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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CARLOS ARTEAGA, Defendant and Appellant.	B284699 (Los Angeles County Super. Ct. No. LA081087)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph A. Brandolino, Judge. Judgment of conviction affirmed; sentence vacated and remanded for further proceedings.

Ava R. Stralla, 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, Scott A. Taryle and Christopher G. Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Carlos Arteaga of two counts of willful, deliberate, and premeditated attempted murder, with criminal street gang and firearm use enhancements. Sentenced to 35 years to life in prison, Arteaga appeals. He contends the trial court erred by refusing to instruct the jury on two lesser included offenses, and the matter must be remanded to allow the trial court to exercise its discretion to strike or dismiss the firearm enhancements pursuant to recently amended Penal Code section 12022.53, subdivision (h).[1] We affirm Arteaga's convictions, but remand the matter to allow the trial court to exercise its discretion and determine whether to strike or dismiss the firearm enhancements.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

During the early afternoon of May 31, 2015, brothers Eduardo and Jesus R.[2] were in Eduardo's Mercedes, stopped behind traffic at a traffic light in North Hollywood. They were not gang members. Suddenly, four or five Hispanic men, including appellant Arteaga, ran towards the passenger side of the Mercedes. When they were within 10 to 15 feet of the vehicle, one or more of the men yelled in Spanish, "Where are you from, son of a bitch?" Both Eduardo and Jesus recognized this as a gang-related challenge. Jesus replied, "Nowhere." One or more

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

[2] For ease of reference, and with no disrespect, we hereinafter refer to the brothers by their first names.

of the assailants yelled, "Mara Salvatrucha." Arteaga, along with another one of the men, fired between five and 10 shots at the car, striking it, but not hitting Eduardo or Jesus. When the light changed, Eduardo drove away. Jesus called 911.

Meanwhile, the assailants ran to a nearby car, where a getaway driver was waiting for them. Two police officers, who had heard the radio broadcast about the shooting, followed and stopped them. Five men were in the car; Arteaga was in the back seat. In separate field showups conducted shortly after the shooting, Eduardo and Jesus identified appellant and another man as the shooters.[3] Both Eduardo and Jesus appeared extremely nervous. After making an identification, Jesus asked to see the suspects again and stated he could not identify any of them. At trial, neither Eduardo nor Jesus identified appellant.

Inside the getaway car, officers found two firearms wrapped in clothing on the rear floorboard, one behind the front passenger seat and one behind the driver's seat. One was a .380-caliber semiautomatic, and the other was a .38-caliber revolver. The .38-caliber revolver contained four spent casings and one live round. Officers located four casings on the ground where the shooting occurred. Testing revealed that the casings were shot from the .380-caliber gun found in the car. Testing also revealed the presence of gunshot residue on Arteaga's hands.

A gang expert testified about the Mara Salvatrucha criminal street gang, including its territory, primary activities,

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[3] At trial, Jesus denied identifying anyone at the field showup. He was aware Mara Salvatrucha was "a big gang" and "they could hurt us." Eduardo was "concerned" about testifying at trial because the Mara Salvatrucha gang was "so dangerous."

symbols, graffiti, hand signs, customs and culture, origins, and predicate offenses.[4] In the expert's opinion, appellant was a Mara Salvatrucha gang member, as were at least three of the individuals with him during the incident. A gang member asking " 'where are you from' " is a threat. Yelling the name of one's gang prior to an act of violence is the equivalent of an advertisement for the gang. The area where the shooting occurred was claimed as Mara Salvatrucha's territory. In response to a hypothetical based on the evidence adduced, the expert opined that the shooting benefitted the gang.

2. *Procedure*

The jury convicted Arteaga of the willful, deliberate, premeditated attempted murders of Eduardo and Jesus. (§§ 664, 187, subd. (a).) It found both crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)) and that Arteaga, and a principal, personally and intentionally used and discharged a firearm (§ 12022.53, subds. (b), (c), (e)(1)). The trial court sentenced Arteaga to 15 years to life in prison on the base term, attempted murder, plus a consecutive 20-year term for the section 12022.53, subdivision (c) firearm enhancement, for a total of 35 years to life. It ordered victim restitution in an amount to be determined at a later hearing, and imposed a restitution fine, a suspended parole revocation restitution fine, a court operations assessment, and a criminal conviction assessment.

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[4] Because Arteaga does not challenge the expert's qualifications or the sufficiency of the evidence to prove the gang enhancement, we do not further detail such testimony here.

DISCUSSION

1. *The trial court did not commit instructional error*

Defense counsel requested that the trial court instruct the jury on assault with a firearm and assault with a deadly weapon (§ 245, subds. (a)(1) & (2)), as well as shooting at an occupied motor vehicle (§ 246), as lesser included offenses of attempted murder. The court declined to do so because the crimes were not lesser included offenses of attempted murder, and the People did not agree to the instructions. Arteaga contends this was error.

A trial court must instruct the jury on all general principles of law relevant to the issues raised by the evidence, including lesser included offenses, even absent a request. (*People v. Smith* (2013) 57 Cal.4th 232, 239.) Instruction on a lesser included offense is required when there is evidence the defendant is guilty of the lesser offense, but not the greater. (*People v. Whalen* (2013) 56 Cal.4th 1, 68.) "[W]ithout the consent of the prosecutor, a court has no obligation to instruct on *lesser related* offenses, which are not *necessarily included* in a charged crime." (*People v. Wolfe* (2018) 20 Cal.App.5th 673, 684.) We independently review the question of whether the trial court erred by failing to instruct on a lesser included offense. (*People v. Nelson* (2016) 1 Cal.5th 513, 538; *People v. Trujeque* (2015) 61 Cal.4th 227, 271.)

"For purposes of determining a trial court's instructional duties," our Supreme Court has said "that 'a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. [Citation.]' " (*People v. Smith*, *supra*, 57 Cal.4th at p. 240.) When applying the accusatory pleading

test, a court looks to whether the charging allegations include language describing the charged offense in such a way that, if committed as alleged, the greater necessarily subsumes a lesser offense. (*People v. Alarcon* (2012) 210 Cal.App.4th 432, 436 (*Alarcon*); *People v. Banks* (2014) 59 Cal.4th 1113, 1160, disapproved on another ground by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3; *People v. James* (2014) 230 Cal.App.4th 1256, 1260.)

Under the elements test, assault with a firearm or a deadly weapon is not a lesser included offense of attempted murder, because attempted murder can be committed without using a firearm. (*People v. Nelson* (2011) 51 Cal.4th 198, 215; *People v. Parks* (2004) 118 Cal.App.4th 1, 6; *People v. Richmond* (1991) 2 Cal.App.4th 610, 616.) The same is true as to shooting at an occupied motor vehicle in violation of section 246. The elements of shooting at an occupied motor vehicle include, as one would expect, that the defendant fired a gun at an occupied motor vehicle. (See § 246; *People v. Manzo* (2012) 53 Cal.4th 880, 885; CALCRIM No. 965.) The elements of the greater offense, attempted murder, do not include all the elements of the lesser offense because attempted murder does not have to be committed by shooting at a vehicle. (See CALCRIM No. 520 [to prove murder, the People must show the defendant "committed an act that caused the death" of another].) Arteaga does not appear to dispute that the crimes were not lesser included offenses under the elements test.

The same result obtains under the accusatory pleading test. Counts 1 and 2 of the information do not mention either use of a firearm or shooting at a vehicle, but state the defendants "unlawfully and with malice aforethought attempt[ed]" to murder

the victims. Thus, the crimes are not alleged in such a way as to make assault with a firearm or shooting at an occupied motor vehicle lesser included offenses.

Arteaga argues that shooting at an occupied motor vehicle and assault with a firearm were nonetheless lesser included offenses under the accusatory pleading test because the information alleged section 12022.53 firearm enhancements, that is, that he personally and intentionally used and discharged a firearm in the commission of the attempted murders. But it has long been held that firearm use enhancements may not be considered when determining whether an offense is necessarily included under the accusatory pleading test. (*People v. Wolcott* (1983) 34 Cal.3d 92, 101; *People v. Sloan* (2007) 42 Cal.4th 110, 113–114; *People v. Parks*, *supra*, 118 Cal.App.4th at p. 6.) *People v. Wolcott* held that a firearm use enhancement was not part of the accusatory pleading for purposes of defining a lesser included offense. (*People v. Wolcott*, at pp. 96, 100–101.) The enhancement statute did not define a new offense, but merely prescribed additional punishment for an offense in which a firearm is used. (*Id.* at p. 100.) *People v. Wolcott* reasoned that treating the enhancement allegation as part of the accusatory pleading for the purpose of defining a lesser included offense would "confuse the criminal trial" and muddle established trial and sentencing procedures. (*Id.* at p. 101.)

Arteaga argues that *People v. Wolcott* is no longer good law in light of *Apprendi v. New Jersey* (2000) 530 U.S. 466.[5] In *Apprendi*, the United States Supreme Court held that other than

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[5] Arteaga acknowledges that *Wolcott*'s holding has been reaffirmed subsequent to *Apprendi*, and avers that he raises the issue to preserve it for federal review.

the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. (*Id.* at p. 490.) In this context, the high court held that "when the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." (*Id.* at p. 494, fn. 19.) Arteaga argues that *Apprendi* and its progeny "eliminated any distinction between elements of a crime and conduct enhancements," and the firearm allegation "should be considered an element of attempted murder . . . for purpose[s] of determining what lesser included offenses were raised by the evidence."

Arteaga's argument mixes apples and oranges. *Apprendi* requires that a jury find true any fact that increases the defendant's sentence. The jury fulfilled that requirement here: it specifically found both the firearm and the gang enhancements true. Nothing in *Apprendi*'s " 'narrow holding' " (*People v. Contreras* (2013) 58 Cal.4th 123, 149) suggests it applies to the wholly distinct question of instruction on lesser included offenses, which is a matter of California law alone. (*Alarcon*, *supra*, 210 Cal.App.4th at p. 438.)

Indeed, Arteaga's argument has been rejected by our colleagues in Division Four in *Alarcon*. *Alarcon* considered the effect of *Apprendi* and a subsequent California Supreme Court decision, *People v. Seel* (2004) 34 Cal.4th 535 (*Seel*). *Seel* held that double jeopardy principles barred retrial of a premeditation and deliberation allegation that had been reversed for lack of substantial evidence. *Seel* reasoned that under *Apprendi*, the premeditation allegation constituted an element of the offense for

purposes of the state and federal double jeopardy clauses. (*Seel*, at pp. 539, 541.) However, as noted by the court in *Alarcon*, after *Seel*, our California Supreme Court "affirmed the vitality of *Wolcott* and the limited scope of *Apprendi*" in three cases. (*Alarcon*, *supra*, 210 Cal.App.4th at p. 437.) *People v. Sloan*, *supra*, 42 Cal.4th 110, held that enhancements may not be considered in determining whether an offense is necessarily included within another crime, for purposes of the rule prohibiting multiple convictions based on necessarily included offenses. (*Id.* at pp. 114, 122–123.) *People v. Izaguirre* (2007) 42 Cal.4th 126, held *Apprendi* did not mandate that enhancement allegations are subject to being struck under the multiple conviction rule. (*People v. Izaguirre*, at pp. 130–134.) And in *Porter v. Superior Court* (2009) 47 Cal.4th 125, the court "underscored its rejection of 'the notion that the high court's "functional equivalent" statement requires us to treat penalty allegations as if they were actual elements of offenses for all purposes under state law.' " (*Alarcon*, at pp. 437–438, citing *Porter v. Superior Court*, at p. 137.) Thus, *Alarcon* reasoned that neither *Apprendi* nor *Seel* undermined *Wolcott*, and "*Wolcott* controls the application of the instructional rule, insofar as the rule relies on the accusatory pleading test." (*Alarcon*, at p. 439.) We agree with *Alarcon*'s reasoning, and adopt it here.

Arteaga also contends that "[t]he equal protection clause . . . requires that the accusatory pleading test consider conduct enhancements." He argues that a defendant who is charged with a substantive crime is similarly situated to a defendant who is charged with a substantive crime and an enhancement, but the former is entitled to instructions on a lesser included offense, whereas the latter is not.

Arteaga's argument misses the mark. "The concept of equal treatment under the laws means that persons similarly situated regarding the legitimate purpose of the law should receive like treatment. [Citation.] ' "The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged." ' [Citations.]" (*People v. Morales* (2016) 63 Cal.4th 399, 408, italics omitted; *People v. Mora* (2013) 214 Cal.App.4th 1477, 1483.)

Arteaga fails to demonstrate that the state has adopted a classification that affects similarly situated groups in an unequal manner. *People v. Wolfe*, *supra*, 20 Cal.App.5th 673 recently rejected a similar contention. There, the defendant, while driving under the influence, killed a pedestrian, and was charged with murder on an implied malice theory. The defendant requested that the jury be instructed on involuntary or vehicular manslaughter as lesser included offenses, arguing that it should have the option of convicting of a lesser crime than murder. (*Id.* at p. 685.) The trial court denied the request because involuntary and vehicular manslaughter were not lesser included offenses. (*Id.* at pp. 685–686.) On appeal from her murder conviction, the defendant argued the jury's "all-or-nothing choice" between murder and acquittal violated her right to equal protection; had she committed a homicide by a means other than a vehicle, an instruction on a lesser included offense would have been given and the jury would have had a choice between murder, manslaughter, and acquittal. (*Id.* at p. 686.)

Rejecting this contention, *People v. Wolfe* explained the defendant's argument was "base[d] . . . on a faulty premise." (20 Cal.App.5th at p. 687.) Not all defendants accused of implied malice murder by means other than a vehicle are entitled to a lesser included offense instruction: for example, no such instruction is required when unsupported by the evidence. (*Ibid.*) In such a case, a jury is presented with the same all-or-nothing choice, regardless of the instrumentality of the crime. (*Id.* at p. 688.) Thus, defendant failed to establish the threshold requirement of disparate treatment. Further, *People v. Wolfe* concluded there was no fundamental right to lesser included offense instructions, and there was a rational basis for the charging scheme. (*Id.* at pp. 688–690.) " '[N]either the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor's discretion in charging under one such statute and not the other, violates equal protection principles.' [Citation.] . . . '[N]umerous factors properly may enter into a prosecutor's decision to charge under one statute and not another . . . and so long as there is no showing that a defendant "has been singled out deliberately for prosecution on the basis of some invidious criterion," . . . the defendant cannot make out an equal protection violation. [Citation.]' [Citation.]" (*Id.* at pp. 689–690, citing *People v. Wilkinson* (2004) 33 Cal.4th 821, 838–839.)

The same is true here. A lesser included offense instruction may be given only when there is substantial evidence in support of it; thus, not all defendants who are charged with attempted murder, but not enhancements, are entitled to lesser included offense instructions. Arteaga has therefore failed to establish disparate treatment. Moreover, a person who commits

attempted murder by means of an instrumentality other than a firearm is not similarly situated to a person who commits attempted murder by means of a firearm. There is a rational basis for treating gun use differently: the Legislature could reasonably find such persons present a greater danger to society. In sum, Arteaga's equal protection challenge lacks merit. (*People v. Wolfe*, *supra*, 20 Cal.App.5th at p. 690.)

Because we conclude the trial court did not err, we do not reach the People's argument that there was insubstantial evidence to support the requested instructions, and the parties' arguments regarding prejudice.

2. *The matter must be remanded to allow the trial court the opportunity to exercise its discretion pursuant to amended section 12022.53*

When the trial court sentenced Arteaga in August of 2017, imposition of a section 12022.53 firearm enhancement was mandatory and the trial court lacked discretion to strike it. (See *People v. Franklin* (2016) 63 Cal.4th 261, 273; *People v. Kim* (2011) 193 Cal.App.4th 1355, 1362–1363.) Thus, on count 1, the attempted murder of Eduardo, the trial court sentenced Arteaga to a consecutive term of 20 years for his use of a firearm. (§ 12022.53, subd. (c).)

Effective January 1, 2018, the Legislature amended section 12022.53, subdivision (h) to give trial courts authority to strike section 12022.53 firearm enhancements in the interest of justice. (Sen. Bill No. 620 (2017–2018 Reg. Sess.), Stats. 2017, ch. 682, § 2.)[6] Arteaga contends his case must be remanded to allow the

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[6] As amended, section 12022.53, subdivision (h) provides: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an

trial court to exercise its discretion to strike the firearm enhancements, and the People agree. The parties are correct. The amendment to section 12022.53 applies to cases, such as appellant's, that were not final when the amendment became operative. (*People v. Watts* (2018) 22 Cal.App.5th 102, 119; *People v. Arredondo* (2018) 21 Cal.App.5th 493, 507; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090–1091; *People v. Brown* (2012) 54 Cal.4th 314, 323; *People v. Vieira* (2005) 35 Cal.4th 264, 305–306; *People v. Nasalga* (1996) 12 Cal.4th 784, 792; *In re Estrada* (1965) 63 Cal.2d 740, 745.) Remand is necessary to allow the trial court an opportunity to exercise its sentencing discretion under the amended statute. (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391; *People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) We express no opinion about how the court's discretion should be exercised.

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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."

DISPOSITION

The sentence is vacated and the matter is remanded to allow the trial court to exercise its discretion and determine whether to strike or dismiss the section 12022.53 firearm enhancements pursuant to section 12022.53, subdivision (h). The judgment of conviction is otherwise affirmed.

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EDMON, P. J.

We concur:

LAVIN, J.

EGERTON, J.