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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. ALBERTO MEJIA, Defendant and Appellant.	B266554 (Los Angeles County Super. Ct. No. BA399060)

APPEAL from a judgment of the Superior Court of Los Angeles County. George G. Lomeli, Judge. Affirmed and remanded.

Chris R. Redburn, 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, Scott A. Taryle and Shawn McGahey Webb, Supervising Deputy Attorneys General, and Tannaz Kouhpainezhad, Deputy Attorney General, for Plaintiff and Respondent.

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Alberto Mejia (defendant) stands convicted of two counts of second degree murder after he gunned down two men as they ran from him. Defendant appeals his convictions and the resulting 80-year sentence, arguing that (1) the conviction is tainted by an evidentiary error, and (2) the sentence is invalid because (a) the trial court erred in running the 40-year sentence for each count consecutively, and (b) the total 80-year sentence constitutes cruel and unusual punishment. Defendant also contends that he is entitled to an opportunity to make a record of evidence relevant to the youth offender parole hearing he will receive during his 25th year of incarceration. (Pen. Code, § 3051, subd. (b)(3);[1] *People v. Franklin* (2016) 63 Cal.4th 261, 284 (*Franklin*).) We affirm defendant's conviction and sentence, but we remand the matter because defendant is entitled to have the trial court assess whether he has had a "sufficient opportunity" to make a record for his future youth offender parole hearing and, if not, grant him that opportunity.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

In June 2012, defendant was walking down a sidewalk in Los Angeles, California when he saw two men he recognized on the other side of the street. He "mad-dogged" them (that is, he stared them down). They started to cross the street. They never made it because defendant stepped into the street, took "a couple of seconds . . . to get a good aim," and opened fire. The men were unarmed and turned to flee. Defendant kept shooting until he

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

ran out of bullets. Defendant stood over one of the men as the man lay dying in the street, cursed him for belonging to a rival street gang, and proclaimed that he "would have shot him in the face" "if he had another round." Both men died.

Defendant was just a month past his 18th birthday at the time of the shootings.

II. Procedural Background

The People charged defendant with one count of murder (§ 187, subd. (a)) for each victim.[2] As to each murder, the People also alleged that defendant intentionally discharged a firearm causing death (§ 12022.53, subd. (d)) and that the murder benefited a criminal street gang (§ 186.22, subd. (b)(1)(C)).

The matter proceeded to trial. The trial court instructed the jury on the crimes of first and second degree murder and on the lesser included offense of voluntary manslaughter due to heat of passion and due to imperfect self-defense.

The jury convicted defendant of two counts of second degree murder and found true the firearm enhancement; it did not find true the gang enhancement.

The trial court sentenced defendant to prison for 80 years to life. For each second degree murder conviction, the court imposed a sentence of 40 years to life comprised of a base term of 15 years to life plus the 25-year minimum for the firearm enhancement. The court then ran the two 40-year sentences consecutively, noting that "each crime involv[ed] separate murder victims."

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[2] The People also charged defendant with one count of attempted murder for an unrelated shooting, but the jury acquitted him of that charge.

Defendant filed a timely notice of appeal.

DISCUSSION

I. Evidentiary Ruling

A. Background facts

To negate the element of malice required for first and second degree murder, and to support his proffered defense of imperfect self-defense, defendant sought to introduce (1) testimony from his sister and himself, who would both testify to defendant's troubled upbringing and his early exposure to a life of violence and paranoia; and (2) testimony from two experts who, drawing upon the foundational facts to be introduced by defendant and his sister, would opine that defendant suffered from a variety of personality, drug, and mental disorders and that defendant had a low IQ and poor impulse control. Defendant's sister did not witness—and thus could not testify to—all of the incidents defendant himself experienced.

The trial court initially ruled that defendant's sister could not testify until after the experts. Midway through trial, however, the court expressed concern that its ruling might pressure defendant into testifying in order to lay the necessary foundation for the experts' testimony.[3] Defendant allayed this concern, however, when he informed the court that he was "going to testify regardless of whether his sister testified." Based on that representation, the trial court ruled that the sister's testimony regarding the abuse she saw defendant suffer would be cumulative of defendant's testimony regarding that very same abuse and excluded it under Evidence Code section 352. The

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[3] Defendant makes no claim on appeal that his decision to testify was coerced.

court indicated it would still allow defendant's sister to testify "if the prosecution attack[ed] the [defendant's] credibility . . . with respect to fabricating the incident[s] that he purportedly suffered and/or experienced."

Defendant testified, the prosecutor did not attack his credibility with respect to the prior incidents, and the two experts testified; defendant's sister did not testify.

B. Analysis

Under Evidence Code section 352, "a trial court has broad discretion to exclude evidence 'if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'" (*People v. Peoples* (2016) 62 Cal.4th 718, 757, quoting Evid. Code, § 352.) This section "permits the exclusion of evidence on the ground that it is cumulative." (*People v. Brown* (2003) 31 Cal.4th 518, 576 (*Brown*).) We review the trial court's ruling for an abuse of discretion. (*Ibid.*)

The trial court did not abuse its discretion in excluding the testimony of defendant's sister on the ground that it was cumulative. At the time the court ruled, defendant indicated an unequivocal intent to testify, and the testimony of defendant's sister would cover the same topic—namely, the incidents she saw defendant suffer as a child. Repetitive testimony is cumulative testimony. (See *People v. Linton* (2013) 56 Cal.4th 1146, 1191; *People v. Filson* (1994) 22 Cal.App.4th 1841, 1850 (*Filson*) [noting the "plain meaning of cumulative as 'repetitive'"], disapproved on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452.) Moreover, because the prosecutor did not attack defendant's credibility with respect to his testimony regarding the prior

incidents, defendant's sister's testimony was not needed to buttress his own testimony.

Defendant effectively raises three arguments in response. First, he asserts that the trial court erred in concluding that his sister's testimony about the prior incidents was cumulative. Specifically, defendant cites *Filson*, *supra*, 22 Cal.App.4th 1841 for the proposition that proffered evidence cannot be cumulative unless the evidence to which it is cumulative has already been introduced into evidence. Defendant is incorrect. *Filson* held that a tape recording that might have shown a defendant to have been intoxicated was not "cumulative" impeachment evidence as to an officer who testified without contradiction that the defendant was *not* intoxicated because that officer's testimony had yet to be impeached. (*Id.* at pp. 1849-1851.) *Filson* does not stand for the broad proposition defendant asserts. Indeed, defendant's argument would preclude trial courts from making rulings under Evidence Code section 352 on the basis of proffers. This is not the law. (E.g., *People v. Brooks* (2017) 2 Cal.5th 674, 723.) Defendant also posits that his sister's testimony was not cumulative because it provides a different perspective than his for the same incidents. This argument would effectively preclude any court from finding evidence cumulative; again, this is not the law. Defendant cites *People v. Carter* (1957) 48 Cal.2d 737, 749 for support, but that case dealt with rebutting a charge of recent fabrication, not Evidence Code section 352.

Second, defendant argues that the trial court was incorrect when it asserted, during the discussion about whether to admit defendant's sister's testimony, that her testimony would be hearsay. Any error in this assertion is of no consequence because the court's ruling was correct under Evidence Code section 352.

(*People v. Chism* (2014) 58 Cal.4th 1266, 1295, fn. 12 [“‘if the ruling was correct on any ground, we affirm’”].)

Lastly, defendant argues that the trial court’s ruling violates his constitutional rights to due process and to present a defense. However, a ruling that complies with Evidence Code section 352’s mandates does not transgress a criminal defendant’s constitutional rights. (*Brown*, *supra*, 31 Cal.4th at pp. 545-546; cf. *People v. Reeder* (1978) 82 Cal.App.3d 543, 553 [where evidence has “*significant* probative value” and should not be excluded under Evidence Code section 352, its exclusion can violate a defendant’s constitutional rights].)

II. Sentencing

A. Imposition of consecutive sentences

A trial court has “broad discretion” to decide whether to run the sentences imposed for separate counts concurrently or consecutively. (*People v. Clancey* (2013) 56 Cal.4th 562, 579; § 669, subd. (a); Cal. Rules of Court, rule 4.425.) California Rules of Court, rule 4.425 sets out factors to guide the court’s discretion, and those factors include “[f]acts relating to the crimes, including whether . . . [t]he crimes involved separate acts of violence.” (Cal. Rules of Court, rule 4.425(a)(2).) A trial court must expressly state its reasons for imposing consecutive terms. (*People v. Tillotson* (2007) 157 Cal.App.4th 517, 545.) Our review is for an abuse of discretion. (*Clancey*, at pp. 579-580.)

The trial court did not abuse its discretion in running the two murder sentences consecutively. The trial court expressly noted that “each crime involv[ed] separate murder victims,” and this finding is indistinguishable from a finding that “[t]he crimes involved separate acts of violence” under California Rules of Court, rule 4.425. This factor is sufficient to support the

imposition of consecutive sentences. (*People v. Calhoun* (2007) 40 Cal.4th 398, 408 [trial court may "consider the fact of multiple victims as a basis for imposing . . . a consecutive sentence"]; *People v. Calderon* (1993) 20 Cal.App.4th 82, 87 ["It has long been the rule that acts of violence against different victims may be charged and punished separately even though they occur on the same occasion"].)

Defendant raises two objections to the trial court's imposition of consecutive sentences. First, he asserts that the trial court was obligated to consider the "hallmarks of youth" factors that the United States Supreme Court has identified as bearing on whether a sentence imposed upon juveniles constitutes unconstitutionally cruel and unusual punishment—namely, juveniles' (1) lack of maturity, impulsiveness and underdeveloped sense of responsibility, (2) vulnerability to negative influences and limited control over their own environment, and (3) lack of well-formed character. (*Miller v. Alabama* (2012) 567 U.S. 460, 471-472 (*Miller*).) This argument lacks merit. The Supreme Court has held that its pronouncements regarding what constitutes cruel and unusual punishment for juveniles apply only to persons under the age of 18. (*Roper v. Simmons* (2005) 543 U.S. 551, 574; *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1380; *People v. Abundio* (2013) 221 Cal.App.4th 1211, 1220-1221; *People v. Argeta* (2012) 210 Cal.App.4th 1478, 1482.) Defendant was 18 at the time of his crimes.

Second, defendant alternatively argues that the trial court erred in not taking into account his status as a "newly minted 'adult.'" Although the court could have considered defendant's age as a factor bearing on whether to impose a consecutive or

concurrent sentence (Cal. Rules of Court, rule 4.408(a) [rules listing relevant factors do not preclude consideration of unenumerated factors]), the court did not prejudicially err in refusing to do so in this case. The court did not err because defendant did not *ask* the court to consider his status as a young adult (as opposed to a juvenile), and defendant consequently cannot complain on appeal about the court's failure to do so. (*People v. Boyce* (2014) 59 Cal.4th 672, 730-731 (*Boyce*).) Any error was not prejudicial because a single aggravating factor is sufficient to warrant imposition of consecutive sentences (*People v. Osband* (1996) 13 Cal.4th 622, 728-729), and there was one such factor here—namely, the presence of multiple victims.

B. Cruel and/or unusual punishment

The Eighth Amendment's prohibition against "cruel and unusual punishments" contains a "'narrow proportionality principle'" that forbids extreme sentences that are "grossly disproportionate" to the severity of the crime. (*Ewing v. California* (2003) 538 U.S. 11, 20 (*Ewing*); *Harmelin v. Michigan* (1991) 501 U.S. 957, 996-997 (conc. opn. of Kennedy, J.).) The California Constitution prohibits "[c]ruel *or* unusual punishment" (Cal. Const., art. I, § 17, italics added), and a court reviewing a sentence must use three criteria to determine whether a penalty is "'so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.'" (*Boyce*, *supra*, 59 Cal.4th at p. 721, quoting *In re Lynch* (1972) 8 Cal.3d 410, 424.) These criteria are: (1) the nature of the offense and offender, with emphasis on his danger to society; (2) the penalty imposed compared with the penalties for more serious crimes in California; and (3) the punishment for the same offense in other

jurisdictions. (*People v. Christensen* (2014) 229 Cal.App.4th 781, 805-806.) When it comes to juvenile offenders, courts must also take into consideration the "hallmarks of youth" factors outlined above. (*Miller*, *supra*, 567 U.S. at pp. 471-472; *Graham v. Florida* (2010) 560 U.S. 48, 74-75; *People v. Caballero* (2012) 55 Cal.4th 262, 266.) Whether a sentence is cruel and/or unusual is a question of law subject to independent review, viewing the facts in the light most favorable to the judgment. (*People v. Em* (2009) 171 Cal.App.4th 964, 971.)

1. Constitutionality as a "juvenile" sentence

Defendant argues that his 80-year sentence transgresses the constitutional limits on juvenile sentences because the trial court did not consider the "hallmarks of youth" factors, even though defendant was just past his 18th birthday at the time of the crimes. The court did not err. As noted above, the Supreme Court has confined its special rules governing juvenile sentencing to persons under the age of 18 at the time of their crimes. And even if the those rules applied to defendant, the California Supreme Court has held that the availability of a youth offender parole hearing during the juvenile's 25th year of incarceration pursuant to section 3051 moots any constitutional challenge to the length of the sentence. (*Franklin*, *supra*, 63 Cal.4th at pp. 280-282.)

2. Constitutionality, generally

Defendant also contends that, even if he is not a "juvenile," his young age is still relevant and renders his sentence "so disproportionate" to the crime as to be conscience-shocking. (*Ewing*, *supra*, 538 U.S. at pp. 20, 22; *Boyce*, *supra*, 59 Cal.4th at p. 721.) Defendant's age is undoubtedly relevant to the inquiry into "'the "nature of the offender."' (*People v. Dillon* (1983)

34 Cal.3d 441, 479; *In re Nunez* (2009) 173 Cal.App.4th 709, 726 ["Age . . . matters"].)

However, we reject defendant's claim that his sentence is grossly disproportionate to his crimes for two reasons. First, he has forfeited the claim by not raising this constitutional objection to the trial court. (*People v. Speight* (2014) 227 Cal.App.4th 1229, 1247 ["A defendant's failure to contemporaneously object that his sentence constitutes cruel and unusual punishment forfeits the claim on appellate review"].) Second, the claim lacks merit. The offenses themselves were quite egregious. Defendant repeatedly shot not just one, but two men in the back as they were running away from him. Defendant's background also evidences an escalating criminality: Although defendant was just over the age of 18 at the time of the shootings, he was nevertheless a self-admitted gang member, he had already committed a gun-related offense, and he was then on probation. Further, defendant's 40-year sentence for each murder is consistent with other sentences for the same crime with a gun enhancement based on personal discharge. (E.g., *People v. Costella* (2017) 11 Cal.App.5th 1, 3-4.) And the severity of California's sentences vis-à-vis other states' is not enough by itself to invalidate the sentence. (*People v. Haller* (2009) 174 Cal.App.4th 1080, 1094 ["'That California's punishment scheme is among the most extreme does not compel the conclusion that it is unconstitutionally cruel or unusual'"].)

Defendant raises several arguments in response. First, he asserts that he will not be released until he is 98 years old. He is wrong because he ignores that section 3051 affords him a youth offender parole hearing during his 25th year of incarceration. (§ 3051, subd. (b)(3).)

Second, defendant argues that the jury's rejection of the first degree murder charges amounts to a finding that he fired the shots as a sudden reaction to a perceived threat, which reduces his culpability and renders the resulting sentence disproportionate to that culpability. This argument ignores that the jury's finding means only that it did not find evidence of premeditation and deliberation beyond a reasonable doubt; the jury's decision to convict defendant of second degree murder necessarily rests upon its findings that he acted with malice and that he did *not* act in the heat of passion or in imperfect self-defense. Contrary to defendant's representations, the verdicts do not reflect a finding that defendant was reacting suddenly to a perceived threat.

Third, defendant argues that his violent upbringing and the mental and personality disorders it spawned render his sentence cruel and unusual. This is certainly part of the evidence to be considered in evaluating the nature of the offender. However, when viewed in conjunction with the aggravating portions of defendant's background as well as the egregious nature of the offenses themselves, the 80-year sentence in this case is not cruel and/or unusual.

III. Remand to Assess Need for Evidentiary Hearing for Eventual Youth Offender Parole Hearing

Section 3051 guarantees a "person who was convicted of a controlling offense that was committed before the person had attained 23 years of age and for which the sentence is a life term of 25 years to life" a "youth offender parole hearing" "during his . . . 25th year of incarceration." (§ 3051, subds. (a)(1) & (b)(3).) At a youth offender parole hearing, the Board of Parole Hearings is to "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth,

and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (§ 4801, subd. (c); see also § 3051, subd. (d).) Such evidence is to be derived by "psychological evaluations and risk assessment instruments," and through the testimony of "[f]amily members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime [as well as] maturity since the time of the crime." (§ 3051, subd. (f)(1) & (2).) To ensure that this evidence is available for an "eventual youth offender parole hearing," our Supreme Court has held that a defendant is entitled to a "sufficient opportunity" to "make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense." (*Franklin*, *supra*, 63 Cal.4th at p. 284; *People v. Perez* (2016) 3 Cal.App.5th 612, 615, 618-619 [applying these procedures to a defendant who was 20 years old at the time of the crimes].)

Under this authority, defendant is entitled to a remand at which the trial court can assess whether defendant has been given the requisite "sufficient opportunity" to present evidence regarding his "characteristics and circumstances at the time of the offense." (*Franklin*, *supra*, 63 Cal.4th at p. 284.) Although, at the time of defendant's sentencing, section 3051 only reached persons who were under 18 at the time of their offenses, our Legislature subsequently amended section 3051 to reach persons who were under 23 (§ 3051, subd. (a)(1), as amended by Stats. 2015, ch. 471, § 1), and that amendment applies retroactively (*Franklin*, at pp. 278-279). The People resist a remand, arguing that defendant testified about his troubled upbringing and presented expert testimony regarding his personality disorders,

low IQ, and poor impulse control. Of course, the focus of that testimony was on the elements of the charged crimes, the lesser included crimes, and defenses rather than defendant's eventual suitability for parole. We leave it to the trial court in the first instance to determine whether defendant had a sufficient opportunity to present the evidence relevant to his eventual youth offender parole hearing.

DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court for further proceedings consistent with *Franklin*, *supra*, 63 Cal.4th 261.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.*
GOODMAN

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