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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. STEVEN GALAVIZ, Defendant and Appellant.	B245828 (Los Angeles County Super. Ct. No. BA375313)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara R. Johnson, Judge. Affirmed as Modified.

Gordon S. Brownell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Steven Galaviz appeals from the judgment entered following his conviction on one count of first degree murder. (Pen. Code, § 187, subd. (a).)[1] Appellant contends that the trial court erred in instructing the jury and that this error violated his due process rights by lowering the prosecution's burden of proof to establish that he committed first degree murder. Appellant further contends that the trial court erroneously imposed a 10-year gang enhancement, in contravention of the California Supreme Court's decision in *People v. Lopez* (2005) 34 Cal.4th 1002 (*Lopez*). We conclude that the trial court did not err in instructing the jury. However, we conclude, and respondent concedes, that the 10-year gang enhancement was erroneously imposed pursuant to *Lopez*. We therefore modify the judgment to strike the 10-year gang enhancement under section 186.22, subdivision (b)(1)(C) and to impose in its place the 15-year minimum parole eligibility term under section 186.22, subdivision (b)(5). In all other respects, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Evidence[2]

On August 14, 2010, around 2:00 a.m., a group of approximately eight friends that included Charlotte Rodas and the victim, Rene Guardado, was gathered outside on 66th Street near Crenshaw Boulevard, talking, smoking marijuana, and drinking. They were standing near a wall in an area that was claimed by a gang known as "Florence."

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

[2] We set forth only the evidence that is pertinent to appellant's contentions on appeal.

While they were standing near the wall, a car traveled very slowly toward them and stopped where they stood. Someone in the car yelled "Fuck Florence."

The area at the wall was well-lit. Rodas focused on appellant, who was sitting in the front passenger seat of the car. She recognized appellant from a previous encounter.

Rodas was standing approximately nine feet away from the car and had an unobstructed view of appellant. She looked at him for what felt like "the longest time," but was approximately 10 seconds. She saw his facial expression change from serious to "kind of smiling," or a "smirk." Rodas felt that something bad was about to happen. Her friend, Maritza Gutierrez, saw appellant point a gun out the car window, and then Gutierrez heard gunshots.

Rodas pulled two of her friends down to the ground and heard gunshots coming from the car. Guardado was shot and killed. The car drove away.

Rodas identified appellant as the shooter in a photographic lineup and at trial. Gutierrez identified appellant in a photographic lineup as looking similar to the shooter and identified him at trial.

The prosecution presented extensive gang evidence at trial.

Defense Evidence

Three of appellant's family members testified that appellant was at home with them having a barbecue on the evening of August 13, 2010, the night of the shooting. They testified that appellant was at home, eating, watching movies, and playing video games with them throughout the evening, until midnight.

Appellant presented evidence that Gutierrez and Rodas appeared to be under the influence of alcohol when they were interviewed by the police. Appellant also

presented expert witness evidence about the uncertainties of eyewitness identification and the effects of alcohol intoxication upon eyewitness memory.

Rebuttal Evidence

On August 23, 2010, at 9:36 p.m., appellant received a text on his cell phone from one of the family members who testified. The message stated, "Where u att [*sic*]."

Procedural Background

Appellant was charged by information with one count of murder. The information also alleged that appellant personally and intentionally discharged a firearm, causing great bodily injury and death within the meaning of section 12022.53, subdivisions (b), (c), and (d), and that the offense was committed for the benefit of, at the direction of, and in association with a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(C). Appellant's first trial resulted in a mistrial after the jury indicated it was unable to reach a verdict.

On retrial, the jury found appellant guilty of first degree murder and found the special allegations to be true. The trial court sentenced appellant to 25 years to life for murder, plus 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)), plus 10 consecutive years for the gang enhancement (§ 186.22, subd. (b)(1)(C)), for a total term of 60 years to life. Appellant filed a timely notice of appeal.

DISCUSSION

I. *Jury Instructions*

Appellant contends that the trial court erred in instructing the jury that it could find appellant guilty of first degree murder even if all the jurors did not agree on the same theory of murder. We conclude that the instructions were not erroneous and that it is not reasonably likely that the jury construed the instructions in a manner violative of appellant's rights. We further conclude that, even if the instructions were erroneous, any alleged error was harmless beyond a reasonable doubt.

A. *Forfeiture Does Not Apply*

Respondent contends that appellant forfeited his challenge to the jury instructions by failing to object in the trial court. The trial court asked both parties if they had reviewed the jury instructions and if there were any changes. After some discussion, the parties agreed on the instructions. Defense counsel did not object when the court stated that CALCRIM No. 520 and No. 521 would be given. Nor did defense counsel object when the jury was instructed.

"'Generally, a party forfeits any challenge to a jury instruction that was correct in law and responsive to the evidence if the party fails to object in the trial court.' [Citation.]" (*People v. McPheeters* (2013) 218 Cal.App.4th 124, 132 (*McPheeters*).) However, where, as here, a defendant claims that "the instruction is *not* correct in law, and that it violated his federal constitutional rights . . . [the] claim need not be preserved by objection before an appellate court can address the issue." (*Ibid*.) We therefore consider appellant's challenge to the jury instructions.

B. *The Instructions Were Not Erroneous*

"We review de novo whether a jury instruction correctly states the law. [Citations.] Our task is to determine whether the trial court '"fully and fairly instructed on the applicable law." [Citation.]' [Citation.] When instructions are claimed to be conflicting or ambiguous, 'we inquire whether the jury was "reasonably likely" to have construed them in a manner that violates the defendant's rights.' [Citation.] We look to the instructions as a whole and the entire record of trial, including the arguments of counsel. [Citations.] We assume that the jurors are '"'intelligent persons and capable of understanding *and correlating* all jury instructions . . . given.'"' [Citation.] If reasonably possible, we will interpret the instructions to support the judgment rather than to defeat it. [Citation.] Instructional error affects a defendant's substantial rights if the error was prejudicial under the applicable standard for determining harmless error. [Citations.]" (*People v. Franco* (2009) 180 Cal.App.4th 713, 720 (*Franco*).)

The instructions that appellant challenges are from CALCRIM No. 520 and No. 521. The court instructed the jury pursuant to CALCRIM No. 520 as follows: "[Appellant] is charged [in Count One] with murder [in violation of Penal Code section 187]. [¶] To prove that [appellant] is guilty of this crime, the People must prove that: [¶] 1. [Appellant] committed an act that caused the death of another person; and [¶] 2. When [appellant] acted, he had a state of mind called malice aforethought. [¶] There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder. [Appellant] acted with express malice if he unlawfully intended to kill.

"[Appellant] acted with implied malice if he: [¶] 1. intentionally committed an act; [¶] 2. The natural and probable consequences of the act were dangerous to human life; [¶] 3. At the time he acted, he knew his act was

dangerous to human life; and [¶] 4. he deliberately acted with conscious disregard for human life.

"Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation of the passage of any particular period of time.

"If you decide that [appellant] committed murder, you must then decide whether it is murder of the first or second degree."

The court also instructed the jury pursuant to CALCRIM No. 521: "You may not find [appellant] guilty of first degree murder unless all of you agree that the People have proved that [appellant] committed murder. But all of you do not need to agree on the same theory.

"[Appellant] is guilty of first degree murder if the People proved that he acted willfully, deliberately, and with premeditation. [Appellant] acted willfully if he intended to kill. [Appellant] acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. [Appellant] acted with premeditation if he decided to kill before completing the act that caused death.

"The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made [rashly], impulsively, [or] without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time.

"The requirements for second degree murder based on express or implied malice are explained in CALCRIM 520, . . . First or Second Degree Murder With

Malice Aforethought. [¶] The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find [appellant] not guilty of first degree murder."

Appellant argues that these instructions erroneously allowed the jury to convict him of first degree murder even if some of the jurors believed that he was guilty only of second degree murder. He specifically cites the following excerpts as being erroneous: "If you decide that [appellant] committed murder, you must then decide whether it is murder of the first or second degree. [¶] You may not find [appellant] guilty of first degree murder unless all of you agree that the People have proved that [appellant] committed murder. But all of you do not need to agree on the same theory." He argues that the juxtaposition of these two instructions gave the jurors the impression that they could find him guilty of first degree murder even if they did not all agree that he committed first degree murder. Appellant's interpretation of the jury instructions is speculative and does not establish that it was reasonably likely that the jury construed the instructions in a manner that violated appellant's rights. (*Franco*, *supra*, 180 Cal.App.4th at p. 720.)

In considering a claim of instructional error, we are to examine the jury instructions as a whole. (*Franco*, *supra*, 180 Cal.App.4th at p. 720.) Immediately following the instructions that appellant contends were erroneous, the court correctly instructed the jury with the requisite elements of first degree murder. The instructions explained that the People needed to prove that appellant acted willfully, deliberately, and with premeditation, and explained each of these terms. Significantly, the instructions included the admonition that "The People have the burden of proving beyond a reasonable doubt that the killing was first degree

murder rather than a lesser crime. If the People have not met this burden, you must find [appellant] not guilty of first degree murder." The instructions therefore correctly set forth the requisite elements of first degree murder and the burden of proof.

Appellant is correct that the Bench Notes to CALCRIM No. 521 state that the instruction he challenges, "all of you do not need to agree on the same theory," is to be given when the prosecution alleges two or more theories for first degree murder, such as felony-murder, murder by torture, and willful, deliberate, and premeditated murder. (CALCRIM No. 521.) Here, appellant was prosecuted under only one theory of first degree murder and second degree murder. Nonetheless, as discussed above, the instructions as a whole clearly set forth the requirements for the jury to find that appellant committed first degree murder and stated that the People bore the burden of establishing that the killing was first degree murder.

Moreover, in considering a claim of instructional error, we are to consider "the entire record of trial, including the arguments of counsel. [Citations.]" (*Franco*, *supra*, 180 Cal.App.4th at p. 720.) During closing argument, the prosecutor stated, "I don't believe it's in dispute that th[e] murder was in the first degree." The prosecutor further argued that "The fact that the person, whoever did the shooting, came to that location, almost in stealth in the middle of the early morning hours, had a gun; that gun was loaded, pointed that gun out of the car, aimed it at a group of people [who were] at the location, and shot at them; that shows an intent to kill." The prosecutor's arguments thus indicate that its theory of first degree murder was based on the circumstances of the shooting.

Defense counsel's argument focused on the witnesses' identification of appellant and his alibi. Appellant's evidence focused on whether he committed the

offense and whether it was committed for the benefit of a gang. He did not dispute the circumstances of the shooting.

The record of the trial thus indicates that the issue at trial was the identification of appellant as the killer. The prosecution's theory of first degree murder was based on the circumstances of the shooting, which were not in dispute. Therefore, viewing the entire record of the trial, we conclude that the instructions were not erroneous. (See *McPheeters, supra*, 218 Cal.App.4th at p. 135 [rejecting the argument that a jury instruction on a stalking charge erroneously omitted the knowledge that the person threatened was the victim's immediate family member because, "viewing the record in light of the prosecution's actual theory," it was apparent that this requirement was not at issue during trial].)

Even if the instructions were erroneous, we conclude that the error, if any, was harmless beyond a reasonable doubt. (*McPheeters*, *supra*, 218 Cal.App.4th at p. 135.) We cannot set aside a judgment on the basis of alleged instructional error unless "it is reasonably probable that the jury would have reached a result more favorable to the appellant absent the [alleged] error. [Citations.]" (*People v. Moore* (1996) 44 Cal.App.4th 1323, 1331 (*Moore*).)

The evidence established that the car in which appellant rode traveled very slowly as it approached the victims and witnesses and then stopped in front of the group. Appellant had a gun, pointed it out the car window, and directly shot at Guardado and his friends. Before appellant fired the gun, Rodas made eye contact with appellant for approximately 10 seconds and saw his expression change from serious to "kind of smiling." The evidence clearly was sufficient to establish that appellant acted willfully, deliberately, and with premeditation in shooting at the victim and the witnesses. Therefore it is not reasonably probable that the jury

would have reached a result more favorable to appellant absent the alleged instructional error. (*Moore*, *supra*, 44 Cal.App.4th at p. 1331.)

C. *Appellant's Due Process Rights Were Not Violated*

Appellant further contends that the trial court's alleged instructional error violated his due process rights by lowering the prosecution's burden of proof. Having found no error, we reject appellant's claim.

Appellant relies on *People v. Hernandez* (2013) 217 Cal.App.4th 559 (*Hernandez*), to argue that the trial court's failure to give a unanimity instruction violated his due process rights. *Hernandez* is inapposite. There, the defendant was convicted of unlawful possession of a firearm and ammunition. The prosecution introduced evidence of two separate incidents of such possession but "never elected which acts constituted possession of the firearm and ammunition." (*Id.* at p. 568.) The appellate court explained that "[i]n California, a jury verdict in a criminal case must be unanimous. [Citation.] Thus, our Constitution requires that each individual juror be convinced, beyond a reasonable doubt, that the defendant committed the *specific* offense he is charged with. [Citation.] Therefore, when the evidence suggests more than one discrete crime, either (1) the prosecution must elect among the crimes or (2) the trial court must instruct the jury that it must unanimously agree that the defendant committed the same criminal act. [Citations.]" (*Id.* at p. 569.) The trial court's failure to give a unanimity instruction sua sponte accordingly was error. (*Id.* at p. 571.)

"A unanimity instruction is given to thwart the possibility that jurors convict a defendant based on different instances of conduct." (*Hernandez*, *supra*, 217 Cal.App.4th at p. 569.) Unlike *Hernandez*, there was only one instance of conduct

at issue here. Thus, there was no danger that the jury could have convicted appellant based on two separate incidents of conduct.

II. *Gang Enhancement*

Appellant contends that the trial court improperly imposed a consecutive 10-year sentence for the gang enhancement found true by the jury pursuant to section 186.22, subdivision (b)(1)(C). Respondent concedes the issue and states that the gang enhancement should be replaced with a 15-year minimum parole eligibility term for appellant's first-degree murder conviction. (See § 186.22, subd. (b)(5).) We agree.

"Section 186.22, subdivision (b)(1)(C) provides that if the gang enhancement is found true and the underlying felony 'is a violent felony, as defined in subdivision (c) of Section 667.5, the [defendant] shall be punished by an additional term of 10 years.'" (*People v. Williams* (2014) 227 Cal.App.4th 733, 740 (*Williams*).) However, section 186.22, subdivision (b)(5) provides, "'[A]ny person who violates this subdivision in the commission of a felony *punishable by imprisonment in the state prison for life* shall not be paroled until a minimum of 15 calendar years have been served.' (Italics added.) 'This provision establishes a 15-year minimum parole eligibility period, rather than a sentence enhancement for a particular term of years.' [Citation.]" (*Ibid.*)

In *Lopez*, the California Supreme Court held that a first degree murder committed for the benefit of a gang is not subject to the 10-year enhancement in section 186.22, subdivision (b)(1)(C), but instead is governed by the 15-year minimum parole eligibility term in section 186.22, subdivision (b)(5). (*Lopez*, *supra*, 34 Cal.4th at pp. 1006-1011.) Therefore, pursuant to *Lopez*, we will strike the 10-year gang enhancement and impose in its place a 15-year minimum parole

eligibility term under section 186.22, subdivision (b)(5). (See *id.* at p. 1011; *Williams*, *supra*, 227 Cal.App.4th at p. 745; *People v. Arauz* (2012) 210 Cal.App.4th 1394, 1405.)

DISPOSITION

The judgment is modified to strike the 10-year gang enhancement under section 186.22, subdivision (b)(1)(C) and to impose in its place the 15-year minimum parole eligibility term under section 186.22, subdivision (b)(5). The clerk of the superior court is directed to prepare an amended abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J. EDMON, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.