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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

SALVADOR ALEXIS TORRES,

Defendant and Appellant.

B285202

(Los Angeles County
Super. Ct. No. LA076730)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard H. Kirschner, Judge. Affirmed in part; reversed in part and remanded.

Matthew Alger, 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, Assistant

Attorney General, Zee Rodriguez, Deputy Attorney General and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Salvador Alexis Torres appeals the judgment of conviction after a jury found him guilty of the first degree murder of Ramiro Lobos and found true the special circumstance allegation of lying in wait and multiple firearm use and gang allegations. The trial court sentenced Torres to life without the possibility of parole for the special circumstance murder, plus a consecutive sentence of 25 years to life for personally and intentionally discharging a firearm causing death.

Torres contends on appeal the evidence is insufficient to support the jury's finding that he personally used and intentionally discharged a firearm causing death, in violation of Penal Code section 12022.53, subdivision (d).¹ Torres also contends he is entitled to remand for a new sentencing hearing to give the trial court an opportunity to exercise its discretion to strike the firearm use enhancements pursuant to section 12022.53, subdivision (h). We reverse the jury's finding true the allegation Torres personally used and intentionally discharged a firearm causing death, but in all other respects affirm. We remand for resentencing.

¹ All further statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Information*

The information alleged Torres committed first degree murder (§ 187, subd. (a)) with the special circumstance that the murder was committed by lying in wait (§ 190.2, subd. (a)(15)). The information alleged further the murder was committed for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)), Torres personally used a firearm during commission of the murder (§ 12022.53, subd. (b)), he personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), he personally and intentionally discharged a firearm and proximately caused great bodily injury or death to Lobos (§ 12022.53, subd. (d)), and a principal personally and intentionally discharged a firearm for the benefit of a criminal street gang (§ 12022.53, subd. (e)(1)).

Torres pleaded not guilty and denied all special allegations.

B. *The Evidence at Trial*²

1. *Torres's relationship with Mayra Gavidia*

Mayra Gavidia knew Torres since they were children in El Salvador. She moved to the United States in 2013, and was quickly arrested by immigration officials. Gavidia was released from custody in May 2013.

Following her release, Gavidia moved in with Torres. Torres physically abused and threatened Gavidia, and isolated her from other people. Unbeknownst to Torres, Gavidia rekindled a relationship with her ex-boyfriend, Lobos. In

² Torres did not call any witnesses.

August 2013 Gavidia decided to end her relationship with Torres, and she moved in with Lobos.

Torres called Gavidia almost every day, begging her to return to him. Gavidia changed her phone number, but Torres obtained her new number and continued contacting her. Gavidia was afraid Torres “would do something to [her]” if she did not respond to him. Eventually she told Torres she had a new boyfriend and asked him to stop calling her. He threatened to kill Lobos and Lobos’s mother if Gavidia did not get back together with him.

Torres continued to send Gavidia text messages almost every day professing his love for her. She blocked him from contacting her on her cell phone, but he continued to contact her using the WhatsApp phone messaging application. Gavidia responded using WhatsApp, but only to remind him to stay away from her. Torres told Gavidia, “[Y]ou will not be able to rid yourself of me or free yourself of me so rapidly.”

2. *Gavidia and Lobos move to Las Vegas, then back to Van Nuys*

Concerned for their safety, in August 2013 Gavidia and Lobos moved to Las Vegas. Torres continued to send messages to Gavidia begging her to return to him, but she declined.

In October 2013 Gavidia returned to Los Angeles to attend a wedding. She stayed at Lobos’s residence in Van Nuys. On October 21 Torres sent a text message to Gavidia saying, “What would happen if I wanted to take revenge on your little husband by sending to kill [his] mother, the little nurse? . . . I know where she works, where she lives. I know everything. And it would be

bad.” Later that day Torres sent Gavidia another text message, “I love you, and I’ve told you . . . I’m capable of doing it all.”

3. *Torres connects with an MS-13 gang leader*

In October 2013 Torres contacted his childhood friend, Pedro Anthony Romero-Cruz, who was a member of the Mara Salvatrucha Trece (MS-13) gang. Romero-Cruz had been a member of the gang for 14 years, and was a “shotcaller,” meaning he was one of the gang’s leaders. At the time of his testimony Romero-Cruz was serving a 30-year sentence in federal prison for multiple crimes, including racketeering, extortion, and conspiracy to commit murder.³ Romero-Cruz was associated with Parkview, an MS-13 clique based in Los Angeles. As a shotcaller, he was aware of MS-13 activity throughout the country. Romero-Cruz used a cell phone to communicate while in prison.

Torres and Romero-Cruz communicated approximately every other day for the next two months. Torres expressed his interest in joining MS-13, and asked Romero-Cruz to put him in touch with MS-13 members in Los Angeles. Romero-Cruz connected Torres with Eduardo Orellano and Luis Ramos. Orellano went by the name Demon Killer or D.K., and Ramos was referred to as Pensativo. D.K. was the first or second in command with Parkview, and Pensativo was his “right-hand-

³ Romero-Cruz was not offered or promised any leniency in exchange for his testimony. When asked why he was testifying as a prosecution witness, Romero-Cruz said he was “fed up with people killing innocent people.”

man.” Torres started “prospecting” for the gang by delivering drugs.⁴

Torres told Romero-Cruz he was in love with Gavidia and was jealous of her new boyfriend. Torres expressed his desire “to do something” about the boyfriend. On October 28, 2013 Torres told Romero-Cruz that he just got home after talking to his “homies.” Gang members would refer to each other as “homies.” Torres sent a photograph of Lobos’s home to Romero-Cruz. Torres told Romero-Cruz they were “trying to get active to see when there was a chance they could accomplish what they wanted to do, . . . killing the victim.”

On November 3, 2013 Torres told Romero-Cruz he was going to see if he could get closer to Lobos’s home. Torres was upset because Gavidia refused to respond to his messages. On November 12, 2013 Torres told Romero-Cruz he was looking for “some toys” to use. “Toys” is slang for weapons. Torres later told Romero-Cruz that he purchased a .38-caliber revolver to “get rid of the guy.” Torres sent Romero-Cruz a photograph of the revolver.

Torres solicited other MS-13 members to help him “babysit” Lobos, meaning to conduct surveillance to find an opportunity to kill him. In Romero-Cruz’s experience, MS-13 members would not have assisted Torres with surveillance unless it was done in conjunction with a plan to kill. The following week Torres told Romero-Cruz, “[T]he dude I was going to hit, I think he left. He went to Las Vegas now.” Torres told Romero-Cruz, “You knew that I wanted to hit that dude. I wanted to kill him.”

⁴ Prospecting consists of performing tasks for the benefit of the gang.

Four days later Torres told Romero-Cruz, “The dude, the son of a bitch is here, dog. He came back from Las Vegas and maybe tomorrow we going to babysit the dude with the homies, dog.” Romero-Cruz took this to mean Torres was ready to kill Lobos if he had the opportunity. A few weeks later Torres told Romero-Cruz he “couldn’t do the work” because “[h]e didn’t come out,” meaning Lobos had not left his home. As of December 23, 2013 Romero-Cruz stopped communicating with Torres because correctional officers had confiscated his phone.

In Romero-Cruz’s view, Torres was willing to do what was necessary to become a member of MS-13. He opined that once Torres completed the murder, he would have become a member of the gang.

4. *Gavidia returns to Las Vegas and Lobos returns to Van Nuys*

In December 2013 Gavidia returned to Las Vegas because she was scared of Torres and feared he knew where she was living. But in January 2014 Lobos moved back to Van Nuys for work. Gavidia expected Lobos would return to Las Vegas in the future.

On January 4, 2014 Torres sent Gavidia a text message asking where she lived. Two days later Torres asked her, “Where are you? With your mom?” Gavidia said “[y]es,” and Torres told her to “[s]tay there.” To protect Lobos, Gavidia told Torres that Lobos was with her in Las Vegas. Torres responded, “It’s a lie” and “He’s not there. I know.”

5. *The shooting*

In January 2014 Lobos was living in Van Nuys with his uncle Luis Diaz and his cousin Eric Diaz.⁵ At approximately 6:30 a.m. on January 8, 2014 Lobos left the house to go to work. He returned one minute later to retrieve something he forgot, but left the house within minutes. Luis and Eric heard six or seven gunshots outside the house after Lobos left. Luis walked outside, where he saw two paramedics tending to Lobos's body lying on the corner of Delano Street and Cedros Avenue. Eric and Luis believed Lobos was not a gang member and had no enemies.

Otto Anleu also lived in the area of Cedros and Delano. On the morning of January 8 he was getting into bed when he heard between six and 10 gunshots outside of his home. Anleu saw a Hispanic male with short dark hair run down the street and enter the passenger side of a silver vehicle before it sped off.

On the morning of the shooting Los Angeles Police Officer Allan Salazar responded to a radio call that shots were fired. When he arrived on the scene, Officer Salazar observed a male victim bleeding from multiple gunshot wounds to his back and head. He observed several bullet casings and three expended bullets near the body. He found two expended bullets underneath the body.

6. *Torres's cell phone records*

Detective James Nuttall obtained a search warrant for T-Mobile for Torres's cell phone records. According to Torres's Internet search history, he conducted searches on gun silencers, how to use .38-caliber and nine-millimeter handguns, and how to

⁵ Because the Diazes share a last name, we refer to them by their first names to avoid confusion.

put a spell on someone you want to kill. Torres subsequently hired two “witch doctors” to put a spell on Gavidia and Lobos. Torres became frustrated with the first witch doctor’s work, asking, “Why are we not getting any results?” Torres hired a second witch doctor. Torres exchanged 137 text messages with the second witch doctor between October and November 2013.

Torres also communicated with a person named Mauro about the purchase of a firearm. Following these communications, Torres sent text messages with a photograph of a .38-caliber revolver to multiple people, telling them he had purchased the gun. He also told several people he was cleaning the gun because “he’s going to be using it soon.”

At 5:48 a.m. on December 16, 2013 Torres used a navigation application on his phone to obtain directions to Van Nuys. Torres also sent a text message to a woman named Alejandra, asking her to take him to Van Nuys to monitor what time “someone” leaves the house. Torres said he needed to leave by 6:00 a.m.

Phone records showed that at 4:00 a.m. on January 8, 2014 Torres’s phone “pinged” off a tower near Culver City. The records showed that Torres traveled towards the San Fernando Valley, where he remained between 5:37 and 6:57 a.m. At 6:47 a.m. Torres’s phone pinged off “the closest tower to the location where the shooting occurred.” Detective Nuttall opined that at that time Torres’s phone was “in close proximity to the tower” near the shooting. Starting at 8:27 a.m. Torres’s phone used towers that were consistent with a return trip to the Culver City area.

7. *The autopsy*

Dr. Lawrence Nguyen, the deputy medical examiner who performed the autopsy, testified Lobos suffered multiple gunshot wounds to the back of his head, torso, right arm, right side of his body, shoulder, and neck. Seven bullets were removed from Lobos's body during the autopsy. Dr. Nguyen concluded Lobos's death was a homicide caused by multiple gunshot wounds.

8. *The bullet evidence*

Each time a semiautomatic firearm is fired, it expels a bullet casing. By contrast, a revolver does not expel any casings when it is fired. Officers collected 10 nine-millimeter bullet casings and three expended bullets from the scene of the shooting. Los Angeles Police Officer Allan Salazar opined the casings came from a semiautomatic firearm and the expended bullets were fired from either a .38- or .357-caliber revolver. Forensic expert Julia Wilkinson of the Los Angeles Police Department's Scientific Division examined the casings and bullets that were collected.⁶ The parties stipulated that the 10 expended nine-millimeter casings found at the scene of the murder were fired from the same gun; the same firearm was used to commit another gang homicide in Los Angeles on September 28, 2013; all seven of the bullets recovered from Lobos's body during the autopsy were consistent with nine-millimeter caliber bullets; and the three expended bullets were fired from the same .38- or .357-caliber revolver. Pensativo, D.K., and Victor Ruiz were charged with the September 28 shooting.

⁶ Wilkerson did not testify at trial, but the parties stipulated to her expertise.

9. *The gang evidence*

Los Angeles Police Detective Frank Flores testified as a gang expert for the prosecution. The Parkview MS-13 clique is named after Parkview Street, which is adjacent to MacArthur Park in Los Angeles. Parkview is one of the most active MS-13 cliques in Los Angeles. Prospective gang members are required to “put in work,” slang for committing violent acts for the benefit of the gang.

Detective Flores opined that Lobos’s murder was committed for the benefit of, at the direction of, or in association with MS-13. The murder had the dual purpose of personally benefiting Torres while furthering his goal to become a member of MS-13.

C. *Motion for Acquittal*

At the close of the prosecution’s case, Torres moved for acquittal under section 1118.1. The trial court denied the motion.

D. *Jury Verdict and Sentencing*

The jury found Torres guilty of first degree murder. (§ 187, subd. (a).) The jury found true the special circumstance allegation that the murder was committed by lying in wait (§ 190.2, subd. (a)(15)), as well as the gang and all the firearm use enhancement allegations.

The court sentenced Torres to life without the possibility of parole for the special circumstance murder. The court imposed a consecutive sentence of 25 years to life for personally and intentionally discharging a firearm and proximately causing death pursuant to section 12022.53, subdivision (d). The court stayed imposition of the 10-year sentence for the gang

enhancement and struck the remaining firearm use enhancements without prejudice, conditioned on the sentence being upheld on appeal.

DISCUSSION

Substantial Evidence Does Not Support the Jury's Finding That Torres Personally and Intentionally Discharged a Firearm Causing Death, But Does Support the Three Other Firearm Use Enhancements

Torres concedes “[t]here was an abundance of evidence that [Torres] intended to kill Lobos,” but contends the evidence was insufficient to support the jury’s finding he was the one who personally and intentionally discharged the firearm and “proximately cause[d] . . . death,” within the meaning of section 12022.53, subdivision (d). We agree. However, we conclude substantial evidence supports the jury’s findings that the other three firearm enhancements were true, which were stricken without prejudice, conditioned on the sentence being upheld on appeal.

1. *Standard of review*

In evaluating the sufficiency of the evidence to support a conviction, “we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution

and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence.” (*People v. Penunuri* (2018) 5 Cal.5th 126, 142; accord, *People v. Casares* (2016) 62 Cal.4th 808, 823.)

““We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]” [Citation.] A reversal for insufficient evidence “is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support’ the jury’s verdict.” (*Penunuri, supra*, 5 Cal.5th at p. 142, quoting *People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

The same standard of review applies in cases where the prosecution relies primarily on circumstantial evidence. (*People v. Ghobrial* (2018) 5 Cal.5th 250, 277-278; accord, *People v. Casares, supra*, 62 Cal.4th at p. 823.) ““““Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant’s guilt beyond a reasonable doubt. “If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.”””””” (*Ghobrial*, at p. 278; accord, *People v. Tully* (2012) 54 Cal.4th 952, 1006-1007.)

2. *The firearm enhancements*

The jury found true four sentence enhancement allegations for personal use of a firearm pursuant to section 12022.53, subdivisions (b) through (e)(1). These enhancements apply to any

person who, in the commission of certain crimes including murder, “personally uses a firearm” (§ 12022.53, subd. (b)), “personally and intentionally discharges a firearm” (§ 12022.53, subd. (c)), or “personally and intentionally discharges a firearm and proximately causes great bodily injury . . . or death” (§ 12022.53, subd. (d)). In addition, the jury found true the firearm enhancement under section 12022.53, subdivision (e)(1), which “extend[s] the enhancement for gun use in any enumerated serious felony to gang members who aid and abet that offense in furtherance of the objectives of a criminal street gang.” (*People v. Garcia* (2002) 28 Cal.4th 1166, 1172; accord, *People v. Gonzales* (2001) 87 Cal.App.4th 1, 11-12.)

3. *Sufficiency of the evidence*

The evidence showed that two firearms were fired at Lobos, a nine-millimeter automatic semiautomatic weapon that fired seven 9-millimeter bullets into Lobos’s body and left 10 casings around the body, and a .357- or .38-caliber revolver, from which three expended bullets were recovered from under and around Lobos’s body. Torres contends he was not the shooter of either weapon, but rather, may have served as a lookout or the getaway driver. Although Torres is correct that substantial evidence does not support a finding he was the shooter of the nine-millimeter weapon that killed Lobos, substantial evidence supports a finding he was the shooter of the .38-caliber revolver that was fired in the commission of the murder.

After Gavidia left Torres, on multiple occasions Torres threatened to kill Lobos if Gavidia did not get back together with him. Torres continued to send Gavidia text messages almost every day professing his love for her. Gavidia refused Torres’s

efforts to reunite and blocked him from contacting her on her cell phone. Gavidia and Lobos were so fearful of Torres that they moved to Las Vegas.

In October 2013 Torres threatened to kill Lobos's mother to take revenge on Lobos. He texted Gavidia, "I love you, and I've told you . . . I'm capable of doing it all." That month Torres contacted his childhood friend Romero-Cruz to enlist the assistance of MS-13 in killing Lobos. Later that month Torres sent a photograph of Lobos's home to Romero-Cruz, and told him they were trying to accomplish their goal of "killing the victim." When Lobos left for Las Vegas, Torres reiterated to Romero-Cruz, "I wanted to kill him."

When Torres's efforts to use a witch doctor to get Gavidia to return to him or kill Lobos failed, he continued his efforts to kill Lobos. Torres purchased a .38-caliber revolver to "get rid of the guy." He conducted searches on gun silencers and how to use .38-caliber and nine-millimeter handguns. Torres told several people he was cleaning the gun because "he's going to be using it soon." Three expended bullets found under and around Lobos's body were fired from the same .38- or .357-caliber revolver. Seven 9-millimeter bullets fired by the same firearm used in a September 2013 killing by MS-13 gang members were recovered from Lobos's body.

When Lobos returned in January 2014, Torres continued to conduct surveillance on him to find an opportunity to kill him. At this point Romero-Cruz believed Torres was ready to kill Lobos if he had the opportunity. When Gavidia denied that Lobos was with her in Las Vegas, Torres responded that "[i]t's a lie," and he knew Lobos was not there. Then, on December 16, 2013 Torres went to Lobos's home in Van Nuys to surveil him.

On January 8, 2014 Lobos was shot just after 6:30 a.m. That morning Torres travelled to the San Fernando Valley, arriving at approximately 5:37 a.m. He was near the site of the shooting at 6:47 a.m. At 8:27 a.m. Torres returned to his home in Culver City. Witness Anleu saw a Hispanic man run down the street and get into the passenger side of a car before it sped off.

This evidence supports a finding that Torres had the motive to kill Lobos, planned to kill him, contacted an MS-13 shotcaller to assist him in the killing, orchestrated the surveillance, purchased a .38-caliber gun, researched how to use .38-caliber and nine-millimeter guns, and was in the area of the shooting at the time of the killing. In light of the evidence that bullets matching a .357- or .38-caliber revolver were found under and around Lobos's body, there was substantial evidence to support the jury's finding that Torres "personally use[d] a firearm" and "personally and intentionally discharge[d] a firearm" in the commission of the murder because Torres's discharge of the .38-caliber revolver and the murder of Lobos were part of one continuous transaction. (See *People v. Frausto* (2009) 180 Cal.App.4th 890, 902 ["a firearm is discharged 'in the commission of' a felony within the meaning of section 12022.53(d) if the underlying felony and the discharge of the firearm are part of one continuous transaction . . ."]; see also *People v. Jones* (2001) 25 Cal.4th 98, 109-110 ["In the case of a weapons-use enhancement, such use may be deemed to occur 'in the commission of' the offense if it occurred *before, during, or after* the technical completion of the felonious sex act."].)

In addition, Torres does not dispute that a principal in the commission in the murder personally and intentionally

discharged a firearm for the benefit of a criminal street gang in violation of section 12022.53, subdivision (e)(1).

However, there is not substantial evidence that Torres fired the nine-millimeter firearm that killed Lobos, and therefore substantial evidence does not support the jury's finding true the allegation Torres "personally and intentionally discharge[d] a firearm and proximately cause[d] great bodily injury . . . or death." (§ 12022.53, subd. (d).) There is no evidence that any of the bullets recovered from Lobos's body came from a .38-caliber revolver. The fact Torres researched how to use a nine-millimeter weapon does not provide substantial evidence that on the day of the shooting he fired the nine-millimeter firearm. To the contrary, the evidence showed that Torres purchased a .38-caliber revolver, and the nine-millimeter firearm that killed Lobos was previously used by MS-13 gang members in a September 2013 murder for which Pensativo, D.K., and Victor Ruiz were charged.⁷

⁷ On remand, pursuant to Senate Bill No. 620 (2017-2018 Reg. Sess.), which went into effect on January 1, 2018, the trial court has discretion under section 12022.53, subdivision (h), to "strike or dismiss an enhancement otherwise required to be imposed by this section." As the People concede, "Senate Bill No. 620's (2017-2018 Reg. Sess.) grant of discretion to strike firearm enhancements under section 12022.53 applies retroactively to all nonfinal convictions." (*People v. Hurlic* (2018) 25 Cal.App.5th 50, 56; accord, *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424-425.)

DISPOSITION

We reverse the jury's finding true the allegation Torres personally and intentionally discharged a firearm causing death, but in all other respects affirm. We remand for resentencing.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

SEGAL, J.