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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. LARRY SANCHEZ, Defendant and Appellant.	B290130 (Los Angeles County Super. Ct. No. TA142787)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura R. Walton, Judge. Affirmed as modified.

William J. Capriola, 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, Margaret E. Maxwell, Supervising Deputy Attorney General, Marc A. Kohm, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Larry Sanchez of attempted premeditated murder, attempted voluntary manslaughter, conspiracy to commit murder, assault with a semiautomatic firearm and possession of a firearm by a felon and found true the special firearm-use and criminal street gang enhancement allegations. On appeal Sanchez contends his conviction for conspiracy to commit murder is not supported by substantial evidence, the prosecutor's closing argument improperly minimized the requirements for a finding of premeditation, and the court erred in calculating the amount of the restitution fine. We modify the judgment to correct an unauthorized sentence and affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Amended Information*

An amended information filed January 23, 2018 charged Sanchez with two counts of attempted premeditated murder (Pen. Code, §§ 664, 187, subd. (a))[1] (counts 1 & 2), possession of a firearm by a felon (§ 29800, subd. (a)(1)) (count 3), conspiracy to commit murder (§ 182, subd. (a)(1)) (count 4) and assault with a semiautomatic firearm (§ 245, subd. (b)) (count 5.) As to the attempted premeditated murder counts, the information specially alleged Sanchez had personally used and intentionally discharged a firearm causing great bodily injury or death (§ 12022.53, subds. (b)-(d)) and a principal had personally used and intentionally discharged a firearm causing great bodily injury or death (§ 12022.53, subds. (b)-(e)(1)). As to the attempted premeditated murder, conspiracy and aggravated assault counts, the information alleged the offenses were

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[1] Statutory references are to this code.

committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)).[2] In addition, as to the conspiracy and aggravated assault counts, the information specially alleged Sanchez had personally used a firearm (§ 12022.5). Sanchez pleaded not guilty and denied the special allegations.

2. *The Evidence at Trial*

a. *The shooting*

Sanchez is a member of Gardena 13, also known as G13, a criminal street gang. South Los, a criminal street gang, is G13's rival. On March 18, 2017 Sanchez and two of his fellow G13 members, George Sandoval and Juan Ramirez, drove to territory claimed by South Los looking for South Los members. Sanchez spotted Edgar Chavez outside a large house party. Chavez had come to the party with his friend, Miguel Gutierrez, in Gutierrez's car and was upset to find the driver's side window of Gutierrez's car had been shattered. As Chavez questioned people on the street about what had happened to the car window, Sanchez walked toward Chavez, pointed a handgun with a laser sight at him and demanded, "Where you from?" a question that Chavez understood as asking for his gang affiliation. Chavez told Sanchez he was not a gang member. Sanchez proclaimed, "This is G13" and asked Chavez, "Where the South Los boys at?"

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[2] For simplicity this opinion uses the shorthand phrase "for the benefit of a criminal street gang" to refer to crimes that, in the statutory language, are committed "for the benefit of, at the direction of, or in association with any criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1); see *People v. Jones* (2009) 47 Cal.4th 566, 571, fn. 2.)

Chavez said he did not know; and Sanchez returned to his companions in the car, a few feet away.

A few seconds later Chavez spoke to Gutierrez on his mobile phone and told him about the window and his encounter with Sanchez. Gutierrez immediately came outside the house. Holding a handgun pointed down at his side, Gutierrez walked toward the car in which Sanchez and his companions were riding. Although the car was moving, traffic was heavy; and the car was still in the area. Upon seeing Gutierrez, Sandoval jumped out of the car, took a few steps toward Gutierrez, pointed an AR-15 assault rifle at Gutierrez and fired 10 times. Sanchez also fired his weapon at Gutierrez. Gutierrez ran away without firing his weapon. He suffered multiple gunshot wounds and collapsed next to Chavez. At this point Chavez picked up Gutierrez's handgun and fired once in Sanchez's direction as Sanchez and his companions sped away in their car. Gutierrez's gun jammed. Chavez handed it to a bystander, called the 911 emergency number and attended to Gutierrez. Gutierrez was severely injured in the attack, but survived. The incident was recorded on neighborhood surveillance cameras, and the video footage was played for the jury. There was no evidence that Gutierrez was a South Los gang member.

A Los Angeles County Sheriff's deputy heard the shooting nearby, activated the lights and siren on his marked police car and pursued the car with Sandoval, Sanchez and Ramirez. Sandoval threw the assault rifle out a window during the chase. The high-speed pursuit ended when Ramirez crashed his car. Sandoval and Ramirez were apprehended at the crash scene; Sanchez fled on foot. Sandoval immediately admitted he had

fired the assault rifle. Sheriff's deputies recovered the rifle where Sandoval had discarded it.

After his arrest Sandoval called his girlfriend and Sanchez on the telephone. Those jailhouse telephone conversations were recorded and played for the jury. In one recording Sandoval explained to his girlfriend that he had been caught because "stupid Juan [Ramirez]" had crashed into five cars. Asked why Ramirez had been with them, Sandoval stated, "Because everyone else was—was just acting like a bitch . . . ." In another recorded call Sanchez told Sandoval "Mikey" wanted to talk with him. Mikey told Sandoval he had "pulled up five minutes late" and asked why Sandoval had not waited for him. Sandoval said, "We don't do that . . . ." Mikey responded, "That's what happens when you [don't wait]. You rush things, shit go sour."

b. *The prosecutor's theory of the case*

The prosecutor argued that Sanchez, Sandoval and Ramirez had agreed among themselves to kill South Los members after a South Los member had testified against their friend and fellow G13 member, Eric "Blackie" Cook, at Cook's murder trial: Cook was on trial for murdering a South Los member; and Pedro Juan, a South Los member, had testified on March 17, 2017 that Cook had been the shooter. The prosecutor emphasized that, shortly after Juan's testimony and less than an hour before the shooting, Sandoval had texted his girlfriend and told her they were "banging" and were going to wait on a "Lace" (a reference to "shoelace," a derogatory term for South Los) to "get crazy."

Gardena Police Officer Jason Hooker testified as a qualified gang expert and explained that, in gang culture, "snitching" on a gang member from your own gang or a rival gang will typically

invite retaliation in the form of a "death sentence." Hooker also emphasized that an assault weapon is a prized possession in gang culture and would be carried for a mission, not simply for protection. Based on a hypothetical closely resembling the facts of this case, Hooker opined the shooting was a retaliatory act to benefit a criminal street gang.

c. *Sanchez's theory of the case*

Sanchez testified in his own defense and claimed he had acted in self-defense. According to Sanchez, a few hours before the shooting he, Sandoval and Ramirez had gone to a strip club. He carried a handgun, and Sandoval, an assault rifle, for protection. After the strip club they drove a short distance and saw people outside a house party. Sanchez got out of the car to look around when he saw Chavez walking briskly toward him. Sanchez pulled out his gun and announced, "I'm from Gardena." Sanchez claimed he had drawn his weapon because Chavez's manner in walking toward him made him fearful. After he spoke with Chavez, however, his fear subsided; he put his gun away and returned to his friends, intending to go back to the strip club with them. Suddenly, he and his friends saw Gutierrez charging toward them with a gun in his hand. Afraid for his own life and that of his friends, he opened fire at Gutierrez. Sanchez could not remember specific details about the shooting or the immediate aftermath, including where he had deposited the gun he had used. He thought he might have thrown it out the car window afterward. Sanchez denied knowing about Cook's trial or that he and his companions were on a mission of retaliation.

3. *Dismissal of Two Firearm-use Enhancements; Jury Instructions, Verdict and Sentence*

Before the case was submitted to the jury, the People voluntarily dismissed the section 12022.53, subdivision (d),

firearm-use enhancement allegation on counts 1 and 2 and the section 12022.53, subdivisions (d) and (e)(1), firearm-use-by-a-principal enhancement allegation on count 2 only.

The jury was instructed, among other things, on attempted premeditated murder, attempted murder and the lesser included offense of attempted voluntary manslaughter based on imperfect self-defense. The jury found Sanchez guilty of the attempted premeditated murder of Gutierrez, attempted voluntary manslaughter of Chavez, conspiracy to commit murder, assault with a semiautomatic firearm and possession of a firearm by a felon. The jury also found true each of the specially alleged gang and firearm-use enhancements, including the count 1 special allegation that a principal had personally used and intentionally discharged a firearm causing great bodily injury or death.

The court sentenced Sanchez on the attempted premeditated murder (count 1) to a term of life with a minimum 15-year parole eligibility date for the gang finding pursuant to section 186.22, subdivision (b)(5), plus a consecutive term of 25 years to life for a principal's personal use and intentional discharge of a firearm resulting in great bodily injury or death (§ 12022.53, subds. (d), (e)(1)).[3] The court imposed a consecutive

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[3] Because the jury found that a principal had violated section 12022.53, subdivisions (d) and (e)(1), not Sanchez personally, the court erred in imposing both the section 12022.53, subdivisions (d) and (e)(1), enhancement and 15-year minimum parole eligibility alternate penalty under section 186.22, subdivision (b)(5). (See § 12022.53, subd. (e)(2); see generally *People v. Brookfield* (2009) 47 Cal.4th 583, 593-594 [identifying the four types of offenders contemplated in section 12022.53; "[t]he second group consists of *accomplices* to a gang-related offense" in which another principal, not the defendant, is found to

term of 25 years to life for conspiracy to commit murder. In addition, the court imposed a six-year term for attempted voluntary manslaughter (count 2) to run concurrently with count 1 and stayed sentence on all remaining counts and specially alleged gang and firearm-use enhancements.

The court ordered Sanchez to pay a $300 restitution fine for each count of conviction, for a total of $1,500; imposed and stayed a parole revocation fine in the same amount; and imposed additional fines, fees and assessments.

DISCUSSION

1. *Substantial Evidence Supports Sanchez's Conviction for Conspiracy To Commit Murder*

The crime of conspiracy to commit murder requires (1) an agreement between two or more persons to commit murder; (2) an overt act by one or more of the conspirators; and (3) specific intent to agree and to commit the offense that is the object of the conspiracy—murder. (*People v. Penunuri* (2018) 5 Cal.5th 126, 144-145 (*Penunuri*); *People v. Juarez* (2016) 62 Cal.4th 1164, 1169; see *People v. Swain* (1996) 12 Cal.4th 593, 607 ["a conviction of conspiracy to commit murder requires a finding of intent to kill, and cannot be based on a theory of implied malice"].) "Evidence of an agreement does not require proof that the parties met and expressly agreed; a criminal conspiracy can be shown through circumstantial evidence. [Citation.] 'Evidence is sufficient to prove a conspiracy to commit a crime "if it

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have violated the statute; "[t]hey are subject to additional punishment under *either* section 12022.53 *or* the gang-related sentence increases under section 186.22, but not *both*"].) Accordingly, we correct the unauthorized sentence by striking the 15-year minimum parole eligibility date imposed in count 1.

supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. [Citation.] The existence of a conspiracy may be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy.'" (*Penunuri, supra,* 5 Cal.5th at p. 145.)

Emphasizing the absence of direct evidence of an agreement to commit murder or that he knew about Cook's murder trial or Pedro Juan's testimony against Cook, Sanchez contends there is insufficient evidence to support the jury's finding he conspired with Sandoval and Ramirez to commit murder.[4] However, Sanchez's argument ignores substantial

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[4] In considering a claim of insufficient evidence in a criminal case, "'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. [Citation.] "Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] 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,*

circumstantial evidence of an agreement to commit murder: Sanchez and Sandoval knew Cook; they were members of the same gang clique. Officer Hooker testified it was typical for gang members to be aware when members of their gang clique were on trial. Within hours after the trial testimony by a South Los member against Cook, Sandoval told his girlfriend that "we" were going out to wait for a South Los to "get crazy." Sanchez and his confederates armed themselves and drove to territory claimed by South Los. Sandoval carried an AR-15 assault rifle, which Hooker testified was a prized possession for a gang; it would not be carried routinely for protection and would typically be used only when going on a "mission" to kill someone. Sanchez confronted Chavez and demanded Chavez tell him his gang affiliation and where he could find members of South Los. Mikey asked Sandoval why they had not waited for him that night, indicating the men had planned the mission in advance. Hooker testified that retaliation for "snitching" was deeply embedded in gang code; "snitchers," he testified, could expect a "death sentence." Although Sanchez testified he was unaware of Cook's trial and there had been no prior agreement to kill a South Los member, the jury did not believe him. Substantial evidence supported Sanchez's conviction for conspiracy to commit murder.

2. *Any Error in the Prosecutor's Comments Concerning Premeditation and Deliberation Was Harmless*

During closing argument the prosecutor likened premeditation and deliberation to the decision an individual makes at a stop sign: "[T]he test [for premeditation and deliberation] is not the extent of time, but the extent of reflection.

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5 Cal.5th at p. 142; accord, *People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

And one way that I think about explaining this to members of the jury is we deliberate and premeditate every single day. We do that in a lot of decisions that we make. For instance, when we come to a stop sign. When we come to a stop sign, what do we do ladies and gentlemen? We look to the left. We look to the right. We decide if it's safe and then we go forward. What have we done? We deliberated. We ask ourselves: Is it safe to enter? And we premeditated. We weigh the decisions of the consequences beforehand. It takes a few seconds. We look to the left. We look to the right. Any other cars? Any pedestrians? We deliberated our decision. We premeditated."[5]

Sanchez contends the prosecution's stop sign analogy misstated and trivialized the requirements for premeditation and deliberation. In *People v. Avila* (2009) 46 Cal.4th 680 (*Avila*) the prosecutor in a trial involving charges of first degree premeditated murder told the jury that the decision whether to stop or continue at a yellow light, a decision based on consideration of a number of factors, including assessments of distance and the location and speed of other vehicles, was an example of a "'quick judgment'" that was "'cold' and 'calculated.'" The prosecutor then stated, "'Deciding to and moving forward with the decision to kill is similar, but I'm not going to say in any way it's the same. There's great dire consequences that have a difference here.'" (*Id.* at p. 715.) In rejecting the defendant's assertion that the prosecutor had improperly equated the decision whether to stop at a yellow light with the kind of cold,

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[5] Because defense counsel objected to the statement as soon as the prosecutor had completed her closing argument, we reject the People's argument that Sanchez has forfeited the issue on appeal.

calculated judgment required for murder, the *Avila* Court emphasized the prosecutor's immediate clarification that he was not equating murder with the decision to travel through a yellow light. (*Ibid.*)

The People insist there was nothing inherently improper about the prosecutor's use of the analogy of stopping at a stop sign to illustrate how quickly a considered judgment can be made. (See generally *People v. Solomon* (2010) 49 Cal.4th 792, 812 [""""Premeditation and deliberation can occur in a brief interval. 'The test is not time, but reflection. "Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly"""""]; CALCRIM No. 601.) The prosecutor, however, did more than emphasize the rapidity in which premeditation and deliberation may occur. She explicitly equated the consideration given to proceeding through an intersection after stopping at a stop sign with the heightened requirements of premeditation and deliberation—"We deliberated our decision. We premeditated"—and did so without the clarification the *Avila* Court found essential to rejecting the claim of impropriety. (*Avila*, *supra*, 46 Cal.4th at p. 714; cf. *People v. Nguyen* (1995) 40 Cal.App.4th 28, 35 [prosecutor improperly equated the beyond-a-reasonable-doubt burden of proof to the standard used "when you make important decisions, decisions about whether you want to get married, decisions that take your life at stake when you change lanes as you're driving," effectively trivializing the standard of proof necessary to sustain a criminal conviction].)

While we are troubled by what we are told is a ubiquitous practice of prosecutors to equate an individual's everyday, traffic-related decisions to the heightened elements of premeditation

and deliberation, thereby effectively minimizing the requirements for a finding of first degree premeditated murder, any error in doing so here was harmless. The jury was properly instructed on the elements of premeditation and deliberation, and we presume the jury followed that instruction. (See *People v. Nguyen*, *supra*, 40 Cal.App.4th at p. 36 [prosecutor's statements improperly equating reasonable doubt standard to everyday traffic decisions was harmless error because jury properly instructed on reasonable doubt; and court presumes jury followed that instruction].) Thus, like the defendant in *Nguyen,* Sanchez has failed to establish that any part of the challenged statement was prejudicial.

3. *We Modify the Judgment To Correct an Unauthorized Sentence*

The court imposed the minimum $300 restitution fine for each count of conviction (§ 1202.4, subd. (b)), for a total of $1,500, and a parole revocation fine, which it stayed, in the same amount (§ 1202.45, subd. (a)). However, the court stayed execution of sentence on Sanchez's convictions for possession of a firearm by a felon (count 3) and assault with a semiautomatic firearm (count 5) pursuant to section 654. Sanchez contends, the People concede and we agree the court erred in using those counts to calculate the restitution fine. (See *People v. Soto* (2016) 245 Cal.App.4th 1219, 1234 [counts for which execution of sentence has been stayed pursuant to section 654 may not be used in calculating restitution fine; "[w]hen a court imposes multiple punishments in violation of section 654, it acts in excess of its jurisdiction and imposes an unauthorized sentence that can be challenged for the first time on appeal"]; *People v. Le* (2006) 136 Cal.App.4th 925, 934 [same].) Accordingly, we modify the judgment by striking the $300 restitution fines imposed on

counts 3 and 5. As modified the judgment shall reflect a restitution fine of $900—$300 for each of the three counts of conviction for which sentence was imposed—along with a stayed parole revocation fine in the same amount (§ 1202.45).

DISPOSITION

The judgment is modified to (1) strike the 15-year minimum parole eligibility alternate penalty imposed under section 186.22, subdivision (b)(5), for the attempted premeditated murder of Gutierrez (count 1); and (2) strike the restitution fine imposed on counts 3 and 5; the modified judgment will reflect an aggregate restitution fine of $900 and a stayed parole revocation fine in the same amount. As modified, the judgment is affirmed. The superior court is directed to prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.