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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ALEXANDER RAMOS, Defendant and Appellant.	B284397 (Los Angeles County Super. Ct. No. BA440112-01)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa B. Lench, Judge. Affirmed in part, reversed in part, and remanded for resentencing with directions.

Sara H. Ruddy, 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, Idan Ivri and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Alexander Ramos appeals from a judgment of conviction of first degree murder (count 1), second degree robbery (counts 3 & 4), and possession of a firearm with the identification numbers removed (count 5). (Pen. Code, §§ 187, subd. (a), 211, 23920.[1]) The jury found true the gang and firearm enhancement allegations, including under section 12022.53. (§ 186.22, subds. (b)(1)(C) (counts 1, 3, 4) & (d) (count 5); § 12022.53, subds. (b) (counts 3, 4) & (d) (count 1).) Defendant admitted an out-on-bail enhancement allegation resulting in a mandatory consecutive two-year term. (§ 12022.1.) The trial court sentenced defendant to 76 years to life in state prison. Because he was 20 years old when he committed these crimes, defendant will be eligible for a parole hearing during his 25th year of incarceration. (§ 3051, subd. (b)(3).)

On appeal, defendant argues: (1) it was error to instruct the jury it could not consider voluntary intoxication evidence on the question of whether he had an actual but unreasonable belief in the need for self-defense; (2) the prosecutor committed misconduct by misstating the law of malice aforethought and premeditation and deliberation in closing argument; (3) this case should be remanded to allow the trial court to exercise discretion to strike section 12022.53 firearm enhancements under Senate Bill No. 620 (2017-2018 Reg. Sess.) (Apr. 25, 2017), effective January 1, 2018; and (4) the trial court erred with respect to

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

defendant's presentence custody credits and by re-imposing sentence in case No. BA438433.

Defendant's first argument is foreclosed by the Supreme Court's recent decision in *People v. Soto* (2018) 4 Cal.5th 968. The Attorney General concedes defendant's third and fourth arguments and we agree. We further conclude defendant forfeited his prosecutorial misconduct claims, but even if preserved we would find the prosecutor did not misstate the law in closing argument.

II. THE EVIDENCE AT TRIAL

The prosecution presented evidence that on September 23, 2015, defendant, armed with a loaded weapon, robbed Ryan G. and Kristen G., and on September 24, 2015, defendant shot and killed Jose A. An eyewitness saw defendant cross the street, pull out a gun and point it at Jose A.'s face, exchange a few words with him and then, while Jose A.'s hands were over his head, palms open, shoot him. When Jose A. fell to the ground, defendant ran.

Defendant admitted he robbed Ryan G. and Kristen G. and shot Jose A. Defendant testified he was a drug user who consumed about two grams of methamphetamine a day and used heroin and marijuana. He robbed Ryan G. and Kristen G. to support his habit. He testified he shot Jose A. after Jose A. approached and took a swing at him: "[H]e took a swing at me, and he fell. [¶] So my first reaction was to pull out the gun and shoot."

III. DISCUSSION

A. *Jury Instruction*

Defendant argues it was error to instruct the jury with respect to the murder charge that it could consider evidence of defendant's voluntary intoxication only in deciding whether defendant acted with intent to kill or acted with deliberation and premeditation. Defendant contends that the jury should have been allowed to consider evidence of voluntary intoxication on the question whether defendant had an actual but unreasonable belief in the need for self-defense.

After defendant filed his opening brief, the Supreme Court decided this question adversely to him. (*People v. Soto, supra*, 4 Cal.5th at p. 968.) In *Soto*, the Supreme Court held that evidence of voluntary intoxication is not admissible "on the question of whether a defendant believed it necessary to act in self-defense" and that CALCRIM No. 625 correctly states the law. (*Id.* at p. 970.)

B. *Prosecutorial Misconduct*

Defendant argues that the prosecutor misstated the law in several respects in closing argument. "'A prosecutor commits misconduct [as a general rule] when his or her conduct either infects the trial with such unfairness as to render the subsequent conviction a denial of due process, or involves deceptive or reprehensible methods employed to persuade the trier of fact.' [Citation.]" (*People v. Rangel* (2016) 62 Cal.4th 1192,1219.) A prosecutor generally commits misconduct by misstating the law

in comments before the jury. (*People v. Centeno* (2014) 60 Cal.4th 659, 666.) The question on appeal is whether the defendant has shown that "in the context of the whole argument and the instructions there was '"a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner."' [Citation.]" (*People v. Rangel, supra*, 62 Cal.4th at p. 1219.)

1. Forfeiture

But first, "[a]s a general rule, '"[a] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety."' [Citations.]" (*People v. Centeno, supra*, 60 Cal.4th at p. 674.) "A prosecutor's misstatements of law are generally curable by an admonition from the court. [Citation.]" (*Ibid.*) Defense counsel did not object to the prosecutor's alleged misstatements at trial or request that the jury be admonished, and defendant has not shown the alleged misstatements were not curable. Therefore, defendant forfeited his prosecutorial misconduct claims. (*Ibid.*)

2. Express malice

Even if defendant had not forfeited his arguments, we would not find error. Defendant first argues that the prosecutor committed an error attempting to illustrate express malice. Murder is "the unlawful killing of a human being . . . with malice aforethought." (§ 187, subd. (a).) "Malice 'may be express or

implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature.'" (*People v. Rangel, supra*, 62 Cal.4th at p. 1220.) The trial court instructed the jury: "The defendant acted with *express malice* if he unlawfully intended to kill[,]" and defined the necessary intent the jury needed to find for a murder conviction. (CALCRIM No. 520.)

Here the evidence showed that defendant pointed a loaded weapon at and shot Jose A. who had his empty hands in the air. The prosecutor argued: "Express malice is where you unlawfully intended to kill somebody. Here, as we have here, you take out a gun, you point it at someone; you pull the trigger, you shoot them. That is express malice." Defendant contends that this argument misstated the law and told the jury that defendant's "intent was a foregone conclusion, and not a question for them to decide[.]" Defendant points to the manner in which he shot Jose A. as negating any intent to kill: he fired a single shot, did not aim at a vital organ, and did nothing to ensure he had caused Jose A.'s death.

While the prosecutor's example may have benefited from additional facts to better highlight the requisite intent, it was not a misstatement of the law. Express malice may be inferred from the circumstances, including where a defendant, without legal excuse, purposefully fires a gun toward a victim at close range. (*People v. Houston* (2012) 54 Cal.4th 1186, 1218; *People v. Smith* (2005) 37 Cal.4th 733, 741-742; *People v. Jackson* (1989) 49 Cal.3d 1170, 1201.) It does not matter that the defendant fired only once, or that the victim might have escaped death because of the defendant's poor marksmanship. (*People v. Smith, supra*, 37 Cal.4th at pp. 741-742.)

We also disagree that the prosecutor's comment misled the jury by indicating defendant's mental state was a foregone conclusion. The prosecutor properly argued the evidence supported an express malice finding. The jury was clearly instructed that defendant's state of mind was a question for them to resolve. We presume the jurors were intelligent, capable of understanding the instructions and applying them to the facts, and that they did so in this case. (*People v. Charles* (2015) 61 Cal.4th 308, 324, fn. 8.) There is no reasonable likelihood the jury construed or applied the prosecutor's comment about express malice in an improper or erroneous manner.

3. Implied malice

Defendant argues next that the prosecutor erred in trying to explain implied malice. Malice "'is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.'" (*People v. Rangel, supra*, 62 Cal.4th at p. 1220.) Implied malice has both a physical and a mental component. ""'The physical component is satisfied by the performance of "an act, the natural consequences of which are dangerous to life." [Citation.] The mental component is the requirement that the defendant "knows that his conduct endangers the life of another and . . . acts with a conscious disregard for life." [Citations.]'"" (*Ibid.*) The jury was instructed: "The defendant acted with *implied malice* if: [¶] 1. He intentionally committed an act; [¶] 2. The natural and probable consequences of the act were dangerous to human life; [¶] 3. At the time he acted, *he knew* his act was dangerous to human life; [¶] AND [¶] 4. He deliberately acted with

conscious disregard for human life." (CALCRIM No. 520, italics added.)

Defendant finds fault with the prosecutor's analogy: "Implied malice, for example, would be somebody goes into Times Square on New Year's Eve. As midnight approaches, they pull out a gun and they shoot the gun into the air. What goes up must come down. The shot comes down, strikes someone in the head, and it kills that person. [¶] That would be an example of implied malice, because *you're doing an act that is so dangerous to human life every reasonable person would understand that. And you did that act anyway. A callous disregard for human life*. That would be an example of implied malice." (Italics added.)

Defendant asserts the prosecutor's statement described gross negligence, not implied malice, a distinction made in *People v. Watson* (1981) 30 Cal.3d 290: "Implied malice contemplates a subjective awareness of a higher degree of risk than does gross negligence, and involves an element of wantonness which is absent in gross negligence." (*Id.* at p. 296.) The court in *Watson* further explained that a "finding of gross negligence is made by applying an objective test" while "a finding of implied malice depends upon . . . a *subjective* standard." (*Id.* at pp. 296-297.) It is the ""conscious disregard for human life"" that sets implied malice apart from gross negligence. (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 109.)

Although the prosecutor used the language "reasonable person" in her argument to the jury, what she described was a shooter who knew what the risk was—that the bullet that went up would have to come down into the crowd—and acted anyway, evidencing a conscious disregard for human life. That is an example of implied malice. The argument was consistent with

the jury instruction that "[a]t the time [defendant] acted, he knew his act was dangerous to human life."

Defendant asserts the prosecutor compounded the error by telling the jury it did not need to decide whether defendant acted with express or implied malice to conclude that defendant was guilty of first degree murder. The record does not support that assertion. In the context of defining murder (not first degree murder), the prosecutor told the jurors they had to decide whether defendant acted with express or implied malice, but they did not have to agree on which type. The prosecutor said: "You don't even have to agree. One of you might say, well, I think its implied malice. And another one of you might say, no, I think its express malice. It doesn't matter. You don't have to agree on the type of malice. You just have to agree there was malice aforethought." This was a correct statement of the law on the definition of murder, and it mirrored the jury instructions. (*People v. Brown* (1995) 35 Cal.App.4th 708, 715-716.)

4. Premeditation and deliberation

The prosecutor then moved on to the definition of first degree murder. The prosecutor argued: "One good example of deliberation and premeditation is traffic lights. We all drive by traffic lights on a daily basis. We see the light changing. We have to make a decision. [¶] Are you gonna gun it and try to get through that intersection? Are you gonna brake? You make that decision, evaluate every single day. And that's all that's required for willful, deliberate, premeditation is that same type of very quick decision. A deliberate decision to kill is first degree."

Defendant argues that the prosecutor erred in using crossing an intersection as an example of premeditation and deliberation because a decision to kill is fundamentally different from deciding whether to cross an intersection as a light is changing. Deciding whether to drive through an intersection is based on the driver's experience drawn from many other intersection crossings and has nowhere near the consequences as a decision to murder.

We conclude the argument was a proper illustration of a deliberate decision made quickly, as approved in *People v. Avila* (2009) 46 Cal.4th 680, 715. In *Avila*, the court did not find fault with the prosecutor's use of that analogy to give "an example of a 'quick judgment' that is nonetheless 'cold' and 'calculated.'" (*Ibid.*) Likewise, here the prosecutor used the intersection analogy to give an example of a quick, willful and deliberate decision. She did not argue that deciding to murder carries no more weight than deciding to drive through an intersection. In addition, the jury was properly instructed on premeditation and deliberation. Viewed in light of the jury instructions, there is no reasonable likelihood the jury construed the prosecutor's comments as an invitation to lower the burden of proof.

5. Ineffective assistance of counsel

Defendant claims his trial attorney was ineffective for failing to object to the prosecutor's statements. As discussed above, we find there was no misstatement of the law or misconduct. Defendant's trial counsel was not ineffective for failing to make unmeritorious objections. (*People v. Lucero* (2000) 23 Cal.4th 692, 732.)

C. *The Firearm Enhancement*

When defendant was sentenced, the trial court had no discretion to strike or dismiss a section 12022.53 firearm enhancement. The law has since changed. Defendant asserts, the Attorney General concedes, and we agree this matter must be remanded to permit the trial court to exercise its discretion under section 12022.53, subdivision (h), as amended by Senate Bill No. 620 effective January 1, 2018. (Stats. 2017, ch. 682, § 2.) The trial court did not impose the maximum possible sentence and gave no indication whether it would have dismissed one or more section 12022.53 firearm enhancements if it had discretion to do so.

D. *Case No. BA438433*

On December 10, 2015, after his arrest in this case, defendant was convicted in case No. BA438433 of carrying a loaded firearm in public, a felony. (§ 25850, subd. (a).) The trial court in No. BA438433 sentenced him to 16 months in the county jail. At the sentencing hearing in the present case, the trial court resentenced defendant in case No. BA438433, imposing a two-year state prison sentence to be served concurrently with the sentence in this case.

Defendant contends and the Attorney General agrees that the trial court erred when it modified the previously imposed sentence. (Cal. Rules of Court, rule 4.452 ["Discretionary decisions of the judges in the previous cases may not be changed by the judge in the current case"]; see *In re Reeves* (2005) 35 Cal.4th 765, 773 ["later sentencing court may not change a prior

sentencing court's discretionary decision to make a particular term concurrent rather than consecutive"].) We will remand for the trial court to impose the original 16-month sentence in case No. BA438433.

E. *Presentence Custody Credit*

Defendant was in presentence custody in this case for 679 days, from September 24, 2015 to August 2, 2017, according to defense counsel. During that time, he was sentenced in two other cases, Nos. BA438433 (December 10, 2015) and BA451927 (February 24, 2017).[2] The trial court denied defendant any presentence custody credit because the court found that "as of December 10, 2015, [defendant was] a sentenced prisoner." Defendant contends that he is entitled to some presentence custody credits in this case, and the Attorney General agrees that defendant "appears to be correct that he is entitled to additional presentence credits." They also agree that the record does not contain sufficient information to make the necessary calculations. We too agree. On remand, the trial court is to compile the necessary record and determine defendant's presentence custody

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[2] On July 25, 2015, defendant was arrested on weapons charges in case No. BA438433. He was out of custody on bail when on September 24, 2015, he was arrested in the present case. On December 10, 2015, defendant was convicted in case No. BA438433 of carrying a loaded firearm in public (§ 25850, subd. (a)), and the trial court sentenced him to 16 months in the county jail. It appears that in BA451927, defendant was charged on October 6, 2016, with drug possession while in county jail custody, and that on February 24, 2017, defendant was convicted on that charge, a felony.

credits in this case. (*People v. Phoenix* (2014) 231 Cal.App.4th 1119, 1126, 1129.)

IV. DISPOSITION

Defendant's convictions are affirmed. Defendant's sentence is reversed, and the matter is remanded for resentencing, which will require the trial court to (1) impose the original 16-month sentence in case No. BA438433, (2) if it so chooses, exercise its discretion to strike or dismiss one or more of defendant's section 12022.53 firearm enhancements, and (3) calculate defendant's presentence custody credits.

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SEIGLE, J.*

We concur:

BAKER, Acting P.J.

MOOR, J.

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