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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. LUIS ENRIQUE FERNANDEZ, Defendant and Appellant.	B235878 (Los Angeles County Super. Ct. No. NA086013)

APPEAL from a judgment of the Superior Court of Los Angeles county. Arthur Jean, Jr., Judge. Affirmed.

Thomas T. Ono, 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, Mary Sanchez and Louis W. Karlin, Deputy Attorneys General, for Plaintiff and Respondent.

Luis Enrique Fernandez appeals from the judgment entered upon his convictions by jury of first-degree murder (Pen. Code, § 187, subd. (a), count 1)[1] and attempted second-degree robbery (§ 211, count 2). As to the murder charge, the jury found to be true the special circumstance allegation that it was committed in the course of committing an attempted robbery (§ 190.2, subd. (a)(17)). The jury also found to be true as to both counts the allegation that the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)) and the allegation that appellant personally and intentionally discharged a firearm causing great bodily injury and death (§ 12022.53, subd. (d)). The trial court sentenced appellant on the murder charge to a life term without the possibility of parole and on the robbery charge to the high term of five years, doubled as a second strike, plus 25 years to life for the firearm enhancement.

Appellant contends that (1) there was insufficient evidence to support the felony-murder conviction and robbery special circumstance, (2) the trial court erred in refusing to give the requested voluntary intoxication instruction, thereby lightening the prosecution's burden of proof and violating appellant's rights to due process and trial by jury, and (3) imposition of the second-strike sentence based on a juvenile adjudication violates his rights to due process and to equal protection.

We affirm.

FACTUAL BACKGROUND

The shooting

On May 29, 2010, near 11:00 p.m., appellant visited Loverette Moye (Moye), a long-time, close friend, at her Long Beach residence. He appeared sober when he arrived. Moye was celebrating her deceased brother's birthday. Her friends Jimmy Mack (Mack), Lamar Cooks (Cooks) and Naomi Johnson, and Jasmine, who was staying with Moye, were present. Several of the guests observed that appellant had a black revolver in his waist band.

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1 All further statutory references are to the Penal Code unless otherwise indicated.

Each guest chipped in so Moye and appellant could go to the store and purchase vodka, which they all drank. Moye testified that no one drank too much because "it was a lot of people. It was not like we was buying gallons. I wasn't like drunk drunk." She testified that she was feeling "buzzed," but not drunk. As the night wore on, appellant seemed to her to be buzzed. Appellant said he needed to get money to buy cigarettes, as he did not have enough to buy a pack, and the store that sold single cigarette for 50 cents was closed.

The partyers continued drinking until 4:00 a.m., when Moye went outside for fresh air. Appellant was already outside. A young man, later identified as Ryan Helm (Helm), was skateboarding down the street. Appellant stopped him, pushed him and tried to pull something out of Helm's pockets. Helm resisted, trying to defend himself. The two men began to punch each other. Appellant grabbed for his revolver, but Helm, who was pushing appellant away, slapped the gun out of his hand and onto the ground, as the two men continued fighting. Helm was getting the best of the fight.

Moye ran inside to get Cooks to break up the fight. Cooks came outside, and saw appellant pointing his gun at Helm and stepped between them to separate them.[2] It looked to Cooks as if appellant was robbing the man. Cooks saw Helm with a knife in his hand after the gun was pointed at him. At some point after the combatants separated, Helm put his hands in the air and said, "For real, homie, are you serious" or "Come on man." Appellant said either, "Insane Crip," "on Insane Crip,"[3] or "No, cuz I am Insane Crip," as he ran to pick up the revolver. He then chased Helm with the revolver as Helm was walking away, trying to gather his belongings, and fired three or four shots at Helm. After shooting Helm, appellant ran back to Moye's house, but no one would allow him in.

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[2] Cooks testified that Jasmine told him to see what was happening outside and that he did not go outside but yelled for the men to stop fighting from the doorway.

[3] Appellant had previously told Moye that he was a member of the Insane Crips gang and known as "Looney." Cooks also knew appellant to be a member of that gang, with the moniker "Deamon." Moye also knew Mack to be an Insane Crips gang member.

The investigation

Officer Daisy Ortiz arrived at the murder scene with her partner at 4:14 a.m. Helm was being treated by emergency personnel. He had been shot twice; once in the arm and a fatal shot though his back. On the ground nearby, there was a trail of blood and numerous items, including Helm's business cards, an identification card and a folding knife with the blade open.

On June 9, 2010, Detective Scott Lasch conducted a recorded interview with Mack. Mack told the detective that appellant complained at the party that he had no money and said, "[W]e should just go hit the lick or something," meaning commit a robbery. He also reported that, in the early morning, Mack heard three or four gunshots outside. He ran outside and saw appellant running with the gun in his hand. At trial, however, Mack denied seeing appellant with a gun, although he admitted hearing shots fired.

On June 11, 2010, Moye gave a recorded statement to police. She denied that the police threatened to take away her children if she did not talk to them and denied telling others that the police had done so. She identified appellant in a photographic six-pack and wrote, "I seen Luis fighting the victim and I seen them. And I seen him pick up the gun and shoot the victim."

Approximately a week after the shooting, Detective Lasch spoke with Cooks and showed him a six-pack that included a photograph of appellant. Cooks also identified appellant in the six-pack as the person who shot Helm.

Gang evidence

Officer Sean Magee testified as a gang expert that the Insane Crips were a dominant Long Beach gang. Its primary activities were committing street robberies, assaults with deadly weapons, murders, and narcotics crimes. Officer Magee opined that appellant was a member of that gang based upon, among other things, appellant's admissions. The officer testified to two predicate offenses.

In response to a hypothetical based on the evidence, Officer Magee opined that the crime was committed for the benefit of, at the direction of, or in association with a

criminal street gang. By claiming the name of the gang during the crime, appellant vindicated his reputation as a member of the Insane Crips and demonstrated that resisting gang crimes would lead to deadly consequences.

Appellant testified and called witnesses to establish an alibi defense. The mother of his best friend testified that her son worked with appellant, and they were working the weekend of the shooting. Moye told the mother that Moye had given a false story to the police because they threatened to take Moye's children. Moye told her that appellant was not at the scene of the shooting. Appellant testified that he did not visit Moye on the weekend of May 29, 2010, but worked in Costa Mesa that weekend. He was subject to a gang injunction that required him to be home by 10:00 p.m., with which he complied that weekend.

DISCUSSION

I. Sufficiency of the evidence

A. Background

The prosecution premised its first degree murder case against appellant on two theories. First, it asserted that it was a premeditated and deliberate murder. Alternatively, it asserted that appellant was guilty of felony murder.

B. Contentions

Appellant contends that there is insufficient evidence to support his felony-murder conviction and the robbery special-circumstance allegation.[4] He argues that the shooting

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[4] Appellant does not challenge the sufficiency of the evidence to support the prosecution's alternative theory that the murder was premeditated and deliberate. Nonetheless, "when the prosecution presents its case to the jury on alternate theories, some of which are legally correct, and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (*People v. Green* (1980) 27 Cal.3d 1, 69, disapproved on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225; *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3; *People v. Perez* (2005) 35 Cal.4th 1219, 1233–1234) The same rule is applicable when the reviewing court holds the evidence insufficient to support conviction on that ground. (*People v. Green, supra,* at p. 70; *People v. Perez, supra,* at p. 1234.) Consequently, appellant need only show that the

and the robbery were not part of a continuous transaction because the attempted robbery was completed before the murder, "which rendered the attempted robbery merely incidental to the subsequent homicide." "[W]hen . . . Cooks successfully intervened between appellant and . . . Helm, the attempted robbery was completed. Appellant never renewed his direct but ineffectual attempts to remove property from Helm's pockets." Further, appellant argues that the gang expert's testimony that obtaining respect for his gang membership was the motive for the murder provided an independent intent for the murder apart from the robbery. This contention is meritless.

C. Standard of review

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the evidence. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) Reversal on this ground is unwarranted unless '"upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin*, *supra*, at p. 331.) This standard of review is the same in cases involving circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.)

D. Robbery based felony-murder and special circumstance

In California, felony murder is established by statute. (*People v. Young* (2005) 34 Cal.4th 1149, 1175; § 189.) Section 189 provides: "All murder . . . which is committed in the perpetration of, or attempt to perpetrate, . . . robbery, . . . is murder of the first degree." By virtue of this statute a killing in the commission of, or attempted

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evidence was insufficient to support the guilty verdict on the felony-murder ground to require reversal, as the general verdict here does not reveal the theory on which it was reached.

commission of, a robbery is deemed to be first degree robbery. (*People v. Young, supra,* at p. 1175.) The only mental state required is to commit the underlying felony. (*People v. Cavitt* (2004) 33 Cal.4th 187, 197.)

The robbery special circumstance, which makes a defendant subject to the death penalty or life imprisonment without the possibility of parole, similarly provides: "The murder was committed while the defendant was engaged in, . . . the commission of, [or] attempted commission of, or the immediate flight after committing, or attempting to commit . . . [¶ . . . (A) Robbery." (§ 190.2, subd. (a)(17)(A).) A robbery that is merely incidental to the murder is insufficient for the special circumstance allegation. (*People v. Lewis* (2008) 43 Cal.4th 415, 464.) The perpetrator must have an independent felonious purpose to commit the robbery.

E. Elements of robbery and the escape rule

Robbery is the "'felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.'" (*People v. Tafoya* (2007) 42 Cal.4th 147, 170.) A killing committed in the perpetration of robbery is first degree murder. (*People v. Cavitt, supra,* 33 Cal.4th at p. 197; § 189.)

Attempted robbery requires only an intent to commit a robbery and a direct but ineffectual act done toward its commission. (*People v. Medina* (2007) 41 Cal.4th 685, 694.) Appellant does not question the sufficiency of the evidence of his intent to commit robbery or his ineffectual acts done towards its commission. Rather, he claims that the attempted robbery was completed before Helm's murder. Consequently, he argues, the felony-murder rule is inapplicable because the murder was not committed in the attempt to perpetrate robbery, and the robbery special circumstance is inapplicable because the murder was not committed while the defendant attempted commission of robbery. We disagree.

The first degree felony-murder rule does not require proof of a strict causal relationship between the felony and the homicide if the killing and the felony are parts of a continuous transaction. (*People v. Whitehorn* (1963) 60 Cal.2d 256, 264; *People v.*

Mason (1960) 54 Cal.2d 164, 168–169; *People v. Young, supra,* 34 Cal.4th at p. 1175.) In dictum, our Supreme Court stated in *People v. Wilson* (2008) 43 Cal.4th 1, 17: For purposes of the felony murder rule, "'[a] robbery is not complete until the perpetrator reaches a place of temporary safety *which is not the scene of the robbery*.'" (Italics added; see also *People v. Young, supra,* at p. 1177 [a robbery for purposes of the felony-murder rule is not complete until the perpetrator reaches a place of temporary safety].) The place of temporary safety rule is also applicable to assessing whether the murder was committed in the attempted commission of a robbery for purposes of the robbery special circumstance. (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1025; § 190.2, subd. (a)(17)(A).) The jury here was so instructed with CALJIC No. 8.21.1. Whether a defendant has reached a place of temporary safety is a question of fact for the jury. (*People v. Johnson* (1992) 5 Cal.App.4th 552, 559.)

F. Here, the attempted robbery and murder are part of continuous transaction

The evidence here amply supports the conclusion that the attempted robbery and murder were interrelated and that the murder occurred in the course of the attempted robbery and before appellant reached a place of temporary safety. Some of the guests saw that appellant had a revolver before he went outside. There was evidence that appellant intended to commit a robbery because he needed money to purchase cigarettes. Mack told police that appellant complained of a lack of money and suggested that they "hit the lick," meaning commit a robbery. Moye observed appellant attempting to rob Helm. Appellant pushed Helm, attempting to remove something from Helm's pockets, and pointed his gun at Helm.

But Helm did not submit to appellant. He pushed him away and knocked the gun out of appellant's hand. They then began fist fighting until Cooks intervened. Helm then went to pick up items that had apparently fallen from his pocket, and appellant ran to retrieve his gun. He then chased Helm, firing multiple shots, hitting Helm in the back, as appellant yelled reference to the Insane Crips.

Thus, the attempted robbery and the murder occurred, if not concurrently, only a matter of seconds apart. It was a natural and totally foreseeable consequence of the

robbery attempt that Helm might resist, causing the robbery to escalate into appellant's use of his revolver. Contrary to appellant's claim that the attempted robbery ended when Cooks intervened, in fact, the fight merely escalated as appellant immediately went for his gun to continue his assault. Thus, the virtually concurrent robbery attempt and murder justify application of the felony-murder rule and the special circumstance allegation.

Furthermore, appellant had clearly not yet reached a place of temporary safety. He was still at the scene of the robbery, which cannot be a place of temporary safety. (*People v. Wilson, supra*, 43 Cal.4th at p. 17) That is the place where the victim was still located, witnesses who could identify him were present, the police were certainly likely to soon arrive, and the danger of citizen or police intervention was highest.

Appellant argues that the asportation requirement is inapplicable because the robbery was unsuccessful and there was no loot to carry away. It was therefore only an attempted robbery. We disagree. In *People v. Keith* (1975) 52 Cal.App.3d 947, the defendant made a similar argument. He claimed that although a robbery is not complete while the robber only has scrambling possession of the loot and has not reached a place of temporary safety, that principal does not apply to unsuccessful robberies that do not result in the taking of any loot. (*Id.* at p. 953.) The Court of Appeal rejected this contention, stating: "While no case has been found applying the *Salas*[5] [escape] doctrine to the precise facts of this case, we have no doubt that it does. Robbery 'is but larceny aggravated by the use of force or fear to accomplish the taking of property from the person or presence of the possessor . . .' [Citation.] It requires no extended discussion to show that the element in a robbery which justifies the application of strict criminal liability concept incorporated in the felony-murder doctrine is the use of force or fear rather than the taking of property. [Citations.]" (*People v. Keith*, *supra*, at p. 953.)

Appellant also argues against application of the place of temporary safety rule because there was no flight or hot pursuit. There was therefore an absence of danger that

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5 *People v. Salas* (1972) 7 Cal.3d 812.

the use of force or fear in the commission of the robbery would continue. We are unpersuaded. This argument ignores the fact that though appellant was not immediately fleeing the scene, there was no way to predict how appellant would respond to the arrival of the police. The risk of further danger is inherent when an armed suspect remains at the scene of the murder when law enforcement arrives.

Finally, appellant argues that the place of temporary safety rule for felony-murder and the robbery special circumstance is not applicable because Helm's killing was not committed for the purpose of carrying out or advancing the commission of the attempted robbery, to facilitate the escape or to avoid detection. He points to the evidence that he yelled a reference to his gang as he fired at Helm, and the gang expert's testimony that he shot Helm to vindicate his and his gang's reputation. We reject this argument. "The jury did not have to find that defendant killed [the victim] for the purpose of robbery: 'The prosecution only needed to prove that the victim was killed during the course of a robbery—accidentally or otherwise.'" (*People v. Wilson, supra*, 43 Cal.4th at p. 17.) Moreover, the fact that appellant may have killed Helm for the purpose of vindicating his gang reputation did not preclude a concurrent intent to kill him related to appellant's efforts to rob him. As stated in *People v. Brents* (2012) 53 Cal.4th 599, 609: "We have, however, found sufficient evidence to support this special circumstance so long as there was a concurrent purpose to commit both the murder and one of the listed felonies."

II. Instructional error

A. Background

Appellant requested a jury instruction on voluntary intoxication.[6] Appellant argues that he requested such an instruction in accordance with a modified version of CALCRIM No. 4.21. CALCRIM No. 4.21, as modified for this case, states: "In the crimes of murder and attempted robbery of which the defendant is accused in Counts one and two, a necessary element is the existence in the mind of the defendant of the specific

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6 The appellate record fails to indicate the precise voluntary intoxication instruction that the defense requested; whether it was a CALJIC, CALCRIM or a special instruction.

intent defined in the instructions for each those crimes. [¶] If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you should consider that fact in deciding whether defendant had the required specific intent. [¶] If from all the evidence you have a reasonable doubt whether the defendant formed that specific intent, you must find that he did not have such specific intent." (CALJIC No. 4.21.)

In response to the request for the instruction, the trial court stated: "I think it becomes utterly speculative for a jury to talk about the state of intoxication. We have no evidence from the defendant that he was intoxicated. I think at least one person said that he was either buzzed or drunk. What does that mean in terms of his ability to function? That simple statement I don't think is enough to base an intoxication instruction unless you [prosecutor] think so." The prosecutor said he did not think the instruction was appropriate and submitted. The trial court then denied appellant's request.

B. Contention

Appellant contends that the trial court erred in refusing to instruct the jury on voluntary intoxication, thereby lightening the prosecution's burden of proof and denying him his rights to a jury trial and due process. He argues that because there was evidence that appellant drank alcohol for five hours and appeared buzzed or drunk, he was entitled to a requested pinpoint instruction for the jury to decide if his intoxication prevented him from forming the intent to kill. This contention is without merit.

C. The duty to instruct

"A criminal defendant is entitled, on request, to instructions that pinpoint the theory of the defense case." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142.) A requested instruction must be given on every material question "upon which there is any evidence deserving of any consideration whatever . . . . The fact that the evidence may not be of a character to inspire belief does not authorize the refusal of an instruction based thereon. . . ." (*People v. Burns* (1948) 88 Cal.App.2d 867, 871.) But, a defendant is entitled to an intoxication instruction "only when there is substantial evidence of the defendant's voluntary intoxication *and* that the intoxication affected the defendants

'actual formation of the specific intent.'" (*People v. Williams* (1997) 16 Cal.4th 635, 677, italics added; see also *People v. Horton* (1995) 11 Cal.4th 1068, 1119.)

D. Voluntary intoxication

Section 22, subdivision (b) provides that intoxication is admissible only on the issue of whether the defendant actually formed a required specific intent, premeditated, deliberated or harbored express malice aforethought when murder or a specific intent crime is charged. However, simply because appellant was drinking alcohol, does not compel the conclusion that he was intoxicated.

The only evidence on the subject of alcohol consumption here was that appellant drank alcohol on the night of the offense and was buzzed. Moye testified that appellant arrived at her home at approximately 11:00 p.m. and was sober. She also testified that all of the guests chipped in to buy some alcohol. When asked the quantity of alcohol that was consumed at the party, she suggested that each person did not drink that much, as she stated: "I mean it was a lot of people. It was not like we was buying gallons. I wasn't like drunk drunk." She said she was merely feeling "buzzed." The only evidence regarding appellant's drinking was Moye's testimony that he got "buzzed" and emotional because it was the birthday of her deceased brother. There was no evidence (1) of what she meant by "buzzed," (2) of the quantity of alcohol appellant consumed, (3) that he was intoxicated, (4) that intoxication affected his actual formation of the specific intent to murder Helm, or (5) how appellant was acting that might have reflected on whether or not he was intoxicated.

"The mere fact that a defendant may have been drinking prior to the commission of a crime does not establish intoxication . . . ." (*People v. Miller* (1962) 57 Cal.2d 821, 830–831.) Even if there is evidence of intoxication, a jury could still have reasonably concluded that appellant retained the capacity to intend to commit the crime. (See *People v. Hernandez* (1988) 47 Cal.3d 315, 346–347.)

Consequently, we conclude that there was insufficient evidence to have required the trial court to instruct on voluntary intoxication. The evidence was nothing more than that appellant had been drinking alcohol, which is simply not enough. We also observe

that intoxication was inconsistent with appellant's theory of the case. He presented an alibi defense that he was not present at the party at all and did not shoot Helm. Hence, whether or not he was intoxicated was irrelevant under appellant's theory of the case and did not require an instruction.

III. Use of juvenile court adjudication as prior felony strike

A. Background

Appellant was sentenced on the murder conviction to life without the possibility of parole. He was sentenced on the attempted robbery conviction to the upper term of five years, doubled to 10 years as a second striker, based upon a 2007 juvenile adjudication for robbery.

Before the court trial of the bifurcated prior conviction allegation, appellant objected to the use of his prior juvenile court conviction to increase his sentence under the three strikes law. The trial court admitted the juvenile court adjudication over appellant's objection and found the second strike allegation true. Appellant also objected to the use of the juvenile adjudication as a prior strike in his sentencing memorandum.

B. Contention

Appellant contends that imposing a second strike sentence based upon a prior juvenile court adjudication violates his rights to due process and to equal protection. He argues that the exception for prior convictions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), from its mandate that facts that increase a sentence beyond the maximum term permitted by the conviction of the charged offense be based upon a jury determination beyond a reasonable doubt, is inapplicable to a juvenile adjudication. In such a proceeding the minor had no right to a jury trial. This contention is without merit.

C. Juvenile Adjudication is prior conviction for* Apprendi *purposes

In *Apprendi,* the United States Supreme Court stated, "Other than 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." (*Apprendi*, *supra*, 530 U.S. at p. 490.)

Trial by jury in a juvenile court adjudication is not a constitutional requirement (*McKeiver v. Pennsylvania* (1971) 403 U.S. 528, 545), and California has not accorded a juvenile a right to a jury trial. (See *In re James F.* (2008) 42 Cal.4th 901, 915; *In re Alex U.* (2007) 158 Cal.App.4th 259, 264.)

Our Supreme Court recently concluded that a juvenile court prior adjudication may be used for sentencing under the three strikes law. (*People v. Nguyen* (2009) 46 Cal.4th 1007, 1028.) We are of course bound by that decision. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD