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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. JEFF EMERSON BRAVO, Defendant and Appellant.	B264652 (Los Angeles County Super. Ct. No. BA430731)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Abzug, Judge. Affirmed as Modified.

Morgan H. Daly, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Jeff Emerson Bravo of six counts of assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b); counts 1-6)[1] and one count of shooting into an occupied vehicle (§ 246; count 7), and found true in each count that defendant personally used a firearm (§ 12022.5, subd. (a)). The trial court sentenced defendant to a total term of 22 years in prison, calculated as follows. It designated count 1 as the base count, and imposed the upper term of nine years, plus an additional ten years pursuant to section 12022.5, subdivision (a) for a total term of 19 years. On count 2, it imposed a consecutive term of one-third the midterm of six years plus one-third the low term of three years pursuant to section 12022.5, subdivision (a), for a total term of three years. The court imposed concurrent terms of 19 years on counts 2 through 6, and stayed the sentence, pursuant to section 654, on count 7.

Defendant appeals from the judgment of conviction, contending: (1) four counts of assault with a semiautomatic firearm must be reversed for insufficient evidence, and (2) the firearm enhancement on count 7 (shooting into an occupied vehicle) must be stricken. We modify the judgment to strike the firearm enhancement on count 7 and otherwise affirm.

BACKGROUND

On October 14, 2014, at around 10:00 p.m., Francisco Nunez was driving his wife, Juana Partida, and their four children (Esmeralda,

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[1] Undesignated section references are to the Penal Code.

Vanessa, Francisco, and Denise) in their white Chevy Tahoe SUV. Juana was in the front passenger seat. Two of the children were in the middle seats. Two of them were in the back seats. The rear windows of the SUV were tinted.

As he approached the intersection of Fickett and Folsom, from about 50 feet away, Nunez saw defendant walking to his left on the sidewalk. As the SUV came nearer, Nunez saw defendant crossing the street to get to Fickett, and noticed that defendant had a beer in his hand. Defendant put his beer down and pulled a semiautomatic pistol from his waistband. He got to one knee, slid back the slide on the pistol, and started to shoot at the SUV from about 20 feet away. Nunez heard three shots. He ducked and sped away. He heard two more shots as he drove off. He pulled over at a parking lot a few blocks away and checked the vehicle for damage while his wife called 911. There was no damage to the vehicle and no one was hurt.

Defendant's neighbor, Santiago Lozano, witnessed the shooting. He was sitting outside his apartment building at the corner of Fickett and Folsom when he noticed defendant crossing Folsom. A white Chevy Tahoe drove by, and when it was directly in front of Lozano he heard three gunshots. When the SUV passed through the intersection, Lozano saw defendant across the street pointing a gun at the SUV. The SUV made a right turn onto Fickett toward Cesar Chavez. Defendant walked down Fickett toward a liquor store.

Santiago went into his apartment and called 911. He told the 911 dispatch operator that he knew the shooter was his neighbor, Jeff

Bravo, and that the police should check him to see if he is the one who fired the gun.

Los Angeles Police Department Officer Ruben Zaragoza found three spent .25 caliber casings at the northwest corner of the intersection, indicating that a semiautomatic weapon had been used.

DISCUSSION

I. *Sufficiency of the Evidence*

Defendant contends that the evidence does not support the four assault convictions in which the Nunez children were the victims, because there was no evidence that he knew facts that would make it reasonably likely the children were present in the car. That is, according to defendant, he did not know the Nunez family, the back windows of the SUV were tinted, and there was no evidence that he saw the children. We conclude that the evidence is sufficient to support the convictions.

As explained in *People v. Williams* (2001) 26 Cal.4th 779 (*Williams*), "a defendant is only guilty of assault if he intends to commit an act 'which would be indictable [as a battery], if done, either from its own character or that of its natural and probable consequences.' [Citation.] Logically, a defendant cannot have such an intent unless he actually knows those facts sufficient to establish that his act by its nature will probably and directly result in physical force being applied to another, i.e., a battery. [Citation.] In other words, a defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably

result from his conduct. He may not be convicted based on facts he did not know but should have known. He, however, need not be subjectively aware of the risk that a battery might occur." (*Id.* at pp. 787-788.) The court in *Williams* added: "For example, a defendant who honestly believes that his act was not likely to result in a battery is still guilty of assault if a reasonable person, viewing the facts known to defendant, would find that the act would directly, naturally and probably result in a battery." (*Id.* at p. 788, fn. 3.) The court also made clear that assault remains a general intent crime: "[W]e hold that assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*Id.* at p. 790.)

Like the court in *People v. Trujillo* (2010) 181 Cal.App.4th 1344 (*Trujillo*), which we discuss below, we conclude that under *Williams,* it was not necessary for the evidence to prove that defendant actually knew facts making the specific presence of the four Nunez children in the SUV reasonably foreseeable. Rather, it is enough that they were in fact present in the SUV, and that defendant actually knew, based on the fact that he fired five shots at an occupied and moving SUV, that his conduct would probably and directly result in the application of physical force against anyone in the SUV.

In *Trujillo*, the defendant, while riding in a car, fired several shots at another car that had two occupants, the driver and a backseat passenger. (*Trujillo, supra*, 181 Cal.App.4th at p. 1347.) According to the testimony of the driver of the defendant's car, the windows of the victims' car were tinted, and he could not see who was in the car. (*Id.* at p. 1349.) The defendant was convicted of two counts of assault with a firearm. On appeal, he contended the evidence was insufficient to convict on two counts, because there was no evidence that he knew the backseat passenger was in the car. (*Id.* at pp. 1347-1349.) The Court of Appeal held that the evidence was sufficient to support the conviction of assault on the backseat passenger, even if defendant did not actually see him. (*Id.* at p. 1348.)

In doing so, the court engaged in a lengthy analysis of (among other decisions) *Williams, supra,* 26 Cal.4th 779, *People v. Felix* (2009) 172 Cal.App.4th 1618, *People v. Riva* (2003) 112 Cal.App.4th 981, and "kill zone" cases such as *People v. Bland* (2002) 28 Cal.4th 313, *People v. Vang* (2001) 87 Cal.App.4th 554 and *People v. Adams* (2008) 169 Cal.App.4th 1009. From this analysis, the court distilled the following principles: "[A] defendant who harbors the requisite mental state for assault while committing one or more acti rei such that a direct, natural, and probable result is a battery against two persons may be convicted of assault against each. Here, there is no dispute that the firing of multiple gunshots from a semiautomatic weapon at [a vehicle] is an 'action [or are actions] enabling him to inflict a present injury' on anyone inside [that vehicle], thus constituting an actus reus or multiple

acti rei of assault. [Citation.] Nor is it reasonably disputed that defendant had the requisite mental state for assault required by *Williams*: he was actually aware that he was shooting at an occupied car in a manner that would lead a reasonable person to realize that a battery against another would directly, naturally, and probably result. [Citation.] Even if he was not actually aware of the second person in the [vehicle], his mental state can be 'readily combine[d]' with the actus reus (or acti rei) of shooting at the car with two people inside to '"multiply the criminal acts for which the [defendant] is responsible."' [Citation.] Just as 'a person maliciously intending to kill is guilty of the murder of all persons actually killed' [citation], a person who harbors the requisite intent for assault is guilty of the assault of all persons actually assaulted. [Citations.]

"Because the gravamen of assault is the likelihood that the defendant's action will result in a violent injury to another [citations], it follows that a victim of assault is one for whom such an injury was likely. [The person] sitting in the backseat of the [vehicle] nearest to defendant's fusillade of gunshots, was no less a victim of defendant's assault than the driver. . . . Therefore, defendant can be charged with and convicted of assault against both occupants of the car even if defendant did not actually see [the person] in the backseat.

"Support for this view can be found in cases involving acts of violence that create a zone of harm encompassing multiple potential victims. [Citations.] . . . [¶] . . . [¶] *Vang* and *Adams* involved attempted murder convictions, not assault. Nevertheless, if the defendants in *Vang* and *Adams* harbored the specific intent to kill

people inside buildings when they were unaware that such persons were in the buildings, it would be absurd to find that they did not also have the mental state required to be convicted of assault against those same victims; the specific intent to kill everyone in a building by shooting them (*Vang*) or burning them (*Adams*) necessarily includes an awareness of facts (shooting into or burning an occupied residence) such that a reasonable person would realize a battery against such persons would directly, naturally, and probably result from his or her conduct. Here, defendant had the requisite mental state for assault and essentially created a zone of harm inside the [vehicle] when he shot a flurry of bullets at it. . . .

"Even if the 'elastic' mens rea concept described by *Bland* or the kill zone theory does not apply here, we would conclude that [the backseat passenger] was a reasonably foreseeable victim of defendant's assault under the rationale expressed in *Felix* and *Riva*. The jurors could have reasonably found that a person with actual knowledge that he is shooting indiscriminately at a moving vehicle would realize that his conduct would directly, naturally, and probably result in a battery to anyone and everyone inside the [vehicle]." (*Trujillo, supra*, 181 Cal.App.4th at pp. 1354-1357, fns. and original italics omitted.)

Under *Trujillo*, it was not necessary for the evidence to show that defendant was aware of specific facts that would make the presence of the four Nunez children in the SUV reasonably foreseeable. Rather, defendant had actual knowledge that he was firing at an occupied and moving vehicle, and from such facts any reasonable person would know

that such conduct would directly, naturally, and probably result in a battery against everyone in the vehicle.

Defendant contends that *Trujillo* extends the reasoning of *Williams* too far. We disagree, and find the reasoning of *Trujillo*, which we have quoted, persuasive.

Defendant relies instead on *People v. Felix, supra,* 172 Cal.App.4th 1618 (*Felix*), but *Felix* is of no help to him. In *Felix*, the defendant fired two gunshots into a house occupied by a father and two children. With respect to the children, the defendant was convicted of two counts of assault with a firearm. (*Id.* at pp. 1621-1622.) The evidence showed that the shooting occurred shortly after midnight on a weeknight. The defendant knew the father was in the house at the time, and knew the children (who were school-aged) lived in the house with the father. (*Id.* at p. 1630.) After the crime, the defendant called the father and asked if anyone had been wounded or killed. (*Ibid.*)

On appeal, the defendant contended that the evidence was insufficient to support the assault convictions as to the children "because he fired the gunshots into their home without absolute certainty they were present." (*Felix, supra*, 172 Cal.App.4th at p. 1627.) The Court of Appeal rejected the notion that the law requires such certainty, or that the assault victims' presence must be "readily apparent to the perpetrator." (*Id.* at p. 1629.) It explained that "no subjective intent to injure a particular victim is required [for an assault]. Rather, a defendant's intended acts are evaluated objectively

to determine whether harm to a charged victim was foreseeable." (*Id.* at p. 1629.)

Based on this standard, the court found the evidence sufficient to support the assault convictions as to the children. "While not every shooting into a car or building will satisfy the 'actual knowledge' requirement of *Williams*, here [the defendant] had detailed, intimate knowledge of the house and inhabitants. He actually knew he was endangering the lives of three or more members of the family when he fired into the house. Indeed, he knew their names and ages, and he inquired about their well-being after the shooting. The evidence is sufficient to support the jury's implied finding that Felix knew it was highly likely that Lisette and Juan were in the house at the time he fired the gunshots. He thus knew that his acts would 'probably and directly result in physical force' against them." (*Felix, supra*, 172 Cal.App.4th at p. 1630.)

Felix does not hold that in every prosecution of assault with a firearm in which the defendant fires into an occupied space, the defendant must know specific facts making it reasonably likely that each specific victim was present. Rather, *Felix* recognized the contrary principle: the evidence is evaluated objectively to determine whether harm to a charged victim was foreseeable. *Felix* simply held that given the defendant's particular knowledge suggesting that the child victims would be present, the evidence was sufficient to prove the defendant actually knew he was putting the children at risk when he shot into the house. *Felix* does not stand for the proposition that such level of actual

knowledge of the foreseeable presence of each particular victim must be present in all cases, and we do not read *Felix* as being inconsistent with the analysis and result in *Trujillo*. To the extent it might be read to be inconsistent with *Trujillo,* we agree with *Trujillo*.

For these reasons, we conclude that the evidence was sufficient to support defendant's convictions of assault with a semi-automatic firearm on the four Nunez children.

II. *Firearm Enhancement on Count 7*

Defendant contends that the firearm enhancement (§ 12022.5, subd. (a)) on count 7, discharging a firearm at an occupied vehicle in violation section 246, must be stricken. We agree.

Section 12022.5, subdivision (a) provides as here relevant: "any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years, *unless use of a firearm is an element of that offense.*"[2] (Italics added.) Use of a firearm is an element of section 246. As pertinent here, section 246 describes the crime of shooting at an occupied vehicle as follows: "Any person who shall maliciously and willfully discharge a firearm at an . . . occupied motor vehicle . . . is guilty of a felony." Because use of a

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[2] The gun enhancement was proper as to the convictions of assault with a semi-automatic firearm, even though use of a firearm is an element of that crime, because section 12022.5, subdivision (d) provides in relevant part: "Notwithstanding the limitation in subdivision (a) relating to being an element of the offense, the additional term provided by this section shall be imposed for any violation of Section 245 if a firearm is used."

firearm is an element section 246, the plain language of section 12022.5, subdivision (a) provides that the firearm enhancement does not apply. As the California Supreme Court has stated, referring to a prior version of section 12022.5, "Section 12022.5, subdivision (a)(1), provides generally that the enhancement does not apply if firearm use is an element of the underlying offense, which precludes its application to the crime of discharging a firearm at an occupied vehicle." (*People v. Kramer* (2002) 29 Cal.4th 720, 723, fn. 2.)

Respondent contends that even if the punishment for the section 12022.5, subdivision (a) enhancement cannot be imposed, the true finding on the enhancement cannot be stricken. We disagree. When an enhancement cannot be imposed, it is error to stay the enhancement or simply not impose it; it must be stricken. (See, e.g., *People v. Haykel* (2002) 96 Cal.App.4th 146, 151 [enhancement either imposed or stricken, not stayed]; *People v. Jones* (1992) 8 Cal.App.4th 756, 758; *People v. Ruiz* (1992) 3 Cal.App.4th 1251, 1256; see also *In re Pritchett* (1994) 26 Cal.App.4th 1754, 1758 [instructing superior court to strike firearm-use enhancement that could not properly be imposed]; *People v. Jordan* (1984) 155 Cal.App.3d 769, 787 [striking armed enhancements as to one crime but not others].)

Here, the section 12022.5, subdivision (a) enhancement could not be imposed because use of a firearm is an element of section 246. The trial court purported to stay the sentence on count 7 under section 654, including the section 12022.5, subdivision (a) enhancement. However,

regardless of the stay on the count 7 sentence, the firearm enhancement on that count must be stricken.

DISPOSITION

The section 12022.5, subdivision (a) enhancement on count 7 is stricken. The judgment is affirmed in all other respects.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.