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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN MOORE,

Defendant and Appellant.

2d Crim. No. B280760
(Super. Ct. No. BA437886)
(Los Angeles County)

Steven Moore appeals from the judgment entered after a jury had convicted him of first degree murder. (Pen. Code, §§ 187, 189.)[1] The first degree finding was based on either of two theories: (1) the murder was willful, deliberate and premeditated, or (2) the murder was committed by discharging a firearm from a motor vehicle. The jury found true allegations that the murder had been committed for the benefit of a criminal street gang (§ 186.22, subd. (b)) and that appellant had personally and intentionally discharged a firearm causing death.

[1] All statutory references are to the Penal Code.

(§ 12022.53, subd. (d).) The trial court found true one prior serious felony conviction (§ 667, subd. (a)(1)) and one prior serious or violent felony conviction ("strike") within the meaning of California's "Three Strikes" law. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) Appellant was sentenced to prison for 80 years to life.

In his opening brief appellant contends that (1) the trial court erroneously failed to instruct the jury sua sponte on perfect self-defense, and (2) his counsel was ineffective for failing to move to exclude statements made by appellant during police interrogation. In a supplemental brief appellant argues that, because his case is not yet final, it should be remanded to the trial court for resentencing pursuant to amended section 12022.53, subdivision (h). The Attorney General concedes that, effective January 1, 2018 the amended section applies retroactively to appellant. Accordingly, we vacate the sentence and remand the matter for resentencing. In all other respects, we affirm.

Facts

One night in June 2015, the police found the victim, Marvin Bradley, "lying . . . in the middle of the [front] doorway of [a] liquor store." He had suffered a single, fatal gunshot wound to the lower back. The police did not find any cartridge cases at the crime scene. They found only one bullet impact, which was in a wall next to the front door of the liquor store. The police were not aware of any eyewitnesses to the shooting. Video cameras captured images of a white vehicle driving by the liquor store before and after the shooting.

The police stopped a car that matched the description of the white vehicle. The driver was Raquel Green. Pursuant to

a search warrant, the police searched Green's residence. After completing the search, they saw appellant standing in the middle of the street in front of Green's residence. They knew that he was "a person of interest" in the liquor store shooting. The police detained him.

Appellant was a member of the Van Ness Gangster Brims (VNG), a "Blood" criminal street gang. VNG's main rival is the "Rollin' 40's," a "Crip" gang. Members of the Rollin' 40's would "hang out" at the liquor store where the shooting occurred. A gang expert testified that the store was "a well-known Rollin' 40['s] location." Damon Wardsworth, a Rollin' 40's member, was inside the store at the time of the shooting. He heard a car outside and someone say, "'What's up, blood?'" In response to a hypothetical question incorporating the facts of this case, the gang expert opined that the shooting had been committed for the benefit of VNG.

At the time of appellant's detention, no witnesses to the shooting "had come forward." Detective Ronald Kingi arranged a sham "field show-up." A police officer dressed in civilian clothes was driven to appellant's location. He identified appellant. Kingi wanted appellant to believe that he had been "identified in some type of crime."

After the field show-up, Detective Kingi interrogated appellant at the police station. Kingi falsely told him that Bradley, the victim, was a gang member, that the police were "investigating [Bradley] for possibly pulling guns on other people," and that contraband had been found on or around his body. In addition, Kingi falsely stated that people had told him appellant was bragging about the shooting. The false statements

were an "investigative technique" designed "to encourage [appellant] . . . to give . . . responses."

Appellant said that Green had picked him up in her car. A person called "Chilly" was also a passenger. Green drove to the liquor store. Appellant did not get out of the car. Chilly got out and argued with persons in front of the store. Chilly returned to the car, and Green drove away. As the car passed by the liquor store, "bullets start flying." Appellant "just kept hearing bullets and bullets." He thought he was "about to die." He "ducked and shot straight up in the air." He fired two shots. He was certain that he had not hit anyone. He knew he "hit the wall because [he] heard it." Appellant was "just trying to protect" himself. He wanted to "cause a distraction" so that the car "could get away." "I'm telling you," appellant said to Kingi, "mines [*sic*] was in self-defense."

Appellant was "surprised that [Green's] car didn't get hit not once." He estimated that the persons doing the shooting had fired "'more than 50 times.'" "God was with us," he told Detective Kingi.

Trial Court's Alleged Failure to Instruct Sua Sponte on Perfect Self-Defense

Appellant claims that the trial court erroneously failed to instruct the jury sua sponte on perfect self-defense pursuant to CALCRIM No. 505. The instruction provides that the killing is justifiable, and the defendant is not guilty of murder, if (1) he reasonably believed that he "was in imminent danger of being killed or suffering great bodily injury," (2) he "reasonably believed that the immediate use of deadly force was necessary to defend against that danger," and (3) he "used no more force than was reasonably necessary to defend against that

danger." A trial court has a duty to instruct sua sponte on a defense "'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.' [Citations.]" (*People v. Barton* (1995) 12 Cal.4th 186, 195; accord, *People v. Brooks* (2017) 3 Cal.5th 1, 73.)

We need not decide whether the trial court had a duty to give CALCRIM No. 505 sua sponte. If it had such a duty, its failure to give the instruction was harmless beyond a reasonable doubt.[2] An instructional omission is "harmless beyond a reasonable doubt under circumstances in which 'the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. In such cases the issue should not be deemed to have been removed from the jury's consideration since it has been resolved in another context, and there can be no prejudice to the defendant . . . .' [Citation.]" (*People v. Wright* (2006) 40 Cal.4th 81, 98.)

The jury's true finding on the gang allegation necessarily resolved the perfect self-defense issue adversely to appellant. In its verdict the jury found "that the [murder] was committed for the benefit of, at the direction of, or in association

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[2] Because the error was harmless under the "harmless beyond a reasonable doubt" standard applicable to federal constitutional errors (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]), we do not decide whether we should use that standard or the less stringent standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (See *People v. Salas* (2006) 37 Cal.4th 967, 984 ["We have not yet determined what test of prejudice applies to the failure to instruct on an affirmative defense"].)

with a criminal street gang with the *specific intent* to promote, further and assist in criminal conduct by gang members." (Italics added.) By this finding, the jury necessarily also found that appellant did not kill because he reasonably believed that he "was in imminent danger of being killed or suffering great bodily injury" and "that the immediate use of deadly force was necessary to defend against that danger." (CALCRIM No. 505.) He killed to advance the interests of a criminal street gang and promote criminal conduct by gang members. The jury was instructed that it could "consider evidence of gang activity . . . for the limited purpose of deciding whether . . . the defendant actually believed in the need to defend himself."

Moreover, although the jury was not instructed on perfect self-defense pursuant to CALCRIM No. 505, it was instructed on the lesser included offense of imperfect self-defense voluntary manslaughter pursuant to CALCRIM No. 571. The latter instruction informed the jury of the theory of perfect self-defense: "If you conclude the defendant acted in complete [i.e., perfect] self-defense . . . , his action was lawful and you must find him not guilty of any crime. The difference between complete self-defense . . . and imperfect self-defense . . . depends on whether the defendant's belief in the need to use deadly force was reasonable." The instruction stated that the defendant acted in imperfect self-defense if he actually but *unreasonably* believed "that he . . . was in imminent danger of being killed or suffering great bodily injury" and "that the immediate use of deadly force was necessary to defend against the danger." Thus, pursuant to CALCRIM No. 571, the jury would have acquitted appellant if it had found that he had reasonably believed in the need to use

deadly force. This is an additional reason why the omission of CALCRIM No. 505 was harmless beyond a reasonable doubt.

Finally, by rejecting the theory of imperfect self-defense and convicting appellant of first degree murder, the jury impliedly found that appellant had not actually believed in the need to use deadly force. This finding precluded an acquittal based on perfect self-defense.

Effective Assistance of Counsel

Appellant argues that his counsel was ineffective for failing to move to exclude statements made by him during Detective Kingi's interrogation. Appellant claims that his statements were involuntary because Kingi's lies resulted in "psychological coercion" that overcame his "will to resist."

"'"In order to introduce a defendant's statement into evidence, the People must prove by a preponderance of the evidence that the statement was voluntary. [Citation.] . . ."' [¶] 'A statement is involuntary if it is not the product of "'a rational intellect and free will.'" [Citation.] The test for determining whether a confession is voluntary is whether the defendant's "will was overborne at the time he confessed." [Citation.] '"The question posed by the due process clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were "such as to overbear [his] will to resist and bring about confessions not freely self-determined." [Citation.]' [Citation.] In determining whether or not an accused's will was overborne, 'an examination must be made of "all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." [Citation.]' [Citation.]" [Citation.]' [Citation.] [¶] . . . 'A confession may be found involuntary if extracted by

threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence. . . .' [Citation.]" (*People v. McWhorter* (2009) 47 Cal.4th 318, 346-347.)

"To demonstrate ineffective assistance of counsel, a defendant must show that counsel's action was, objectively considered, both deficient under prevailing professional norms and prejudicial. [Citation.] To establish prejudice, a defendant must show a reasonable probability that, but for counsel's failings, the result of the proceeding would have been more favorable to the defendant. [Citation.] As we explain below, we need not determine here whether counsel's actions were deficient, for [appellant] has failed to show prejudice." (*People v. Seaton* (2001) 26 Cal.4th 598, 666.) If counsel had moved to exclude appellant's statements on the ground that they were involuntary, it is not reasonably probable that the trial court would have granted the motion.

Appellant contends that his statements were coerced because of two ruses employed by Detective Kingi. The first ruse was telling appellant that he had been identified as the shooter in a "field lineup." Appellant alleges: "What Kingi fail[ed] to tell appellant, despite his assurances that he was being truthful, was that this 'lineup' was staged and a sham. A cop dressed in plainclothes had posed as a[n] eyewitness to the shooting and was the one who identified appellant as the shooter in the field lineup. [Citation.] There was no eyewitness."

This ruse did not render appellant's statements involuntary. In *People v. Farnam* (2002) 28 Cal.4th 107, 177, the defendant contended that the police had "psychologically coerced his confession by falsely telling him his fingerprints were found" on the victim's wallet. Our Supreme Court noted: "'Lies told by

the police to a suspect under questioning can affect the voluntariness of an ensuing confession, but they are not per se sufficient to make it involuntary.' [Citations.] Where the deception is not of a type reasonably likely to procure an untrue statement, a finding of involuntariness is unwarranted. [Citation.]" (*Id*. at p. 182.) The Supreme Court concluded that the defendant's statements were not involuntary because "the deception concerning [his] fingerprints was unlikely to produce a false confession. [Citations.]" (*Ibid*.) Likewise, in the instant case the deception concerning the eyewitness identification was unlikely to produce false statements. (See *People v. Richardson* (2008) 43 Cal.4th 959, 993 [defendant's statements not rendered involuntary by false information from police that witnesses had seen defendant leaving victim's residence the night of the murder]; *Frazier v. Cupp* (1969) 394 U.S. 731, 737-739 [defendant's statements not rendered involuntary by interrogating officer's false assertion that defendant's accomplice had confessed].)

The second ruse employed by Detective Kingi was suggesting that appellant may have shot the victim in self-defense. Kingi falsely stated that the victim "had a gun on him" when the police arrived at the scene of the shooting. He also falsely stated that "the people that were around there said there was some type of confrontation" and that the victim had earlier "pulled a gun on somebody else." Based on the victim's earlier conduct, Kingi said he "kind of believe[d]" that the victim had pulled a gun on the shooter. Kingi told appellant he wanted to know "'what that guy did that caused you to, maybe, defend yourself or whatever.'"

Appellant argues: "The implications of Kingi's statements are that he believes appellant was acting in self[-]defense, even though Kingi made up the entire scenario about the victim being armed and pulling out his gun." "[T]hese representations were clearly intended to make appellant believe that if he admitted his presence and role in the shooting, he would have the absolute defense of self[-]defense to the charges. . . . Kingi's assurance of a defense was an unnecessary and ultimately deceitful promise whose sole purpose was to extract . . . a confession." Kingi made an implied "promise of leniency." (See *People v. Holloway* (2004) 33 Cal.4th 96, 115 ["'a confession is involuntary and therefore inadmissible if it was elicited by any promise of benefit or leniency whether express or implied'"].)

Detective Kingi did not suggest that appellant would have an "absolute defense of self[-]defense" if he admitted his role in the shooting. Kingi said he wanted to know what the victim had done to cause appellant "to, *maybe*, defend yourself or whatever." (Italics added.) Kingi "did not represent that [he], the prosecutor or the court would grant [appellant] any particular benefit if [appellant] told [him] how the [shooting] happened." (*People v. Holloway*, *supra*, 33 Cal.4th at p. 116.)

People v. Carrington (2009) 47 Cal.4th 145, shows that Detective Kingi's conduct did not render appellant's statements involuntary. In *Carrington* the police interrogated the defendant concerning a burglary and murder that had occurred at an office building. A detective "told defendant that 'what happened out there at [the office building] was probably an accident' and that there could be mitigating circumstances: 'What if she [the victim] scared you? She confronted you. Or

maybe there was someone else with you.'" (*Id.* at p. 170.) A short time later, the defendant confessed to the burglary and murder. Our Supreme Court rejected the defendant's claim that "the police officers persuaded [her] that she would receive lenient treatment if she confessed to murdering [the victim]." (*Id.* at p. 169.) The court reasoned: "[The detective's] suggestions that the . . . homicide might have been an accident, a self-defensive reaction, or the product of fear, were not coercive; they merely suggested possible explanations of the events and offered defendant an opportunity to provide the details of the crime. This tactic is permissible. [Citation.]" (*Id.* at p. 171.)

The same reasoning applies to Detective Kingi's suggestion that appellant may have acted in self-defense. Thus, like the detective in *Carrington*, Kingi used a permissible tactic. (See also *People v. Holloway*, *supra*, 33 Cal.4th at p. 116 [detective's "suggestions that the killings might have been accidental or resulted from an uncontrollable fit of rage during a drunken blackout, and that such circumstances could 'make[ ] a lot of difference,' fall far short of being promises of lenient treatment in exchange for cooperation"].)

In support of his claim that Kingi's lies were coercive, appellant cites *People v. Hogan* (1982) 31 Cal.3d 815. But the Supreme Court's holding in *Hogan* "was ultimately grounded upon the police promise to obtain help for Hogan if he confessed; there was no comparable promise in the present case." (*People v. Thompson* (1990) 50 Cal.3d 134, 167.) "Hogan, confronted with false statements purporting to show his guilt of murder, came to doubt his own sanity, and confessed in response to a police offer to get him help for his alleged mental condition. [The Supreme Court] held the confession inadmissible, not on account of the

deception, . . . but because of the promise to defendant of help if he confessed."[3] (*Ibid*.)

Amended Section 12022.53, Subdivision (h)

The jury found true an enhancement allegation that appellant had personally and intentionally discharged a firearm causing death. (§ 12022.53, subd. (d).) For this enhancement, the trial court imposed a consecutive term of 25 years to life.

When appellant was sentenced, section 12022.53, subdivision (h) prohibited the striking of a firearm enhancement found true under section 12022.53. On October 11, 2017, the Governor signed Senate Bill 620 amending section 12022.53, subdivision (h). The amendment is effective January 1, 2018. Amended section 12022.53, subdivision (h) provides: "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, § 2.)

In a supplemental brief, appellant argues that the amendment applies retroactively to cases that are not yet final. Therefore, "this court should remand appellant's case for resentencing."

In his reply to the supplemental brief, the Attorney General concedes that the amendment "will apply retroactively to cases in which judgment is not yet final on appeal." The Attorney General maintains that appellant's claim is not ripe until the

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[3] *Hogan* was disapproved on another ground in *People v. Cooper* (1991) 53 Cal.3d 771, 836.)

amendment becomes effective on January 1, 2018. Since our opinion is filed after that date, the ripeness issue is moot.

The Attorney General does not argue that a remand would be futile because there is no reasonable probability that the trial court would strike the section 12022.53, subdivision (d) enhancement. Nor does he argue that the striking of the enhancement would be an abuse of discretion.[4] We therefore vacate the sentence and remand the matter for resentencing pursuant to amended section 12022.53, subdivision (h).

Disposition

The sentence is vacated. The matter is remanded to the trial court to allow it to exercise its discretion to strike or impose the section 12022.53, subdivision (d) enhancement. Discretion shall be exercised as provided in amended section 12022.53, subdivision (h). If the trial court strikes the

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[4] At page 5 of the People's supplemental brief filed December 7, 2017, the argument is headed, "**APPELLANT'S SB 620-BASED CLAIM IS NOT YET RIPE; IN ANY EVENT, REMAND IS NOT APPROPRIATE BECAUSE IT WOULD BE AN ABUSE OF DISCRETION TO STRIKE APPELLANT'S FIREARM ENHANCEMENT**." The argument that follows this heading discusses the first issue - ripeness. It does not discuss the second issue - whether remand would be appropriate. On December 11, 2017, the Attorney General filed a Notice of Errata stating, "[T]he main headline of the Argument appearing on the top of page 5 is in error. That headline should state only: '**APPELLANT'S SB 620-BASED CLAIM IS NOT YET RIPE; SB 620 WILL RETROACTIVELY APPLY EFFECTIVE JANUARY 1, 2018**.'" Thus, the People waived the argument that remand would not be appropriate because the striking of the section 12022.53, subdivision (d) enhancement would be an abuse of discretion.

enhancement, it shall resentence appellant. If the trial court declines to strike the enhancement, it shall reinstate the sentence previously imposed. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Laura F. Priver, Judge

Superior Court County of Los Angeles

Stephen M. Hinkle, under appointment by the Court of Appeal for defendant and appellant.

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