Filed 1/30/18 P. v. Santana CA2/6

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ANGEL SANTANA,<br><br>Defendant and Appellant. | 2d Crim. No. B280321<br>(Super. Ct. No. LA078686)<br>(Los Angeles County) |

Angel Santana appeals after a jury convicted him of two counts of murder and one count of attempted murder. Santana contends that the trial court: (1) erred by failing to give a curative instruction after the prosecutor misstated the law regarding provocation; (2) erred in admitting Facebook messages regarding a firearm transaction; (3) should have imposed a minimum parole eligibility term (Pen. Code,[1] § 186.22, subd. (b)(5)) instead of a 10-year gang enhancement (§ 186.22, subd.

[1] Further unspecified statutory references are to the Penal Code, unless stated otherwise.

(b)(1)(C)) on the murder counts; and (4) should have stricken the prior prison term enhancements (§ 667.5, subd. (b)). We modify the judgment to correct sentencing errors, but otherwise affirm.

## FACTUAL AND PROCEDURAL HISTORY

Troy Nichols was with Maron States and Deshawn Miles in front of a convenience store when Santana and another man approached them. Nichols testified that the two men asked them, "You guys know where you are?" Delray Gregory, who was also in front of the store, testified that Santana made an "L" sign with his hands and told the three men, "This is Langdon Street. . . . Y'all need to get on. It ain't cool for y'all to be kicking it."

Gregory testified that two of the three men started arguing with Santana, saying "This is not Langdon Street. It's over there. This is 7-Eleven. We ain't got to go nowhere." Gregory intervened and told the three men that they should leave and come back, but the three men said "they got the situation handled." Gregory walked away from the group and overheard one of the three men say "We ain't going nowhere." Santana then pulled out a gun and started shooting.

Gregory testified that Santana shot a gun while Santana's companion did nothing. Nichols testified that Santana and his companion both shot guns.

States and Miles were shot and died in front of the store. Gregory was shot in the leg. Nichols was not shot and ran away.

A surveillance video captured the shooting. It shows Santana and his companion driving up in a white car. Santana got out of the car and approached Nichols, States, and Miles. He

appeared to be holding something while talking to States and Miles. The video also shows Santana shooting a gun.

Based on a description of the shooter, a responding officer believed that Santana was the suspect. The officers included Santana's photo in a six-pack photo line-up. Nichols, who returned to the store and talked to the police, identified Santana from the six-pack.

The officers found bullets and five bullet casings at the crime scene. There were two types of bullet casings (.380 and 9 millimeter). An officer testified that it was possible to shoot a .380 bullet out of a 9 millimeter gun, but the gun would fire once and would not eject the casing.

Officers also found a blue bandana at the scene and had it tested for DNA. The results showed DNA from one "major contributor" and two minor contributors. The DNA profile for the major contributor matched Santana.

Officers searched Santana's Facebook account, which contained photographs of him wearing a blue bandana similar to the one found at the crime scene and messages regarding a firearm transaction. The messages, which were dated six weeks before the incident, consisted of a conversation between Santana and a girlfriend of another gang member. Santana sought to "get rid of" a "S.K.S." rifle in exchange for "two straps" (two handguns) or enough cash to "buy me two straps." The girlfriend asked for pictures of the rifle and stated that she "found someone interested in it." Santana replied with a photograph of the rifle and asked if she received the photo. She said "Yee." He responded, "Hey. [¶] . . . [¶] So what happen[ed]?"

Officers interviewed Gregory several months later. The officer showed Gregory a photo of Santana, and Gregory

identified him as one of the shooters and referred to Santana by his name. Gregory said that he heard Santana or his companion say "This is Langdon Street" and Nichols, States, or Miles yell "Blythe Street." Blythe Street is a rival gang to the Langdon Street gang.

An expert witness opined that Santana was a gang member and that his crime was committed for the benefit of the gang. He was familiar with Santana, knew him for five or six years, and had about 10 previous contacts with him. Santana had claimed Langdon Street as his gang during past contacts. Santana had several gang tattoos which identified him as a member of Langdon Street. He had a large tattoo on the back of his scalp that said "Langdon," a Saint Louis Cardinal logo, and the initials "LST" above his navel. He also had "13" tattooed on his chest and neck. It symbolized "M," the 13th letter in the alphabet, which signified the "Mexican Mafia," a prison gang. Langdon Street is associated with the Mexican Mafia on a "street gang level." Langdon Street members are territorial and impose fear and intimidation within their territory. Their primary activities include violent crimes such as murder.

The jury convicted Santana of two counts of first degree premeditated murder (§§ 187, subd. (a), 189) and one count of attempted murder (§§ 664, subd. (a)/ 187, subd. (a)). The jury also found true a "multiple murder special circumstance" (§ 190.2 (a)(3)) and gang and multiple firearm allegations on all counts (§§ 186.22, subd. (b)(1)(C), 12022.53, subds. (b)-(e)). In a bifurcated trial, the trial court found true that Santana had two prior strike convictions (§§ 667, subd. (d), 1170.12, subd. (b)), two serious prior felony convictions (§ 667, subd. (a)), and two prior prison terms (§ 667.5, subd. (b)). The court sentenced him to two

consecutive terms of life without the possibility of parole (LWOP), plus two consecutive 45-years-to-life terms for counts 1 and 2 (25 years to life for the firearm allegations, 10 years on the gang allegation, and 10 years for the serious prior felony allegations), and a consecutive 85-years-to-life term for count 3 (50 years to life for underlying crime, 25 years to life for firearm allegation, 10 years for the serious prior felony allegation).

## DISCUSSION

### *Curative Instruction*

Santana argues the trial court erred by refusing to give a curative instruction after the prosecutor misstated the standard for provocation as a basis to reduce first degree murder to second degree murder. He contends that the prosecutor's statements caused the jury to apply an objective rather than a subjective standard. Because the prosecutor did not misstate the law, no curative instruction was required.

We independently review a trial court's decision regarding further instruction on provocation. "'Whether or not to give any particular instruction in any particular case entails the resolution of a mixed question of law and fact that, we believe, is however predominantly legal. As such, it should be examined without deference.' [Citation.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1217 (*Cole*).)

The Attorney General argues Santana forfeited his claim on appeal because he failed to explicitly ask for a curative instruction. The failure to object to prosecutorial error and subsequent failure to request a curative admonition forfeits the claim on appeal. (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

Santana did not forfeit his claim. Defense counsel objected to the prosecutor's comments regarding provocation at

trial and stated: "I'm not sure what the court can do as far as curing it, just so there's no confusion." The trial court apparently construed counsel's statement as a request for a curative instruction because it denied the request.

Although not forfeited, Santana's contention is meritless because the prosecutor's statements during his rebuttal were not misleading. Here, the prosecutor explained provocation was something that "enrages you, that your mental faculties are infringed upon, that you cannot form a serious thought. You're very sensitive. I call your mother a whore and you get enraged. Boom. [¶] *What did [the victims] say? Even if they said 'Blythe,' . . . how is that provoking [him]? Yeah, maybe it provokes the gang member who wants to defend their territory.* But that's motive. And there's a distinction between motive and provocation. [¶] Provocation means, again, you're making a rash decision. There's nothing rash about what they're doing. They're coming up with their guns. . . . That is not rash. That is deliberate. That is premeditated. That is thought about. That is motive." (Italics added.)

The prosecutor's statements during his rebuttal did not mislead the jury into believing the standard for provocation was an objective standard. Santana focuses on the italicized portion of the prosecutor's statements. But at no point did the prosecutor state that the standard was an objective one. Nor do the italicized statements support such an implication, especially when considered in context with the entire argument. The thrust of the argument was that there was insufficient provocation in light of evidence that Santana approached the victims armed with guns and referencing his gang's territory. The prosecutor's statement was proper argument.

Moreover, the jury was properly instructed regarding provocation as basis to reduce first degree murder to second degree murder. The trial court instructed the jury as follows: "Provocation may reduce a murder from first degree to second degree. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder." (CALCRIM 522.)

The court also instructed the jury that a first degree murder conviction required the prosecution to prove that Santana acted "willfully, deliberately and with premeditation. [¶] . . . [¶] A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated." (CALCRIM 521.)

"Provocation . . . as used in the instruction[] here bore [its] common meaning, which required no further explanation in the absence of a specific request." (*Cole*, *supra*, 33 Cal.4th at pp. 1217-1218.) These instructions were complete and the jury did not request any clarification. We assume that the jury was aware of the common meaning of provocation and properly applied the instructions. (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1332, 1334.) Because there was no misstatement of law and the jury received proper instruction, no curative instruction was required.

***Admission of Facebook Messages***

Santana claims the trial court erred in admitting his Facebook messages because they lack relevance and their probative value is substantially outweighed by their prejudicial

effect (Evid. Code, § 352). The trial court did not err because the messages are relevant.

Only relevant evidence is admissible. (Evid. Code, § 350.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) A trial court has discretion to exclude relevant evidence when its prejudicial effect substantially outweighs its probative value. (Evid. Code, § 352.) Evidentiary rulings are reviewed for abuse of discretion and a court's decision will be upheld unless it exceeds the bounds of reason. (*People v. Williams* (1997) 16 Cal.4th 153, 196-197.)

The Facebook messages are relevant because they show that Santana sought to obtain two handguns six weeks before the incident and that those handguns could have been used to commit the crime. The police did not recover the guns used during the incident, but evidence found at the crime scene showed that the victims were shot with one or two handguns ejecting .380 and 9 millimeter casings. The Facebook messages are circumstantial evidence to show that Santana possessed handguns and used them, a fact that was contested at trial. (See *People v. Gunder* (2007) 151 Cal.App.4th 412, 416 [evidence that the defendant possessed firearms on two instances days before a shooting was relevant circumstantial evidence to refute a claim that the police planted firearms found in his possession].)

Santana argues that the evidence was inadmissible because it merely showed his propensity to possess guns. (*People v. Barnwell* (2007) 41 Cal.4th 1038; Evid. Code, § 1101, subd. (a).) He relies on *People v. Riser* (1956) 47 Cal.2d 566, 577, overruled on other grounds in *People v. Morse* (1964) 60 Cal.2d 631, 639,

footnote 5, in which evidence that the defendant possessed other types of guns was inadmissible propensity evidence where the prosecution relied on a specific type of gun used to commit the crime. (*Id*. at p. 577.) But this case is distinguishable from *Riser* because there was no conflicting evidence demonstrating that the guns Santana sought to obtain six weeks earlier were different from those used to commit the crime. Evidence of a defendant possessing a gun is admissible where, as here, the prosecution asserts that the gun could possibly be the same one used to commit the crime. (See *Ibid*. ["When the specific type of weapon used to commit a homicide is not known, it may be permissible to admit into evidence weapons found in the defendant's possession some time after the crime that could have been the weapons employed"].)

The trial court did not err in finding the probative value of the Facebook messages was not substantially outweighed by the prejudicial effect. The evidence was particularly probative here as the identity of the shooter was a contested issue. Moreover, the messages were not unduly prejudicial in light of the other evidence, such as the witness testimony and surveillance video evidence showing that Santana was a shooter.

We also reject Santana's contention that the trial court erred by admitting the Facebook messages without expert testimony explaining the notations reading "Deleted False" below each of the Facebook message entries. Nothing in the record shows that the jury was confused by the evidence or these notations. The jury asked several questions about the evidence, but none of these questions pertained to the Facebook messages.

Even assuming the trial court erred in admitting the Facebook messages, any error would have been harmless under

any standard. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836-837.) There was overwhelming evidence, including witness testimony, photo identifications, a surveillance video, and evidence of Santana's gang involvement that supported the jury's verdict.

***Gang Enhancement***

Santana argues the trial court erred in imposing a 10-year consecutive term for a gang enhancement under section 186.22, subdivision (b)(1)(C) on counts 1 and 2, rather than the 15-year minimum parole eligibility term under section 186.22, subdivision (b)(5), because the latter applies to LWOP sentences. We agree.

Section 186.22, subdivision (b)(1)(C) provides for an additional 10-year consecutive term when a gang enhancement applies to a violent felony (§ 667.5). Section 186.22, subdivision (b)(1)(C) does not apply where a defendant commits "a felony punishable by imprisonment in the state prison for life." (§ 186.22, subd. (b)(5).) Rather, section 186.22, subdivision (b)(5) imposes a 15-year minimum parole eligibility term in those cases.

In *People v. Lopez* (2005) 34 Cal.4th 1002 (*Lopez*), our Supreme Court held that the 15-year parole eligibility minimum, and not the 10-year gang enhancement, applied to a defendant who received a 25-years-to-life sentence for a gang-related first degree murder offense. (*Id*. at p. 1010.) The court determined that the plain language of the statute meant that the subdivision (b)(5) exception applied to not only straight life terms, but also to "years-to-life" terms. (*Id*. at pp. 1007, 1011.) In so holding, it acknowledged that a 15-year minimum parole eligibility term will have "no practical effect" with a first degree murder conviction, but that imposition of such a term is "neither an absurdity nor an

anomaly" even though the punishment for murder is equal to or greater than 15 years. (*Id*. at p. 1009.)

The reasoning in *Lopez* compels the same result here. The plain language of subdivision (b)(5) mandates that a 15-year minimum parole eligibility term applies to life terms, including LWOP sentences.

***Prison Prior Enhancements***

Santana contends, and the Attorney General concedes, that we must strike the two prior prison term enhancements (§ 667.5, subd. (b)), which the trial court imposed but stayed. We agree.

The trial court erred in imposing one-year prison prior enhancements under section 667, subdivision (b) because it imposed five-year serious felony enhancements under section 667, subdivision (a) based on the same prior convictions. "[W]hen multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, but only that one, will apply." (*People v. Jones* (1993) 5 Cal.4th 1142, 1150-1153; see also *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1562.)

***Section 12022.53 Firearm Enhancement***

On October 11, 2017, the Governor signed Senate Bill 620. This legislation provides that effective January 1, 2018, section 12022.53, subdivision (h) is amended to permit the trial court to strike, in its discretion, a firearm enhancement. The amended section 12022.53, subdivision (h) provides: "The court may, in the interest of justice pursuant to [s]ection 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.) The People concede that since Santana's appeal was not final as of January 1, 2018, the amended section applies to his sentencing. (*People v. Brown* (2012) 54 Cal.4th 314, 323-324; *People v. Francis* (1969) 71 Cal.2d 66, 75-76.)

Santana contends that this case must be remanded for resentencing to allow the trial court to exercise its discretion under the amended section 12022.53, subdivision (h). We decline to do so.

"[N]o purpose would be served in remanding for reconsideration" if the record shows that the trial court would not "have exercised its discretion to lessen the sentence." (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [no remand necessary where the court commented that imposing the maximum sentence was appropriate and imposed the high term on one count and two discretionary enhancements]; see also *People v. Gamble* (2008) 164 Cal.App.4th 891, 901 [remand is an idle act where the record shows that the trial court would not have exercised its discretion even if it believed it could do so].)

Here, the record demonstrates the trial court would not have exercised its discretion to strike the firearm enhancement. At sentencing, the trial court imposed two consecutive LWOP terms plus two consecutive 45-years-to-life terms for counts 1 and 2, and a consecutive 85-years-to-life term for count 3. Notably, the trial court declined to strike any of Santana's prior convictions, stating that "given the overall circumstances of this case and the totality of circumstances surrounding it, I don't think it would be appropriate and I would not exercise my discretion that I know I have to strike either of the prior convictions per your request." Additionally, its decision

to impose but stay the two prior prison term enhancements reflects its intention to impose the maximum sentence. In light of the trial judge's comments and sentencing decisions in favor of a maximum sentence, no purpose would be served to remand the matter for resentencing.

**DISPOSITION**

The judgment is modified to strike the 10-year gang enhancement (§ 186.22, subd. (b)(1)(C)), impose a 15-year minimum parole eligibility requirement (§ 186.22, subd. (b)(5)), and strike two prior prison term enhancements (§ 667.5, subd. (b)). The clerk of the superior court shall prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

YEGAN, Acting P. J.

PERREN, J.

Thomas Rubinson, Judge

Superior Court County of Los Angeles

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