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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. LUIS ARMANDO DELAVEGA, Defendant and Appellant.	B276578 (Los Angeles County Super. Ct. No. KA100238)

APPEAL from a judgment of the Superior Court of Los Angeles County. Thomas C. Falls, Judge. Affirmed as modified.

Janyce Keiko Imata Blair, 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, Margaret E. Maxwell and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Luis Armando Delavega appeals from the judgment following trial at which the jury convicted him of first degree murder (Pen. Code, § 187, subd. (a); count 1)[1] and carrying a loaded firearm (§ 25850, subd. (a); count 2) and found true the allegations that, as to the murder, he personally used a firearm and personally and intentionally discharged a firearm which also caused great bodily injury and death (§ 12022.53, subds. (b)-(d)). The trial court found true that he had served a prior prison term (§ 667.5, subd. (b)). The court sentenced defendant to prison to the two-year midterm on count 2, and on count 1 to a consecutive term of 25 years to life, plus 25 years to life for the firearm enhancement pursuant to subdivision (c) of section 12022.53. The court imposed and stayed (§ 654) another 25-year-to-life term under subdivision (b) of that same section and struck the one-year prior prison term enhancement. As to count 2, the court awarded defendant 2,684 days of presentence credit, consisting of 1,342 custody days and 1,342 conduct days.

Defendant contends the judgment must be reversed, because the trial court failed sua sponte to give cautionary instructions regarding the accomplice testimony of codefendant David Rodriguez, whom the jury acquitted, and Jose Orozco, an immunized prosecution witness, which error was prejudicial. He challenges his sentence on count 2 as unauthorized, because that sentence should have been stayed (§ 654) or, if his carrying a loaded firearm were unrelated to the murder, such crime was unsupported by the evidence. Respondent contends the trial court should have imposed the term of 25 years to life for the firearm enhancement under section 12022.53, subdivision (d), not

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1 All further section references are to the Penal Code.

subdivision (c); no conduct credit was proper; and the custody credit award should be appended to defendant's entire sentence.

By letter, we invited the parties to submit supplemental briefing on whether the trial court committed unauthorized sentencing errors regarding the firearm enhancements set forth in section 12022.53 and, if so, the appropriate disposition. We have received their responses. As we shall discuss, the trial court erred by failing to sentence defendant as mandated by section 12022.53, which resulted in an unauthorized sentence.

We correct the sentencing errors regarding the firearm enhancements, strike the award of conduct credit, and correct the award of custody credit so that it applies to the entire sentence, not just count 2. In all other respects, we affirm the judgment.

FACTUAL BACKGROUND

We recount the evidence pursuant to the usual standard of review. (*People v. Elliott* (2012) 53 Cal.4th 535, 585.) Defendant, who owned an auto body shop, and three others were engaged in a credit card fraud scam. The other scammers were Mr. Rodriguez, defendant's personal driver; Edil Barbosa-Vasquez, also known as "Chuy"; and Mr. Orozco, who was a paint delivery driver for Chuy. Chuy and Mr. Orozco installed credit card readers at gas stations. Defendant made phony credit cards with the information "skimmed." Mr. Orozco then used the phony cards to buy diesel fuel, which defendant sold, and other items.

On November 14, 2012, defendant fired multiple bullets into Chuy, killing him. He believed Chuy had cheated him over business several times. Prior to the shooting, defendant set up a meeting with Chuy and Mr. Orozco. While en route, Chuy, who was driving his white truck, received a call on his cell phone and

told Mr. Orozco, who was seated on the passenger side, to take the call, which was from defendant. Defendant said to get off on Rosemead, pull over, and stop. Mr. Rodriguez, who was driving a black Pontiac, pulled in behind the truck, and defendant got out. Mr. Orozco stayed in the truck. After exiting the truck, Chuy walked to its front, urinated, and walked to the rear of the truck where defendant was standing. Mr. Orozco heard "two, three pops." Looking in the rear mirror, he saw Chuy holding his stomach and falling to the ground. He then saw defendant stand over Chuy and shoot him three times.

While driving on Rosemead near Rush, Leticia Banuelos noticed two people, whom she could not describe as male or female, in front of the passenger side of a black Pontiac. She heard a number of "bangs" like shots and saw one person fall down. She called 911.

Jumping into the driver's seat, Mr. Orozco drove off and called 911. He told the operator he had been shot at and "[his] friend" had been shot and reported "they" were following him in a black Pontiac. He gave his first name, phone number, and location.

At a dead end, defendant caught up with Mr. Orozco. Mr. Orozco removed the battery from his phone, because 911 continued to call back and he did not want defendant to know he had called 911. Defendant exited his vehicle with his gun, walked up to Mr. Orozco's truck door, and displayed the gun to him. He then removed the gun's magazine and pulled back the slide to show Mr. Orozco the gun had no round in the chamber. Defendant told Mr. Orozco to relax and he had "nothing against" him but Chuy "had it coming." He then removed his gloves and got into the truck.

Mr. Rodriguez followed in the Pontiac as Mr. Orozco drove defendant to a gas station. After telling defendant Chuy's phone was in the truck, Mr. Orozco and defendant broke apart the phone, which was thrown into a window washing fluid receptacle. Defendant put the gun and his gloves in a compartment in the truck's utility bed.

When Mr. Orozco dropped off defendant near his home, defendant took the gun with him. Mr. Orozco did not stop at a nearby sheriff's station to report the shooting.

Surveillance camera footage from a nearby building about the time of the shooting revealed a white truck stopped; its passenger side door remained closed; and the truck left about 30 seconds later, followed by a black vehicle. About two days after the shooting, deputies detained Mr. Orozco while he was driving the white truck. During an interview, detectives told him he was the primary suspect because the white pickup was seen leaving the murder scene. Mr. Orozco described the shooting.

About a week and a half after the shooting, defendant and Mr. Rodriguez in a Honda Accord picked up Mr. Orozco to get credit card readers. During the ride, Mr. Orozco stated he was scared when the shooting happened. Mr. Rodriguez responded it was a good thing he did not exit the truck and run away, because defendant might have shot him. Defendant laughed in agreement and said he did not like Chuy, because he had "screwed" him over in business a few times.

About November 26, 2012, deputies stopped a Honda with defendant and Mr. Rodriguez inside. The key to a storage unit in Monterey Park recovered from defendant was used to access the unit. During a search, deputies recovered a rifle bag containing a Baikal semiautomatic handgun loaded with seven Makarov

cartridges. The gun had fired the bullets evidenced by the expended casings found at the crime scene. Defendant was probably the contributor of the DNA found on one of two pairs of gloves recovered from a compartment in the rear of the truck when Mr. Orozco was detained, and Mr. Rodriguez was probably the contributor of the DNA found on the other pair.

On November 30, 2012, during the recorded conversation in a jail cell, Mr. Rodriguez spoke with undercover deputies Manuel Avina and Anthony Bautista. Mr. Rodriguez related the shooter was mad at Chuy and shot him four times in the head. At trial, Deputy Avina testified although Mr. Rodriguez at that point did not then name defendant as the shooter, he referred to defendant during other parts of the conversation, and Deputy Avina understood he was referring to defendant when he stated "he" shot Chuy four times in the head.

At trial, defendant did not testify. Nelson Tchir testified that while driving on Rosemead, he heard about five gunshots and saw two men, one a "big Latino guy, long hair, wearing a blue work utility shirt" who jumped into a white truck. He testified defendant was not that man. At the preliminary hearing, Mr. Tchir had identified Mr. Rodriguez as that man.

Mr. Rodriguez testified he was present during several arguments about finances between defendant and Chuy. During one argument, defendant accused Chuy of stealing money from his register. These arguments were ongoing up to the moment Chuy was killed.

On the day of the shooting, Mr. Rodriguez was driving defendant in the Pontiac. Defendant, who was upset, directed Chuy through Mr. Orozco over the phone to stop the truck. The truck stopped on the side of the road, and Mr. Rodriguez pulled

up behind the truck. Defendant did not tell Mr. Rodriguez he wanted to kill Chuy. After defendant exited the Pontiac and Chuy exited the white truck, Mr. Rodriguez heard gunshots. He saw Chuy fall down and defendant fire more shots at Chuy. Running back to the Pontiac, defendant told Mr. Rodriguez to drive off.

After Mr. Orozco drove off in the truck, defendant said, "Now I'm gonna have to get rid of Chema [(Orozco's nickname)]." He added if Mr. Rodriguez said something, he would kill him also. The Pontiac caught up with and stopped behind the truck. After exiting the Pontiac with the gun in hand, defendant entered the passenger side of the truck. Over the phone, defendant directed Mr. Rodriguez to follow them to a gas station. Once there, he told Mr. Rodriguez to remove the paper license plate that covered the Pontiac's regular plate. Mr. Orozco and defendant stomped on a phone, joined by Mr. Rodriguez at the latter's behest. Mr. Rodriguez did not call police, because he was afraid.

The next day, defendant told Mr. Rodriguez he shot Chuy four times in the head. Mr. Rodriguez drove defendant who had "a long suitcase" to the storage facility. He denied knowing anything about firearms being stored there. Defendant returned to the car without the suitcase.

Tony Garcias, who had worked with Mr. Rodriguez at defendant's auto shop, testified he signed paperwork for a storage unit on defendant's behalf and gave the unit's keys to defendant.

Susan Renteria, Mr. Rodriguez's girlfriend, testified Mr. Rodriguez told her he was driving a black car when defendant, the passenger, exited and shot Chuy who had exited from a white truck.

DISCUSSION

1. Omission of Accomplice Testimony Cautionary Instruction

Defendant contends the trial court committed prejudicial error in failing sua sponte to instruct the jury to view the accomplice testimony of Mr. Rodriguez and Mr. Orozco with caution. His contention is unsuccessful.

"Section 1111 provides, 'A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense. . . .' It defines an accomplice as 'one who is liable to prosecution for the identical offense charged against the defendant on trial . . . .' [Citations.] Whether a person is an accomplice within the meaning of section 1111 presents a factual question for the jury 'unless the evidence permits only a single inference.' [Citation.] Thus, a court can decide as a matter of law whether a witness is or is not an accomplice only when the facts regarding the witness's criminal culpability are 'clear and undisputed.' [Citations.]" (*People v. Williams* (1997) 16 Cal.4th 635, 679.) The trial court has a sua sponte duty to instruct the jury to view accomplice testimony unfavorable to defendant with care and caution. (*People v. Guiuan* (1998) 18 Cal.4th 558, 560-561.)

"A trial court's failure to instruct on accomplice liability under section 1111 is harmless if there is 'sufficient corroborating evidence in the record.' [Citation.] To corroborate the testimony of an accomplice, the prosecution must present 'independent evidence,' that is, evidence that 'tends to connect the defendant with the crime charged' without aid or assistance from the accomplice's testimony. [Citation.] Corroborating evidence is

sufficient if it tends to implicate the defendant and thus relates to some act or fact that is an element of the crime. [Citations.] ' "[T]he corroborative evidence may be slight and entitled to little consideration when standing alone." [Citation.]' [Citation.]" (*People v. Avila* (2006) 38 Cal.4th 491, 562-563.)

Initially, we point out Mr. Orozco was not charged with the murder of Chuy. Further, Mr. Orozco was offered immunity from prosecution under section 32 for the destruction of Chuy's phone in exchange for his testimony at the preliminary hearing, not for murder. Additionally, defendant does not point to any evidence that demonstrates Mr. Orozco was an accomplice in Chuy's murder. The record in fact is silent in that regard. No evidence was presented from which a reasonable inference could be drawn that Mr. Orozco was aware of and shared defendant's intent to murder Chuy. To the contrary, the evidence revealed Mr. Orozco called 911 and reported the shooting as he fled the crime scene. He also gave his first name, phone number, and location. After defendant caught up and cornered him at a dead end street, Mr. Orozco removed his phone's battery to halt the repeated attempts by the 911 operator to contact him. The only reasonable inference that may be drawn is that Mr. Orozco feared defendant intended to kill him, rather than that Mr. Orozco was defendant's accomplice in Chuy's murder. The trial court thus was entitled to find, as a matter of law, Mr. Orozco was not an accomplice. Accordingly, no accomplice testimony cautionary instruction was warranted.

In contrast, the trial court did err in not giving such instruction as to Mr. Rodriguez, an accomplice as a matter of law, i.e., he was prosecuted for the same offense as defendant. Nonetheless, such error was not prejudicial in view of the

substantial evidence independent of and corroborating his testimony. After obtaining a key to a storage unit from defendant, deputies found the gun that fired the fatal bullets in that unit. Mr. Orozco testified after hearing three "pops," he saw Chuy fall down while holding his stomach and then defendant shot him three times as he stood over Chuy. The testimony of other witnesses described above also corroborates defendant's guilt of the murder of Chuy.

2. Count 2 Sentence Not Unauthorized

Defendant contends his sentence on count 2 for carrying a loaded firearm is unauthorized, because section 654 prohibits punishment for both this offense and the murder, which arose from the same course of conduct. Alternatively, defendant contends there is insufficient evidence to support his conviction for carrying a loaded firearm. His contentions are without merit.

a. Procedural summary

During trial, the jury was instructed that defendant "is accused of having committed the crime of carrying a loaded firearm in Count 2. The prosecution has introduced evidence for the purpose of showing that there is more than one act upon which a conviction in Count 2 may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that he committed any one or more of the acts or omissions. However, in order to return a verdict of guilty on Count 2, all jurors must agree that he committed the same act or acts. It is not necessary that the particular act be stated in your verdict."

In sentencing defendant, the trial court imposed a sentence of the two-year midterm on count 2 as the base term. In imposing a consecutive sentence for the murder in count 1, the court found: "The record should reflect the carrying of the loaded

firearm was a separate and distinct offense [t]hat took place in a vehicle that was not related to the homicide in this case. So it is not a 654 situation."

b. Applicable legal principles

"Section 654 prohibits multiple punishment for a single physical act that violates different provisions of law." (*People v. Jones* (2012) 54 Cal.4th 350, 358.) "Whether a defendant may be subjected to multiple punishment under section 654 requires a two-step inquiry, because the statutory reference to an 'act or omission' may include not only a discrete physical act but also a course of conduct encompassing several acts pursued with a single objective. [Citations.] We first consider if the different crimes were completed by a 'single physical act.' [Citation.] If so, the defendant may not be punished more than once for that act. Only if we conclude that the case involves more than a single act—i.e., a course of conduct—do we then consider whether that course of conduct reflects a single 'intent and objective' or multiple intents and objectives. [Citations.]" (*People v. Corpening* (2016) 2 Cal.5th 307, 311-312 (*Corpening*).)

If the facts are undisputed that "the multiple convictions are based upon a single physical act," we review de novo as a question of law the applicability of section 654. (*Corpening, supra*, 2 Cal.5th at p. 312.) In contrast, where the applicability of section 654 turns on the resolution of a factual issue, the trial court has broad discretion in determining that issue and its finding will be upheld on appeal if supported by substantial evidence. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.) "We review the trial court's determination in the light most favorable to the respondent and presume the existence of every

fact the trial court could reasonably deduce from the evidence." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143 (*Jones*).)

Whether carrying a loaded firearm and its unlawful use fall within the purview of section 654 essentially depends on the timing of the two events. "[M]ultiple punishment is improper where the evidence 'demonstrates at most that fortuitous circumstances put the firearm in the defendant's hand *only at the instant of committing another offense* . . . .' [Citation.]" (*Jones*, *supra*, 103 Cal.App.4th at p. 1144, italics added; see, e.g., *People v. Bradford* (1976) 17 Cal.3d 8, 13 [when stopped for speeding, the defendant who just robbed a bank snatched the officer's gun and shot at him and another before fleeing].) Absent such fortuity, however, section 654 is inapplicable. In *People v. Hudgins* (1967) 252 Cal.App.2d 174, the court explained: "Possession of the gun constituted one offense, and this was an act separate and apart from any use that was made of the gun, and would have been a completed offense even if no use had been made of it. [Defendant] was properly sentenced for both offenses." (*Id.* at p. 185; accord, *Jones*, at p. 1146.)

In this matter, defendant's convictions for carrying a loaded firearm and murder are not subject to the multiple punishment bar of section 654. No evidence was presented from which the trial court could have inferred defendant obtained the gun through happenstance or by accident moments before fatally shooting Chuy multiple times. Rather, the totality of the circumstances reflects defendant carried the loaded gun with him in the Pontiac and when he exited the Pontiac. In so doing, the crime of carrying a loaded firearm was complete. That act therefore is separate and distinct from his subsequent act of

murder by means of the firearm. (See *Jones*, *supra*, 103 Cal.App.4th at pp. 1141, 1147.)

The evidence reflects defendant was in possession of a firearm on a separate, distinct occasion both before and after the murder. The jury was entitled to infer that defendant had the gun with him when he exited the Pontiac and confronted Chuy. Although he instructed Chuy to get off the freeway at Rosemead and stop, he had no foreknowledge of the exact spot where he would stop. Nothing in the record indicated that defendant retrieved the gun from the vicinity where he shot Chuy. After the murder and at a different location, defendant displayed the gun, which was still loaded, to Mr. Orozco. This act also constituted the completed crime of carrying a loaded firearm that was separate and distinct from his possession during the murder. (See *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1413 ["justifiable inference" drawn "defendant's possession of the weapon was not merely simultaneous with the robberies, but continued before, during and after those crimes"].)

3. Noncompliance with Section 12022.53 Unauthorized Sentence

Section 12022.53 is "known as 'the 10-20-life law' " (*People v. Jones* (2009) 47 Cal.4th 566, 570) and authorizes a graduated increase in punishment based on the seriousness of a defendant's personal firearm usage. If a defendant "personally uses a firearm" in committing a qualifying crime, he may be subject to an additional and consecutive prison term of 10 years (§ 12022.53, subd. (b)). That term becomes 20 years if he "personally and intentionally discharges a firearm" (§ 12022.53, subd. (c)), and, if in so doing, he "causes great bodily injury . . . or death," the term becomes 25 years to life (*id.*, subd. (d)). "Only

one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment." (*Id.,* subd. (f).)

The information alleged and the jury found true as to count 1 (murder) the three firearm enhancements set forth in subdivisions (b) through (d) of section 12022.53. In supplemental briefing, the parties agree the trial court erred by: (1) imposing and then staying a term of 25 years to life pursuant to subdivision (b), which only provides for a 10-year determinate term; (2) imposing a term of 25 years to life pursuant to subdivision (c), which only provides for a 20-year determinate term; (3) failing to impose a term of 25 years to life pursuant to subdivision (d), which authorizes such term; and (4) failing to impose the longest term of imprisonment and stay the shorter terms (§ 12022.53, subd. (f); *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1130; *People v. Palacios* (2007) 41 Cal.4th 720, 723 [stay imposed under § 12022.53, not § 654]).

The longest applicable prison term here is 25 years to life, which is authorized pursuant to subdivision (d) of section 12022.53. The shorter terms of 10 years under subdivision (b) and 20 years under subdivision (c) also are applicable. The trial court therefore committed unauthorized sentencing error (*People v. Scott* (1994) 9 Cal.4th 331, 354) by failing to sentence defendant on count 1 (murder) as mandated under section 12022.53.

The trial court's sentencing errors are correctable without referring to factual findings in the record, and there is no need to remand for further findings. The errors present a pure question

of law with only one correct answer. Accordingly, we may correct the errors without remanding for further proceedings in the presence of defendant. (*People v. Smith* (2001) 24 Cal.4th 849, 852, 854.) We modify the sentence as to count 1 (murder) to impose the 25-year-to-life firearm enhancement under subdivision (d) of section 12022.53; impose the 10-year and 20-year firearm enhancements under, respectively, subdivisions (b) and (c) of that section; and stay the 10- and 20-year enhancements pursuant to subdivision (f) of that section.

5. Precommitment Credit Award Correction Warranted

Respondent contends the trial court erred by awarding defendant conduct credit as to count 2 and that the court should have credited the award of custody credits against defendant's entire sentence. We agree.

The trial court awarded defendant 2,684 days of precommitment credit, comprised of 1,342 custody days and 1,342 conduct days, which award was ordered appended only to count 2.

a. Award of any conduct credit error

Respondent asserts, and defendant does not disagree, defendant is not entitled to credit of any conduct days. This assertion is meritorious. "[A]ny person who is convicted of murder . . . shall not accrue any [conduct] credit." (§ 2933.2, subd. (a).) Defendant was convicted of murder. He therefore is not entitled to any conduct credit on his convictions for murder (count 1) and carrying a loaded firearm (count 2). (*People v. McNamee* (2002) 96 Cal.App.4th 66, 68, 71; see also *People v. Duff* (2010) 50 Cal.4th 787, 792, 798-799.) We strike the award of conduct credits.

b. Custody credit applicable to entire sentence

Respondent asserts that defendant's precommitment credit award, consisting of 1,342 custody days, applies to his entire sentence, not just count 2. Defendant does not disagree. This assertion has merit. "Credit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed." (§ 2900.5, subd. (b).)

DISPOSITION

We modify the judgment as to count 1 (murder) to impose the 25-year-to-life firearm enhancement under subdivision (d) of section 12022.53; impose the 10-year and 20-year firearm enhancements under, respectively, subdivisions (b) and (c) of that section; and stay the 10- and 20-year enhancements pursuant to subdivision (f) of that section. Further, we strike the award of precommitment conduct credit and order the 1,342 days of custody credit applies to the entire sentence. The trial court is directed to prepare an amended abstract of judgment reflecting these modifications and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J. SORTINO, 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.