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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. MANUEL PENALOZA, Defendant and Appellant.	B238012 (Los Angeles County Super. Ct. No. BA318700)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alex Ricciardulli, Judge. Affirmed.

Jean Ballantine, 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, James William Bilderback II and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Manuel Penaloza appeals from the judgment entered following his convictions by jury on two counts of first degree willful, deliberate, and premeditated murder (Pen. Code, § 187, subd. (a); counts 1 & 2) with personal and intentional discharge of a firearm causing great bodily injury and death (Pen. Code, § 12022.53, subd. (d)) and a multiple-murder special-circumstance finding (Pen. Code, § 190.2, subd. (a)(3)), on count 3 – carjacking (Pen. Code, § 215, subd. (a)) with personal infliction of great bodily injury (Pen. Code, § 12022.7, subd. (a)), and on count 5 – grand theft of an automobile (Pen. Code, § 487 subd. (d)(1)). The court sentenced appellant to prison for two consecutive terms of life without the possibility of parole, plus 50 years to life, plus 12 years 8 months. We affirm the judgment.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established about 11:00 p.m. on October 27, 2006, Francisco Regalado and Joey Malta (the decedents) were at appellant's home in Highland Park. The three were friends, but appellant murdered Regalado and Malta in appellant's detached bedroom by shooting each of them once in the head, i.e., near the right eye. A dark circle around Regalado's gunshot wound was "muzzle tattooing" indicating the gun was touching, or extremely close to, Regalado's skin when appellant fired the gun. Regalado died within about three hours of the shooting.

At some point, appellant put the decedents in a car. Joanna Arellano testified she was Malta's girlfriend and had a close relationship with Regalado. Arellano had seen Regalado's car previously and had seen him drive it. Arellano identified a photograph (People's exh. No. 3) as "the picture of Regalado, Frankie's car."

About 11:30 p.m., Heidi Muenzenmayer was driving in Pasadena when she saw a Honda colliding with objects. The Honda's hood raised and the Honda was on fire. The Honda stopped and appellant climbed out one of its windows. Muenzenmayer identified photographs (People's exh. Nos. 2 & 3) as depicting the Honda. Muenzenmayer exited her car and approached appellant to help. Appellant told Muenzenmayer that he was

drunk. He then carjacked her vehicle, seriously injuring her in the process. Appellant later crashed Muenzenmayer's car into another vehicle, then left on foot. A paramedic summoned to the scene where appellant had left the Honda saw Malta and Regalado inside it. The paramedic identified a photograph (People's exhibit No. 2) as depicting the Honda. Malta was dead. Regalado was alive but later died.[1]

On or about October 27, 2006, a police officer searched appellant's bedroom. The officer had been there on many previous occasions. On or about the above date, the bedroom was unusually clean. It was freshly painted, and it had been cleaned with bleach. A window was open, a ceiling fan was operating, and a rug had been removed. The blood of Regalado and the blood of Malta were found in the bedroom.

Appellant was extradited from Mexico. On March 31, 2010, he told police the following. On the night of the shooting, appellant was paranoid and high on drugs. He felt Regalado and Malta were disrespecting him, so appellant fired two warning shots into the wall to scare them.[2] Regalado and Malta continued whispering stupid remarks. Appellant, believing they were going to kill him, shot both with a .22-caliber gun he later discarded.

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[1] The medical examiner who conducted Malta's autopsy testified Malta had additional contusions on his body, but the medical examiner did not know how those injuries were caused and denied he was able to testify they were consistent with a fight or struggle. The medical examiner who conducted Regalado's autopsy testified Regalado had additional nonfatal injuries, and that medical examiner did not offer an opinion as to how those injuries were caused. Each medical examiner testified the decedent died as a result of a gunshot wound to the head.

[2] A detective who examined the walls of the bedroom "right after" the shootings denied he had seen gunshots in the walls.

Appellant also told police the following. After the shootings, appellant cleaned his bedroom with bleach. He put the decedents in a car and stole it.[3] The lady (later identified as Muenzenmayer) was at the wrong place at the wrong time. Appellant entered her car and left. The decedents had not deserved to die, and the shootings, like the injury to Muenzenmayer, were accidents. Appellant regretted he had not shot a person named Mata. Appellant still wanted to kill Mata because Mata had said things appellant disliked.

In defense, Dr. Ronald Markman, a psychiatrist, testified appellant had a history of drug use, and such use could cause paranoia, impulsive behavior, and aggression, and could impair deliberation. Markman opined appellant's actions were premeditated but not deliberated.

ISSUES

Appellant claims (1) there is insufficient evidence of premeditation and deliberation, (2) the prosecutor committed misconduct during jury argument, and (3) there is insufficient evidence of grand theft of an automobile.

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[3] Appellant gave conflicting statements as to whether he stole the car. After appellant told police he fired two shots at the wall, the following occurred: "[Appellant:] . . . And then I shot them [unintelligible] and their attention. And they got so fucking, they got so fucking two dead bodies. . . . I just got the fuck out of there. I don't know how, how . . . [¶] [Detective:] Remember . . . putting them in the car? [¶] [Appellant:] [Unintelligible] [¶] [Detective:] Remember the car you put them into [appellant]? [¶] [Appellant:] Fucking [unintelligible] someone's car right there, yeah. [Unintelligible] fucking car. They stole the fucking car. I didn't, I didn't steal the fucking [unintelligible]. I stole it. [¶] [Detective:] It belonged to Francisco. [¶] [Appellant:] A GT or right there or . . . [¶] [Detective:] No, I don't if he took the key off . . . he wasn't alive at the time to tell you, 'no.' [¶] [Appellant:] [Unintelligible]"

DISCUSSION

1. *There Is Sufficient Evidence of Premeditation and Deliberation*.

Appellant claims there is insufficient evidence of premeditation and deliberation. We disagree. We resolve this issue based on familiar principles.[4] There is no dispute appellant murdered Regalado and Malta. The jury reasonably could have concluded as follows. Appellant, who had had a prior relationship with the decedents, was bothered by remarks they made. Both decedents were unarmed, and neither had threatened appellant or had presented legally sufficient provocation. Appellant, using a firearm in his bedroom, shot both at close range, execution-style, each one above the eye. There was no proof the nonfatal bruises to the decedents occurred during a struggle as opposed to during the crash of the Honda. Appellant, when describing the shootings to police, made no mention of a struggle. Appellant shot each decedent in the head, a vital part of the body, and appellant had time to reflect between the shootings.

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[4] "Deliberate" means arrived at as a result of careful thought and weighing of considerations for and against the proposed course of action, and "premeditated" means considered beforehand. (*People v. Perez* (1992) 2 Cal.4th 1117, 1123 (*Perez*).) "Premeditation and deliberation do not require an extended period of time, merely an opportunity for reflection." (*People v. Cook* (2006) 39 Cal.4th 566, 603.) "An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse." (*People v. Stitely* (2005) 35 Cal.4th 514, 543.) "[P]remeditation can occur in a brief period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .' [Citations.]" (*Perez, supra,* 2 Cal.4th at p. 1127.) Premeditation and deliberation can thus occur in rapid succession. (*People v. Bloyd* (1987) 43 Cal.3d 333, 348.) *People v. Anderson* (1968) 70 Cal.2d 15, sets forth three categories of evidence, i.e., evidence of planning activity, prior relationship, and manner of killing, relevant to whether a defendant harbored premeditation. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1019.)

The act of obtaining a weapon is evidence of planning consistent with a finding of premeditation and deliberation. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1081-1082.) The method of killing alone can sometimes support a conclusion a murder was premeditated and deliberated. (*People v. Memro* (1995) 11 Cal.4th 786, 863-864.) An execution-style shooting at close range with no bruises or lacerations on the victim that

The alleged firing of warning shots supported a conclusion the murders were premeditated and deliberated. Appellant failed to secure medical attention for the decedents and attempted to conceal evidence he had committed the murders. We conclude there was sufficient evidence the murders were premeditated and deliberated.

2. *No Prejudicial Prosecutorial Misconduct Occurred*.

Appellant claims the prosecutor committed misconduct during jury argument on three occasions as indicated below. We note as to each occasion appellant failed to object on the ground of prosecutorial misconduct and failed to request a jury admonition with respect to the prosecutor's comments, which would have cured any harm. Appellant therefore waived each of the prosecutorial misconduct issues below. (Cf. *People v. Gionis* (1995) 9 Cal.4th 1196, 1215; *People v. Mincey* (1992) 2 Cal.4th 408, 471.)

a. *The Prosecutor's Explanation of Premeditation and Deliberation Was Not Misconduct*.

(1) *Pertinent Facts*.

During closing argument, the prosecutor referred to portions of the given jury instructions on premeditation and deliberation. The prosecutor later commented, "Now, let's talk about in real life, in our [everyday] life, an example of deliberation and premeditation to make it easy for you to understand. [¶] Every day as we drive, we make decisions. We get to a stop sign. We get to [a] railroad crossing. *And we decide, the first thing we think about is, we got to look to the left. We're at a stop sign. We got to look to the right. And then we decide if it's safe for us to enter the road. We go forward. Well,*

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show a struggle may establish premeditation and deliberation. (*People v. Hawkins* (1995) 10 Cal.4th 920, 957 (*Hawkins*).) The assailant's use of a firearm against a defenseless person may show sufficient deliberation. (*People v. Bolin* (1998) 18 Cal.4th 297, 332-333.) Firing at vital body parts can show preconceived deliberation. (*Ibid*; *People v. Thomas* (1992) 2 Cal.4th 489, 517-518.) Other factors which may be considered include the nature of the wounds suffered, the fact the attack was unprovoked, the fact the deceased was unarmed, the fact the defendant hid evidence, and the fact the defendant failed to secure medical attention for the victim. (*People v. Clark* (1967) 252 Cal.App.2d 524, 529-530; *People v. Lewis* (1963) 217 Cal.App.2d 246, 259.)

that split second decision, ladies and gentlemen, is deliberation. It is safe to enter, involves premeditation. You weigh beforehand, 'Should I enter the street? Should I stop?' That's premeditation. So deliberation and premeditation, we use every day in our lives. We stop, we look left and right, we go forward. That's a split second of a decision that we make. That makes a deliberate and premeditated action of passing the stop sign or stopping at the railroad." (Italics added.)

(2) *Analysis.*

Appellant claims the prosecutor committed misconduct by analogizing premeditation and deliberation to a driver's decision to enter an intersection after arriving at a stop sign or railroad crossing. Quoting the above italicized comments of the prosecutor, appellant maintains entering an intersection is an inconsequential decision made hastily or impulsively rather than after "true 'deliberation' or 'planning activity.' " We reject the claim.

We resolve this issue based on familiar principles.[5] Viewing the challenged comments in context, we believe the jury reasonably would have understood the prosecutor to be saying the everyday, potentially life-threatening act of driving into an intersection after arriving at a stop sign or railroad crossing was the product of premeditation and deliberation. That is, the driver would think about looking to the left,

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[5] A prosecutor's intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Hill* (1998) 17 Cal.4th 800, 819).) A prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. (*Ibid.*) To prevail on a claim of prosecutorial misconduct based on comments to a jury, the defendant must show a reasonable likelihood the jury understood or applied the challenged comments in an improper or erroneous manner. (*People v. Frye* (1998) 18 Cal.4th 894, 970; *People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

think about looking to the right, consider the pros and cons of moving forward, decide whether it was safe, and then decide to move forward. We also believe the jury reasonably would have understood the prosecutor's reference to these events occurring during a "split second" as hyperbole, not verifiable mathematical information. (Cf. *People v. Wharton* (1991) 53 Cal.3d 522, 567.) No prosecutorial misconduct occurred.[6]

b. *The Prosecutor's Comments About Appellant Walking Were Not Prejudicial Misconduct*.

(1) *Pertinent Facts*.

During closing argument, the prosecutor commented, "That cold, calculated approaching of the victims with a loaded firearm, pointing a gun to their heads, and firing that weapon is a deliberation process. He's thinking. 'They didn't get it. They didn't get my warning.' '*What am I going to do*?['] 'I'm going to end this. I'm going to show those guys what I need. I need respect. They can't be fuckin' with my head anymore.' [¶] *So he walked up to* one of the victims, and he pulled the trigger. And he pulled the trigger and shot him execution style. It's not a shot to the leg, to the arm, to the lower torso, up in the air to try to scare the guys and say, 'get the fuck out of my house.' No, it's not. As Penaloza said, they were fuckin' with his head to a point where he had to do something. And what he did was an execution style murder of the first victim."

The prosecutor then stated, "But after he shot the first victim, he didn't stop. He didn't stop there. *He walked over to* the second victim, he pulled the gun, the same way, same location, right to the head, 'boom.' Pulled the trigger. Another execution style. Shot to the second victim's head. And now why is the location of the wound important? Because that shows a cold, calculated deliberate intent to kill. It's not a shot to the leg.

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[6] *People v. Johnson* (2004) 119 Cal.App.4th 976, cited by appellant, does not compel a contrary conclusion, since that case held only that the trial court reversibly erred by misinstructing on reasonable doubt. (*Id*. at p. 978.)

It's not a shot to anywhere else to their bodies. It's one shot to the head, right above the eye."[7]

(2) *Analysis*.

Appellant claims the prosecutor committed prejudicial misconduct by arguing facts not in evidence when the prosecutor (1) indicated appellant, in the bedroom, walked to one victim, then walked to another victim, (2) commented appellant thought "What am I going to do?" before walking to the victims, and (3) characterized the shootings of the victims as "execution-style." We disagree.

As to the first above-enumerated issue, the jury reasonably could have concluded that even if appellant did not walk to each decedent, appellant physically oriented himself towards each to accomplish the shootings. The prosecutor did not state how far appellant allegedly walked. The jury heard the evidence as to appellant's actions in the bedroom, and was aware appellant and the victims were in a small room. Appellant conceded during jury argument the room was a small, confined area.

As to the second above-enumerated issue, to the extent the prosecutor suggested appellant thought "What am I going to do?" before shooting the decedents, the suggestion was fair comment on the evidence. There was ample evidence of premeditation and deliberation even absent the comments challenged in connection with the first two above-enumerated issues. The court, using CALCRIM No. 222, instructed the jury that nothing attorneys said was evidence and the remarks of the attorneys during closing arguments were not evidence. We presume the jury followed those instructions. (Cf. *People v. Sanchez* (2001) 26 Cal.4th 834, 852 (*Sanchez*).) No prejudicial prosecutorial misconduct occurred as to the first two above-enumerated issues. (Cf. *People v. Yeoman* (2003) 31 Cal.4th 93, 149; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

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[7] During rebuttal argument, the prosecutor similarly commented, "The only person who *goes* to put the muzzle to the head of a victim and pulls the trigger execution style is a person who deliberated, and premeditated, and decided to kill." (Italics added.)

As to the third above-enumerated issue, the jury reasonably could have concluded appellant shot the victims at close range without a struggle. Such shootings are "execution-style." (Cf. *Hawkins, supra,* 10 Cal.4th at pp. 956-957.) No misconduct occurred.

(3) *The Prosecutor Did Not Equate Intent to Kill With Premeditation and Deliberation.*

During closing argument, the prosecutor commented, ". . . Markman himself said . . . [paranoid people on drugs] *do their acts intentionally. Intent. And if you do an act intentionally, and if you then surround the intentional act with his actions, his words, it screams out to you, deliberate, premeditated first degree murder* of Francisco Regalado and Joe Malta." (Italics added.)

Later, the prosecutor commented, "When you're looking at Joe Malta's gunshot wound, as [the medical examiner] testified, it's right on his right eye. And as [the medical examiner] said, front to end, front to back, a little bit upward, just slightly upward. Now why is that important? That's important *because that shows his specific intent. That shows his execution style, deliberated, premeditated murder of Joe Malta. That shows that he had to go up to Malta, put the gun to the eye, and pull the trigger in cold-calculated murder.*" (Italics added.)

Appellant, quoting the above-italicized comments, claims the prosecutor committed misconduct by equating intent to kill with premeditation and deliberation. We reject the claim. In each instance, the prosecutor commented to the effect appellant's intent to kill, coupled with surrounding circumstances, established premeditation and deliberation. No misconduct occurred.[8]

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[8] To the extent appellant claims his counsel's failures to object to challenged comments of the prosecutor denied appellant effective assistance of counsel, no prosecutorial misconduct occurred. Moreover, the court, using CALCRIM No. 200, instructed the jury to follow the court's instructions and, using CALCRIM No. 222, instructed that the remarks of the attorneys during argument were not evidence. We presume the jury followed these instructions. (*Sanchez, supra,* 26 Cal.4th at p. 852.) There was strong evidence of appellant's guilt. Finally, the record sheds no light on why

3. *There Is Sufficient Evidence of Grand Theft of an Automobile*.

Appellant claims there is insufficient evidence supporting his conviction for grand theft of an automobile (Regalado's Honda) because there is insufficient evidence of the element the Honda belonged to Regalado, and insufficient evidence of the element appellant lacked consent to take the Honda.[9] We reject appellant's claim.

As to the possession element, i.e., whether the Honda belonged to Regalado, there was substantial evidence that after appellant shot Malta and Regalado, appellant put them in a car. Appellant, later driving the Honda, was involved in a collision and exited the Honda. Malta and Regalado were still inside the Honda. The jury reasonably could have concluded from these facts appellant put Malta and Regalado inside the Honda and drove it to said collision site.

Muenzenmayer and a paramedic identified a photograph(s) as depicting the Honda they had seen at said collision site. Arellano, who had a close relationship with Regalado, identified one of those photographs as depicting "Regalado, Frankie's car." Moreover, although appellant, speaking to police, suggested he did not steal the car (see fn. 3, *ante*), he also expressly told police he stole it, and we view the evidence in the light most favorable to the judgment. The fact appellant also said "[t]hey" stole the car was

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appellant's trial counsel failed to act in the manner challenged, the record does not reflect said counsel was asked for an explanation and failed to provide one, and we cannot say there simply could have been no satisfactory explanation. We reject appellant's ineffective assistance claim. (See *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.)

[9] There is no dispute the theft, if any, of the Honda was a theft by larceny. "The elements of theft by larceny are well settled: [T]he offense is committed by every person who (1) takes possession (2) of personal property (3) owned or *possessed* by another, (4) by means of *trespass* and (5) with intent to steal the property, and (6) carries the property away." (*People v. Davis* (1998) 19 Cal.4th 301, 305 (*Davis*), italics added.) Appellant's claim implicates only the third and fourth elements.

not inconsistent with his theft of it; "[t]hey" could have been appellant's accomplices. There was sufficient evidence Regalado possessed the Honda.[10]

As to the trespass element, trespass, but not lack of consent, is an element of theft by larceny. Continuing its discussion of larceny, *Davis* stated, "The act of taking personal property from the possession of another is *always* a trespass [fn. omitted] *unless* the owner consents to the taking freely and unconditionally [fn. omitted] . . . ." (*Davis, supra,* 19 Cal.4th at p. 305, italics added.) After discussing *Davis* and other authorities, the court in *People v. Brock* (2006) 143 Cal.App.4th 1266, observed, "Thus, while a lack of consent is not an essential element of the crime, consent is an affirmative defense. [Citation.]" (*Id*. at p. 1275, fn. 4.) There was no need for there to be substantial evidence of lack of consent as an element of theft by larceny.

Finally, even if lack of consent were an element of larceny, appellant mortally wounded Regalado by shooting him in the head. The medical examiner who conducted Regalado's autopsy testified the bullet damaged Regalado's brain so severely Regalado could not have been saved. After appellant shot Regalado in the head, appellant put him in the Honda and drove away. The jury reasonably could have concluded Regalado was unconscious from the time appellant shot him. Even if appellant did not shoot Regalado for the purpose of taking the Honda, there was substantial evidence Regalado was unconscious when appellant took the Honda and, therefore, that appellant lacked consent to take it. (See *People v. Green* (1980) 27 Cal.3d 1, 53-53; *People v. Partner* (1986) 180 Cal.App.3d 178, 186, fn. 5.) There was substantial evidence appellant's taking of the Honda was nonconsensual, and no substantial evidence the taking was consensual.

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[10] Appellant suggests there was insufficient evidence Regalado owned, or exclusively owned, the Honda. However, ". . . ' " '[c]onsidered as an element of larceny, "ownership" and "possession" may be regarded as synonymous terms[.]' . . . 'Possession alone, as against the wrongdoer, is a sufficient interest to justify an allegation and proof of ownership in a prosecution for larceny.' " ' [Citation.]" (*People v. Smith* (2009) 177 Cal.App.4th 1478, 1491.)

DISPOSITION

The judgment is affirmed.

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KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.