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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. DANIEL JOSUE RAMIREZ, Defendant and Appellant.	B270205 (Los Angeles County Super. Ct. No. KA102395)

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

Jennifer A. Mannix, 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, Shawn McGahey Webb, Scott A. Taryle and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

Daniel Josue Ramirez was convicted by jury on one count of second degree murder. The jury also found true gun and gang allegations. Appellant contends his confrontation clause rights were violated under *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). He also challenges the jury instruction on involuntary manslaughter and the failure to instruct on voluntary intoxication. Appellant also contends his sentence of 40 years to life violates the Eighth Amendment's proscription against cruel and unusual punishment. We affirm the conviction but remand for the trial court to hold a hearing pursuant to *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*).

FACTUAL AND PROCEDURAL BACKGROUND

I. *Prosecution Evidence*

The Shooting

In February 2013 appellant lived in La Puente with his parents and three brothers. Appellant was 17 years old at the time. Late in the evening of February 9, 2013, appellant was at home drinking with his brother Pedro and his friend Brian.[1] When Pedro decided to go to sleep around 5:00 a.m., he was intoxicated. He told appellant, who had fallen asleep in Pedro's bed, to get out of the bed. Pedro fell asleep and was still intoxicated when he woke up later that morning.

When Pedro woke up he was alone in the bedroom. He got out of bed and went to the kitchen to check the house's security cameras,

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[1] Because of several common last names, we will refer to the victim and some of the witnesses by their first names.

which was his habit. As Pedro walked into the kitchen, he saw an unknown person leaving the house.

At trial, Pedro testified that he did not know who the person was. However, in his police interview on February 10, 2013, Pedro said that he saw appellant run out of the kitchen and go down the driveway to the street. A portion of the recording of his interview was played at trial.

Pedro looked in the living room and saw someone lying on the floor in a fetal position. Pedro initially did not recognize the person, who subsequently was identified as Christopher Ramirez. At first Pedro thought Christopher was sleeping, but then he saw blood. Pedro did not have a phone, so he drove to a store where his brother Eric worked, to get Eric's cell phone to call 911.

After getting Eric's phone, Pedro drove back to the house, calling 911 along the way. Pedro explained that there was someone bleeding in his house and that he did not know if the victim had been stabbed or shot. The 911 dispatcher told Pedro to place his hand on the victim's stomach to see if he was breathing. Pedro moved Christopher and determined that he was not breathing. Pedro went outside when law enforcement arrived.

Los Angeles County Sheriff's Deputy Andrew Cruz arrived around 11:30 a.m. and saw Pedro emerge from the house. Deputy Cruz described Pedro as "startled" and "visibly shaken." When Deputy Cruz saw the victim on the floor, he believed he was dead. An autopsy revealed that Christopher was killed by a single gunshot wound to the head. The bullet entered "at the back of the head towards the top of the

head on the right side" and went from the right side of his head to his left.

Post-Shooting Events

Detective Philip Guzman interviewed Alejandro Alvarado after the shooting. Alejandro went to high school with Christopher and appellant and was friends with both of them. At trial, Alejandro was a reluctant witness. He denied having spoken with any detectives, but a portion of the recording of his interview with Detective Guzman was played at trial.

Alejandro told Detective Guzman that appellant came to his house on the night of February 10. Appellant was frightened, shaking and crying, and he smelled like urine and vomit. Appellant was afraid to tell Alejandro what was wrong, stating that he had "fucked up" and done "something bad," and that his friends would never see him again. Alejandro asked appellant what he had done, but appellant would not tell him. Alejandro thought appellant might have killed someone because appellant said "that he was going to go to hell." Alejandro thought appellant was on drugs because of the appearance of his eyes. After staying for a few hours, appellant walked outside to a car that arrived to pick him up, and he left.

Alann Avila was friends with Christopher, Alejandro, and appellant. Avila went to Alejandro's house sometime after appellant arrived, and the three of them were sitting in Alejandro's room. Alejandro left the room at some point, leaving Avila alone with appellant, who was "acting crazy." Appellant told Avila that he had

shot someone in the head, saying something about a "duck." Avila testified that "duck" was a derogatory term for the East Side Dukes gang used by rival gang members. Appellant also told Avila that he used a .38 caliber revolver. Appellant smelled like urine, and he told Avila he had urinated on his hands to try to remove gunshot residue. Appellant had a bag containing clothes that he said he needed to get rid of.

Iris Alvarado testified that she, appellant, Christopher, and Christopher's girlfriend were friends who socialized together before the shooting. She was not aware of any problems between Christopher and appellant prior to the shooting and therefore was surprised by the incident. About two weeks before the shooting, appellant told Iris that he had bought a gun "for protection." A few days after the shooting, Iris sent appellant a message on Facebook saying, "that's fucked up what you did . . . we all called you our homie and your fucken [*sic*] dumbass goes ahead and does that shit to your own 'homie.' . . . karmas a fucken bitch Danny keep that shit in your head." Iris testified that her message was referring to appellant shooting Christopher. Appellant responded, "LHG all day bitch ima kill you tyo [*sic*] bitch fuk u."

Gang Expert Testimony

Detective Armando Orellana testified as a gang expert, but he had no personal knowledge of appellant or Christopher. He was familiar with two rival gangs in the area of the shooting: the Little Hill Gang and the East Side Dukes. The parties stipulated that both gangs were

criminal street gangs within the meaning of Penal Code section 186.22.[2] The activities of the Little Hill Gang included taxing local vendors, tagging walls, assaults, robberies, and murder.

Detective Orellana testified that tagging crews were not "seen as actual gang members," but that they were beginning to act more like gangs. He stated that street gangs recruited tagging crew members into their gangs. He was familiar with a tagging crew called the Nasty Habits Crew. The East Side Dukes recruited members of this crew into their gang. Detective Orellana testified that other deputies had told him that Christopher was a member of the Nasty Habits Crew. Defense counsel objected on hearsay grounds, but the court overruled the objection.

Detective Orellana also testified about a photograph of appellant and two other people submitted into evidence by the prosecution. According to Detective Orellana, the people in the photograph were using their arms to form the letters "L," "H," and possibly "G," which stood for the Little Hill Gang. Detective Orellana had seen members of that gang making similar motions with their arms before. He testified that "duck" was a "disrespectful term used towards an East Side Duke gang member." After hearing a hypothetical based on the facts of this case, Detective Orellana opined that the crime was committed for the benefit of the Little Hill Gang.

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[2] Further unspecified statutory references are to the Penal Code.

II. *Defense Evidence*

Appellant testified on his own behalf. He had been friends with Christopher since 2010 and had not seen him since 2011 before the shooting.

In the early morning on February 10, 2013, appellant was at home with his brother and his friend Brian. Appellant was intoxicated and on drugs at the time. Appellant admitted that he was a member of the Little Hill Gang, but at the time of the shooting, he had been "calming down" and not "doing much at all" with the gang. He fell asleep on his brother's bed until around 7:00 a.m., when his brother woke him up. Appellant moved to the living room and slept on the couch until he was awakened by a knock on the door around 10:00 a.m. He checked the security cameras and opened the door and was happy and surprised to see Christopher, whom he had not seen in a while. Christopher was not a gang member.

Christopher told appellant he had come to get Brian's phone. Appellant told Christopher he had a new gun, which he had bought for his protection because he lived in "the heart of" the territory of Puente, a rival gang. Appellant brought his gun from his bedroom to the living room to show Christopher, who examined it and said it "looks nice." Appellant took the gun back from Christopher and was "fidgeting" with it and talking to Christopher about smoking marijuana when the gun accidentally went off, striking Christopher. Appellant was standing at the time, and Christopher was sitting on the couch to his left. Appellant did not notice that the hammer of the gun had been cocked back. He thought that Christopher must have cocked it while he was

playing with it. Christopher groaned, grabbed his head, and fell to the floor. Appellant thought Christopher was playing, so he got on the floor next to him and told him to get up. He did not intend to shoot Christopher and reiterated his testimony that the gun went off accidentally.

When appellant realized Christopher was not joking, he panicked and left the house. He was afraid the police would not believe him and would "give [him] life in prison." He threw the gun away, took a bus to the Valley Inn in El Monte, and called a friend to pick him up. He stayed at his friend's house in Fontana until March 13, when he was arrested.

Appellant stated that when he sent the Facebook message to Iris, he was drunk and upset by the tone of her message because she accused him of killing Christopher intentionally. He thought that her statement, "karma is a bitch," was a threat to have someone kill him. He acknowledged that his reply to her, "L.H.G. all day," was a reference to the Little Hill Gang.

Appellant denied going to Alejandro's house and speaking with Alejandro and Avila. He stated that he was at the Valley Inn at the time, waiting for his friend to pick him up.

III. *Procedural Background*

An April 9, 2014 information charged appellant with one count of murder and alleged that appellant personally and intentionally discharged a firearm, causing death. (§§ 187, subd. (a), 12022.53.) The information further alleged that the offense was punishable in state

prison for life, causing the sentence to be subject to the gang enhancement found in section 186.22, subdivision (b)(5).

The jury found appellant guilty of second degree murder and found true the allegations that he personally and intentionally discharged a firearm and committed the offense for the benefit of a criminal street gang. The trial court sentenced appellant to a term of 15 years to life, plus 25 years to life for the firearm enhancement, for a total term of 40 years to life. The court imposed and struck a 10-year term for the gang enhancement. Appellant timely appealed.

DISCUSSION

I. *Hearsay and Confrontation Clause*[3]

Appellant contends his confrontation rights were violated pursuant to *Sanchez*, which held that state hearsay law permits an expert witness to refer generally to hearsay sources of information as a basis for the expert's opinion, but precludes experts from "rely[ing] on case-specific hearsay to support their trial testimony. [Citation.]"

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[3] Respondent contends that appellant forfeited his confrontation clause claims by failing to object on this ground at trial. (See *People v. Dykes* (2009) 46 Cal.4th 731, 756 [citing "the general rule that trial counsel's failure to object to claimed evidentiary error on the same ground asserted on appeal results in a forfeiture of the issue on appeal"].) However, "[a]ny objection would likely have been futile because the trial court was bound to follow pre-*Sanchez* decisions holding expert 'basis' evidence does not violate the confrontation clause." (*People v. Meraz* (2016) 6 Cal.App.5th 1162, 1170, fn. 7 (*Meraz*), review granted March 22, 2017, S239442, opn. ordered to remain precedential.) Accordingly, we consider appellant's confrontation clause claim.

(*People v. Williams* (2016) 1 Cal.5th 1166, 1200.) "'Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried.' [Citation.]" (*People v. Burroughs* (2016) 6 Cal.App.5th 378, 406.)

Sanchez "adopt[ed] the following rule: When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. omitted.) Thus, "a court addressing the admissibility of out-of-court statements must engage in a two-step analysis. The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* [*v. Washington* (2004) 541 U.S. 36] limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is *testimonial hearsay*, as the high court defines that term." (*Id.* at p. 680.)

Appellant contends that Detective Orellano's testimony regarding Christopher's membership in the New Habits Crew constituted case-specific testimonial hearsay in violation of *Sanchez*. We agree that Detective Orellano's testimony violated *Sanchez*. However, the error was harmless.

Detective Orellano acknowledged that he did not have personal knowledge of Christopher's membership in the New Habits Crew but instead learned about it by speaking to other deputies. Christopher's membership in a tagging crew is case-specific information because it "relate[s] '*to the particular events and participants* alleged to have been involved in the case being tried' . . . . [Citation.]" (*Meraz*, *supra*, 6 Cal.App.5th at pp. 1174–1175.) Moreover, his membership in a tagging crew that may lead to membership in the East Side Dukes, a rival gang to appellant's gang, "could be relevant to the . . . motive and gang enhancements in this case. [Citation.]" (*Id.* at p. 1176.) The testimony was offered to prove the truth of the fact it asserts, and there was no showing of unavailability or forfeiture of the right to cross-examination. (*Sanchez*, *supra*, 63 Cal.4th at pp. 680, 686.) The testimony thus constitutes testimonial hearsay in violation of the confrontation clause. (*Id.* at p. 686.)

Nonetheless, we conclude that the admission of the testimony constituted harmless error. (See *Sanchez*, *supra*, 63 Cal.4th at p. 698 [applying harmless error analysis to the confrontation clause violation]; *Meraz*, *supra*, 6 Cal.App.5th at pp. 1176-1177 [same].) The finding that appellant committed the offense for the benefit of the Little Hill Gang is

supported by evidence other than Detective Orellano's testimony. In his trial testimony, appellant admitted being a member of the Little Hill Gang. The prosecution also submitted into evidence a photograph of appellant and two other people forming letters that stood for the Little Hill Gang. Avila testified that appellant said he had shot a "duck," which Avila understood to be a derogatory term for an East Side Dukes gang member. Iris testified that appellant wrote in a Facebook message, "LHG all day bitch ima kill you t[o]o," and a picture of the message was admitted into evidence. The admission of Detective Orellano's testimony about Christopher's membership in the tagging crew was harmless beyond a reasonable doubt.

II. *Jury Instruction on Involuntary Manslaughter*

Appellant contends the jury instruction on involuntary manslaughter erroneously failed to take into account his age and inexperience in handling the gun and that his trial counsel rendered ineffective assistance by failing to request such an amplification of the instruction. We disagree.

The trial court instructed the jury as follows on involuntary manslaughter pursuant to CALJIC No. 8.45: "Every person who unlawfully kills a human being, without malice aforethought, and without an intent to kill, and without conscious disregard for human life, is guilty of the crime of involuntary manslaughter in violation of Penal Code section 192, subdivision (b). [¶] A killing in conscious disregard for human life occurs when a killing results from an intentional act, the natural consequences of which are dangerous to life,

which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for human life. [¶] A killing is unlawful within the meaning of this instruction if it occurred: [¶] In the commission of an act, ordinarily lawful, which involves a high degree of risk of death or great bodily harm, without due caution and circumspection. [¶] The commission of an unlawful act, without due caution and circumspection, would necessarily be an act that was dangerous to human life in its commission. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A human being was killed; and [¶] 2. The killing was unlawful."

The court also instructed the jury on due caution and circumspection pursuant to CALJIC No. 8.46: "The term 'without due caution and circumspection' refers to a negligent act which is aggravated, reckless and flagrant and which is such a departure from what would be the conduct of an ordinarily prudent, careful person under the same circumstances as to be in disregard for human life, or an indifference to the consequences of such act. The facts must be such that the consequences of the negligent act[s] could reasonably have been foreseen. It must also appear that the death was not the result of inattention, mistaken judgment or misadventure, but the natural and probable result of an aggravated, reckless or grossly negligent act. [¶] In determining whether a result is natural and probable, you must apply an objective test. It is not what the defendant actually intended, but what a person of reasonable and ordinary prudence would have expected likely to occur. The issue must be decided in light of all the

circumstances surrounding the incident. A 'natural' result is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. 'Probable' means likely to happen." Appellant contends that, rather than being held to the standard of "a person of reasonable and ordinary prudence," he should have been held to the standard of "a reasonable person of like age, intelligence, experience, and prudence."

"A criminal defendant has a right to accurate instructions on the elements of a charged crime. [Citation.] 'We determine whether a jury instruction correctly states the law under the independent or de novo standard of review. [Citation.] Review of the adequacy of instructions is based on whether the trial court "fully and fairly instructed on the applicable law." [Citation.] . . . "Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation." [Citation.]' [Citation.]" (*People v. Spaccia* (2017) 12 Cal.App.5th 1278, 1287.)

The jury instructions accurately instructed the jury on the elements of the offense. Even if the instructions were not accurate, appellant "did not ask the trial court to clarify or amplify the instruction." (*People v. Cole* (2004) 33 Cal.4th 1158, 1211.) "A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language. [Citation.]" (*People v. Lang* (1989) 49 Cal.3d 991, 1024.)

Appellant relies on *People v. Mathews* (1994) 25 Cal.App.4th 89, which reversed a conviction for assault on a peace officer. The court

held that the trial court erroneously refused to instruct on the defense theory that the defendant "was held to the standard of a reasonable person with a similar physical disability in deciding whether he reasonably should have known that he was in the presence of a peace officer." (*Id.* at p. 93.) The defendant in *Mathews*, who was elderly, blind, and hearing impaired, testified that he thought that police officers, who forced entry into his home with a battering ram, were intruders because he did not hear their announcements that they were from the police department. The trial court refused his request for an instruction that the jury take into account his sensory impairments in determining whether he reasonably should have known the intruders were police officers. The appellate court reasoned that it made "no sense, either in law or logic, to hold [the defendant] to the standard of a reasonable person *with* normal eyesight and hearing," pointing out that "[w]hat is 'apparent' to a reasonable person who can see and hear is not 'apparent' to a person who is blind and hearing impaired." (*Id.* at pp. 99-100.)

Unlike *Mathews*, appellant here did not request that the trial court give a special instruction about his age or inexperience with a gun. Nor did appellant introduce any evidence about his age or inexperience with guns. In fact, on cross-examination, he testified about the gun in a manner that did not indicate any inexperience with guns. By contrast, the defendant in *Mathews* testified that, because of his sensory impairments, "he had no idea that the intruders [entering his home] were police officers." (*Mathews*, *supra*, 25 Cal.App.4th at p. 94.) This evidence thus was key to his defense and a "'central issue'" on

appeal. (*Id.* at p. 94, fn. 1.) In *Mathews*, the People even conceded that "'the entire case was about'" the defendant's disabilities. (*Id.* at p. 99.) Here, appellant's age and inexperience with guns was not at issue.

We conclude that appellant forfeited the right to request an instruction regarding his age and inexperience. We further conclude that appellant has failed to establish ineffective assistance of counsel for the failure to request such an instruction.

"The standard for showing ineffective assistance of counsel is well settled. 'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.] A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel. [Citations.] If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.] Otherwise, the claim is more appropriately raised in a petition for writ of habeas corpus.' [Citation.]" (*People v. Gray* (2005) 37 Cal.4th 168, 206-207 (*Gray*).) "Further, 'a court need not determine whether counsel's performance was deficient

before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.' [Citation.]" (*People v. Carrasco* (2014) 59 Cal.4th 924, 982.)

"To succeed on his claim of ineffective assistance of counsel, defendant would have to show that his '(1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings.' [Citation.]" (*People v. Richardson* (2007) 156 Cal.App.4th 574, 596 (*Richardson*).)

Appellant's ineffective assistance claim must be rejected because the record on appeal does not reveal why trial counsel did not request an amplification of the jury instruction. (See *Gray*, *supra*, 37 Cal.4th at p. 207.) Nor was trial counsel asked for an explanation. (See *ibid.*) Moreover, as discussed above, the jury instruction correctly stated the relevant law, and there was no evidence of appellant's inexperience with guns. Therefore there was a "'satisfactory explanation'" for trial counsel's decision not to request an amplification of the jury instruction. (*Ibid.*)

Moreover, on this record, it is not reasonably probable that if counsel had requested such an instruction, and one had been given, a different result would have been reached. In finding the section 12022.53, subdivision (d) enhancement true, the jury found that appellant intentionally discharged a firearm causing death. In finding

the section 186.22, subdivision (b)(5) allegation true, the jury concluded that he intentionally committed the murder for the benefit of a criminal street gang. Given these findings, which are fatally inconsistent with any notion that appellant accidentally discharged the firearm, it is not reasonably probable that had an instruction on appellant's inexperience with guns been given, the jury would have returned any verdict other than murder.

III. *Jury Instruction on Voluntary Intoxication*

Appellant contends that defense counsel rendered ineffective assistance by failing to request a jury instruction on the defense theory of voluntary intoxication. Several witnesses testified that appellant was intoxicated or under the influence of drugs. First, Pedro testified that he, appellant, and Brian drank beer until the early morning. Second, Alejandro told Detective Guzman that when appellant came to his house after the shooting, appellant appeared to be on drugs. Finally, appellant testified that he was intoxicated and had taken drugs and smoked marijuana prior to the shooting.

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Former section 22[4] "often comes into play in a homicide case when an offender accused of murder or manslaughter was voluntarily intoxicated. Initially enacted in 1872, [former] section 22 sets forth the general principle in this state that a criminal act is not rendered less criminal because a person commits the act in a state of voluntary intoxication. Evidence of voluntary intoxication is not allowed to negate the capacity to form any mental states for the crimes charged. However, such evidence is admissible on the issue of whether the defendant *actually* formed a required specific intent or, with respect to a charge of murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought. [Citation.]" (*People v. Timms* (2007) 151 Cal.App.4th 1292, 1296–1297, fn. omitted.) "A defendant is entitled to such an instruction only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's 'actual formation of specific intent.' [Citations.]" (*People v. Williams* (1997) 16 Cal.4th 635, 677.)

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[4] "Penal Code former section 22 was renumbered section 29.4 without substantive change. [Citation.]" (*People v. Soto* (2016) 248 Cal.App.4th 884, 896, fn. 5 (*Soto*).) Section 29.4 provides in pertinent part: "(a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. [¶] (b) Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought."

"[A]bsent a defense request, the trial court had no duty to instruct on voluntary intoxication. [Citations.]" (*People v. Myles* (2012) 53 Cal.4th 1181, 1217 (*Myles*).) Appellant therefore makes only a claim of ineffective assistance of counsel for trial counsel's failure to request such an instruction. Appellant's ineffective assistance claim fails for several reasons.

First, we must reject appellant's ineffective assistance claim because the record on appeal sheds no light on trial counsel's decision not to request a voluntary intoxication instruction. (See *Gray*, *supra*, 37 Cal.4th at p. 207.) Second, although there was evidence that appellant had been drinking prior to the shooting, "there was no substantial evidence . . . that intoxication affected his ability to 'actually form[] a required specific intent.' [Citations.]" (*Myles*, *supra*, 53 Cal.4th at p. 1217.) To the contrary, appellant submitted no evidence that intoxication affected his ability to form a specific intent. Instead, his defense was that the gun went off accidentally because he did not notice that the hammer had been cocked back. He did not offer any evidence that his intoxication affected him. Finally, "[t]he California Supreme Court has held that instructional error restricting a jury's consideration of voluntary intoxication amounts to state law error only. [Citation.]" (*Soto*, *supra*, 248 Cal.App.4th at p. 901.) Thus, even if the jury should have received a voluntary intoxication instruction, appellant's ineffective assistance claim would fail because he has failed to show a reasonable probability of a more favorable result had the jury been so instructed. (*Id.* at pp. 901-902; *Richardson*, *supra*, 156 Cal.App.4th at p. 596.) Appellant's contentions that he did not hold anything against

Christopher and that the gun went off accidentally are incompatible with his statement to Avila that he had shot a "duck" and his message to Iris, naming his gang and threatening to kill her. We find no error, but even if there was error, "it is not reasonably probable the error "'affected the verdict adversely to [appellant].'" [Citation.]" (*Soto*, *supra*, 248 Cal.App.4th at p. 903.)

Appellant relies on *People v. Saille* (1991) 54 Cal.3d 1103, in which the supreme court addressed "an amendment to the definition of malice in section 188. The *Saille* court concluded that the law no longer 'permits a reduction of what would otherwise be murder to nonstatutory voluntary manslaughter due to voluntary intoxication . . . .' [Citation.]" (*People v. Turk* (2008) 164 Cal.App.4th 1361, 1373–1374 (*Turk*), fn. omitted.) *Saille* and *Turk* do not help appellant because these cases merely set forth the basic principles regarding the voluntary intoxication defense. (See *Turk*, *supra*, 164 Cal.App.4th at pp. 1376–1377 ["To the extent that a defendant who is voluntarily intoxicated unlawfully kills with implied malice, the defendant would be guilty of second degree murder."].)

IV. *Sentencing*

Appellant contends that his sentence of 40 years to life is the functional equivalent of life without the possibility of parole (LWOP) and consequently violates the federal constitutional proscription against cruel and unusual punishment. We disagree.

"Over the past several years, the United States Supreme Court has addressed the constitutional limits of punishment for a juvenile's criminal offenses." (*People v. Watson* (2017) 8 Cal.App.5th 496, 509 (*Watson*).) In *Graham v. Florida* (2010) 560 U.S. 48 (*Graham*), "the court held that the Eighth Amendment prohibits states from sentencing a juvenile convicted of nonhomicide offenses to LWOP. [Citation.]" (*Watson, supra*, 8 Cal.App.5th at p. 509.) Subsequently, in *Miller v. Alabama* (2012) 567 U.S. 460, the court held that "a mandatory sentence of life imprisonment without the possibility of parole for a juvenile convicted of murder . . . violates the Eighth Amendment. [Citation.] The *Miller* court explained that a mandatory life sentence 'precludes consideration of [the juvenile's] chronological age and its hallmark features–among them, immaturity, impetuosity, and failure to appreciate risks and consequences.' [Citation.] Although the *Miller* court did not prohibit sentencing juvenile offenders convicted of murder to life imprisonment without the possibility of parole, it held that sentencing courts must 'take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.' [Citation.]" (*People v. Jones* (2017) 7 Cal.App.5th 787, 816–817 (*Jones*).)

Our high court addressed *Graham* in *People v. Caballero* (2012) 55 Cal.4th 262, where it held that "sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes

cruel and unusual punishment in violation of the Eighth Amendment." (*Id.* at p. 268.)

"In response to *Graham*, *Miller*, and *Caballero*, the Legislature enacted section 3051, effective January 1, 2014. Section 3051 states that 'any prisoner who was under 23 years of age at the time of his or her controlling offense' shall be provided '[a] youth offender parole hearing . . . for the purpose of reviewing the [prisoner's] parole suitability . . . .' (§ 3051, subd. (a)(1).) 'A person who was convicted of a controlling offense that was committed before the person had attained 23 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing . . . .' (§ 3051, subd. (b)(3).) Section 4801 provides that the parole board 'shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.' (§ 4801, subd. (c).)

"In *Franklin*, *supra*, 63 Cal.4th 261, the California Supreme Court held that 'sections 3051 and 4801 [,] . . . enacted by the Legislature to bring juvenile sentencing in conformity with *Miller*, *Graham*, and *Caballero*,' mooted a juvenile's claim that his sentence of 50 years to life was the functional equivalent of LWOP and thus unconstitutional. [Citation.] The Supreme Court explained that, '[c]onsistent with constitutional dictates, those statutes provide [the juvenile] with the possibility of release after 25 years of imprisonment [citation] and require the [parole board] to "give great weight to the diminished

culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity.'" [Citation.] Because the enactment of the statutes meant that the juvenile was 'now serving a life sentence that includes a meaningful opportunity for release during his 25th year of incarceration,' his sentence 'is neither LWOP nor its functional equivalent' and 'no *Miller* claim arises.' [Citation.]" (*Jones*, *supra*, 7 Cal.App.5th at pp. 817-818.)

Although *Franklin* held that the juvenile's sentence was not functionally equivalent to LWOP because of the statutory enactments, the court found that it was not clear whether the juvenile "had sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing." (*Franklin*, *supra*, 63 Cal.4th at p. 284.) The court therefore remanded for the trial court to determine whether he had such opportunity and, if not, for the trial court to receive evidence, such as "documents, evaluations, or testimony" that "demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors. The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board [of Parole Hearings], years later, may properly discharge its obligation to 'give great weight to' youth-related factors (§ 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law' [citation]." (*Ibid.*; see also *Jones*, *supra*, 7 Cal.App.5th at pp. 818-819 [relying on *Franklin* to find the juvenile's

constitutional challenge to his sentence moot and to remand for a hearing].)

As in *Franklin* and *Jones*, appellant "will be entitled to a youth offender parole hearing with a meaningful opportunity for release after 25 years of incarceration. (§ 3051, subd. (b)(3).)" (*Jones*, *supra*, 7 Cal.App.5th at p. 818.) His sentence accordingly is not the functional equivalent of LWOP.

However, as in *Jones*, appellant was sentenced prior to the supreme court's decision in *Franklin*, and "neither party addressed the type of evidentiary record showing that would be required for [appellant's] youth offender parole hearing under sections 3051 and 4801." (*Jones, supra*, 7 Cal.App.5th at p. 819.) Although trial counsel here submitted letters from appellant's family members, he did not file a sentencing memorandum or offer evidence of appellant's "culpability or cognitive maturity." (*Franklin*, *supra*, 63 Cal.4th at p. 284.) "[A]s the Supreme Court explained in *Franklin*, such a record is better made close in time to the offense 'rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away.' [Citation.]" (*Jones*, *supra*, 7 Cal.App.5th at p. 819.) We therefore remand "so that the trial court can follow the procedures outlined in *Franklin* to ensure that" appellant has the opportunity "to present evidence regarding his . . . youth-related characteristics and circumstances at the time of the offense." (*Id.* at p. 820.)

DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court for a *Franklin* determination.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.