BMW. The evidence confirmed Cunningham was shooting at the BMW when he told Robinson a few days later that he "threw a thousand rocks at his bitch ass." Additionally, L.B. observed Cunningham shoot with straight arms and his hands clasped. She testified, "[h]e didn't go up, down, no," belying his assertion on appeal that he fired "haphazardly." L.B.'s observation was supported by the fact that two bullets hit homes on 118th Street, indicating Cunningham was aiming at the BMW stopped between the south side of the street, where Cunningham was standing, and the north side, where the homes were located. Also unlike *Overman,* there was evidence that Cunningham hit his target. Hammond told Cunningham he believed Cunningham had hit one of the occupants of the BMW. No view of the evidence in this matter establishes that Cunningham was grossly negligent in the discharge of his firearm, but did not shoot at an occupied vehicle.

Cunningham dismisses this evidence, stating that his intent to keep the Athens Miller members from killing him or his friends made all of the evidence discussed above "ambiguous." According to Cunningham, the jury could infer from his self-defense testimony that he was firing haphazardly to get the car to leave the area. However, we find that is speculation, unsupported by logic or the record. "Speculation is insufficient to require the giving of an instruction on a lesser included offense." (*People v. Mendoza* (2000) 24 Cal.4th 130, 174.)

In any event, no prejudice resulted from the trial court's failure to sua sponte instruct the jury on grossly negligent discharge of a firearm. In reaching our conclusion, we apply the

harmless error test under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*), to determine whether it was reasonably probable that Cunningham would have obtained a more favorable result absent the error. (*People v. Beltran* (2013) 56 Cal.4th 935, 955.) We find he would not have.

Here, the jury found Cunningham guilty of two counts of attempted voluntary manslaughter based on the same acts of shooting at the BMW. (§§ 664/192.) In so finding, the jury necessarily found he had a specific intent to kill a human being, which is an element of attempted voluntary manslaughter. (*People v. Montes* (2003) 112 Cal.App.4th 1543, 1550.) Under the facts in this case, that specific intent can only be manifested by shooting at the BMW occupied by the Athens Miller gang members. Thus, the jury necessarily rejected the theory that Cunningham was firing haphazardly to get the BMW to leave. It is not reasonably probable the jury would have found Cunningham guilty of discharging a firearm in a grossly negligent manner even if the trial court had given that instruction.

Further, the *Watson* test for harmless error "focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*People v. Breverman* (1998) 19 Cal.4th 142, 177.) This is such a case. Cunningham admitted he "aimed" "towards [the victim's] general direction"

when he fired his first four shots at the BMW. The theory that he shot haphazardly to get the BMW to leave is, as we have said, pure speculation.

II. Resentencing is Necessary to Allow the Trial Court to Exercise its Discretion

The trial court imposed and stayed, pursuant to section 654, a three-year sentence (the midterm) for each of the attempted voluntary manslaughter counts (count 1 and 2) plus a four-year firearm enhancement under section 12022.5, subdivision (a), and a 10-year gang enhancement under section 186.22, subdivision (b)(1)(C) as to each count.

At the time of Cunningham's sentence, the trial court was prohibited from striking or dismissing any of the firearm enhancements under subdivision (c) of section 12022.5. During this appeal, however, the Governor signed Senate Bill 620 (SB 620) into law, which amended subdivision (c) of section 12022.5 to provide: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 1.)

In supplemental briefing, Cunningham requests we reverse that portion of his sentence related to the firearm enhancements and remand this matter for the trial court to exercise its newfound discretion. The Attorney General concedes a limited remand for this purpose is appropriate. We agree.

The discretion to strike a firearm enhancement under section 12022.5 may be exercised as to any defendant whose conviction is not final as of its effective date. (See *In re Estrada*

(1965) 63 Cal.2d 740, 742–748; *People v. Brown* (2012) 54 Cal.4th 314, 323.) There is no dispute that Cunningham's appeal was not final when SB 620 went into effect on January 1, 2018. (See *People v. Vieira* (2005) 35 Cal.4th 264, 305–306 ["a defendant generally is entitled to benefit from amendments that become effective while his case is on appeal"]; see also *Bell v. Maryland* (1964) 378 U.S. 226, 230 ["The rule applies to any such [criminal] proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it"].)

On remand, the trial court may strike the firearm enhancement attached to each of the attempted voluntary manslaughter counts or impose and stay the enhancements as it did below. If it chooses to strike or dismiss the firearm enhancements, the court may strike the punishment for the enhancement instead of the enhancement itself. (§ 1385, subd. (c)(1).) If it strikes the enhancement itself, the allegations are stricken for all purposes.

If the court chooses to strike only the punishment for an enhancement, the allegation is retained. In such a case, the fact of the enhancement remains in the defendant's criminal record, but does not add any punishment. However, the defendant will not accrue more than 15 percent of good time/work time credit, as this case would then come within the provisions of section 2933.1.[6] (*In re Pope* (2010) 50 Cal.4th 777, 779.) "In determining

---

[6] Section 2933.1, subdivision (a), specifies: "Notwithstanding any other law, any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of worktime credit, as defined in Section 2933." Section 667.5, subdivision (c)(8), includes "any felony in which the

whether to strike the entire enhancement or only the punishment for the enhancement, the court may consider the effect that striking the enhancement would have on the status of the crime as a strike, the accurate reflection of the defendant's criminal conduct on his or her record, the effect it may have on the award of custody credits, and any other relevant consideration." (Cal. Rules of Court, rule 4.428(b).)

III. The Abstract of Judgment Should be Corrected

Cunningham further contends the abstract of judgment fails to correctly reflect the oral pronouncement of judgment as to the gang enhancement for possession of a firearm by a felon in count 6. In that count, Cunningham was charged with a gang allegation under section 186.22, subdivision (b)(1)(A). The punishment under subdivision (b)(1)(A) is a prison term of two, three, or four years. The trial court sentenced Cunningham to the three-year midterm, but stayed the sentence under section 654. The abstract of judgment, however, reflects a gang enhancement for count 6 under subdivision (b)(1)(C) of section 186.22, which provides for a 10-year sentence.

The People concede the abstract of judgment should be amended to reflect the correct subdivision under which Cunningham was sentenced. We agree. (*People v. Walz* (2008) 160 Cal.App.4th 1364, 1367, fn. 3 [oral pronouncement of judgment controls over conflicting abstract of judgment or minute order].)

---

defendant uses a firearm which use has been charged and proved as provided in subdivision (a) of Section 12022.3, or Section 12022.5 or 12022.55."

DISPOSITION

The matter is remanded for the purpose of allowing the trial court to exercise its discretion to strike or dismiss the firearm enhancements as specified in section 12022.5, subdivision (c). The trial court is further ordered to amend the abstract of judgment to show the gang enhancement for count 6 was imposed under section 186.22, subdivision (b)(1)(A), and to forward a copy of the corrected abstract of judgment to the California Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

BIGELOW, P.J.

We concur:

GRIMES, J.

HALL, J.*

---

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