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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL CARTER, Defendant and Appellant.	B278705 (Los Angeles County Super. Ct. No. BA433568-01)

APPEAL from a judgment of the Superior Court of Los Angeles County, Henry J. Hall, Judge. Affirmed in part; modified in part; remanded in part.

Edward H. Schulman, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Michael Carter appeals from a first degree murder conviction. (Pen. Code,[1] § 187, subd. (a).) The prosecution presented evidence that following a brief verbal exchange, defendant, a gang member, shot and killed Kapre Brown, a former rival gang member. Defendant shot Brown six times at close range while in the middle of a crowded Hollywood crosswalk. Surveillance video and cell phone records placed defendant in the area at the time Brown was shot. Multiple witnesses identified defendant.

The prosecution argued this was an intentional, gang-related killing. Defense counsel, while conceding defendant was in the area at the time, argued defendant had been misidentified as the perpetrator. Defense counsel further briefly argued the crime committed was voluntary manslaughter, not murder, because the shooter acted in rage after a sudden quarrel.

A jury convicted defendant of first degree murder. The jury further found true personal firearm use and criminal street gang enhancement allegations. (§§ 186.22, subd. (b)(1)(C), 12022.53, subds. (b), (c), (d).) The trial court sentenced defendant to 50 years to life in state prison.

On appeal, defendant contends: (1) the instructions on provocation reducing murder from first to second degree misinformed the jurors they should apply an objective rather than a subjective standard of reasonableness; (2) imposing the firearm enhancement violated California's multiple conviction

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1 Further statutory references are to the Penal Code.

rule as well as constitutional double jeopardy principles; (3) the trial court miscalculated defendant's presentence custody credit; and (4) this case should be remanded so that the trial court may exercise its discretion to dismiss the firearm enhancement under subdivision (h) of section 12022.53 as amended by Senate Bill No. 620 effective January 1, 2018. We remand to allow the trial court to exercise its discretion under section 12022.53, subdivision (h), as amended effective January 1, 2018, modify the judgment with respect to defendant's presentence custody credit, and otherwise affirm.

DISCUSSION

A. *Jury Instruction on Provocation*

Defendant contends the trial court's instructions on provocation reducing murder from first to second degree misinformed the jurors they should apply an objective rather than a subjective standard of reasonableness. (See *People v. Jones* (2014) 223 Cal.App.4th 995, 1000 ["a subjective test applies to provocation as a basis to reduce malice murder from the first to the second degree"]; *People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1332 ["If the provocation would not cause *an average person* to experience deadly passion but it precludes the defendant from *subjectively* deliberating or premeditating, the crime is second degree murder" (italics added)].) A trial court has a duty to instruct, even absent a request, "'on general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case.' [Citation.]" (*People v. Townsel* (2016) 63 Cal.4th 25, 58.) In addition, when a court,

absent a sua sponte duty to do so, chooses to instruct on a particular legal point, it must do so correctly. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015.) Once adequate and correct instructions are given, a trial court has no duty to give clarifying or amplifying instructions unless asked to do so. (*People v. Mayfield* (1997) 14 Cal.4th 668, 778; disapproved on another point in *People v. Scott* (2015) 61Cal.4th 363, 390, fn. 2.)

We review a claim that instructions were incorrect or misleading de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) "'The relevant inquiry [when instructional error is claimed] is whether, "in the context of the instructions as a whole and the trial record, there is a reasonable likelihood that the jury was misled to defendant's prejudice." [Citation.] Also, '"'we must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given."'"' [Citations.]" (*People v. O'Malley* (2016) 62 Cal.4th 944, 991.)

Defendant's argument was considered and rejected by our Division Four colleagues in *People v. Jones, supra*, 223 Cal.App.4th at pages 999-1003. And in *People v. Hernandez, supra*, 183 Cal.App.4th at pages 1331-1334, the Court of Appeal for the Fourth Appellate District rejected a similar claim—that CALJIC No. 522 was incomplete and misleading as it relates to second degree murder because it does not specify that heat of passion arising from provocation can negate the premeditation and deliberation necessary for first degree murder. We agree with the reasoning in *Jones* and *Hernandez* and reject defendant's claim for several reasons.

1. Defense counsel forfeited this argument

First, an instruction explaining that a subjective rather than objective test applies to reduce murder from first to second degree is a pinpoint instruction (*People v. Rogers* (2006) 39 Cal.4th 826, 877-878; *People v. Jones, supra*, 223 Cal.App.4th at p. 1001), and defense counsel's failure to request a pinpoint instruction explaining that the objective test did not apply to reduction of murder from first to second degree forfeited the argument. (*People v. Jones, supra*, 223 Cal.App.4th at p. 1001.) Notably, defendant's trial attorney never argued his client was guilty (if at all) only of second degree murder. And the prosecutor never argued that an objective test applied to reduce murder from first to second degree.

Defendant relies on the nonforfeiture rule in section 1259: "The appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." However, because the jury was correctly instructed, there was no error affecting defendant's substantial rights. (See *People v. Sattiewhite* (2014) 59 Cal.4th 446, 474-475.) And defendant's failure to request clarification of the otherwise correct instructions on murder and voluntary manslaughter forfeited his claim for purposes of this appeal. (*People v. Whalen* (2013) 56 Cal.4th 1, 81-82, disapproved on another point in *People v. Romero and Self* (2015) 62 Cal.4th 1, 44, fn. 17.)

2. The jury was correctly instructed

Second, even if defendant did not forfeit his argument, the trial court's instructions on murder (CALCRIM No. 520),[2] first

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[2] "The defendant is charged in the information with murder in violation of Penal Code section 187. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant committed an act that caused the death of another person; [¶] AND [¶] 2. When the defendant 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. [¶] The defendant acted with *express malice* if he unlawfully intended to kill. [¶] The defendant acted with *implied malice* if: [¶] 1. He 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 or the passage of any particular period of time. [¶] An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. [¶] If you decide that the defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in Instruction No. 521, which follows." (CALCRIM No. 520.)

degree murder (CALCRIM No. 521),[3] provocation (CALCRIM No. 522)[4] and voluntary manslaughter (CALCRIM No. 570)[5] were

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[3] "The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted *willfully* if he intended to kill. The defendant acted *deliberately* if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with *premeditation* if he decided to kill before completing the acts 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." (CALCRIM No. 521.)

[4] "Provocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [¶] Also, consider the provocation in deciding whether the defendant committed murder or manslaughter." (CALCRIM No. 522.)

[5] The trial court instructed the jury on voluntary manslaughter at defense counsel's request. The trial court instructed: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The

correct. (*People v. Jones, supra*, 223 Cal.App.4th at p. 1001; *People v. Hernandez, supra*,183 Cal.App.4th at p. 1334.) "[The instructions] accurately inform[ed] the jury what is required for first degree murder, and that if the defendant's action was in fact the result of provocation, that level of crime was not committed.

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defendant killed someone because of a sudden quarrel or in the heat of passion if: [¶] 1. The defendant was provoked; [¶] 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; [¶] AND [¶] 3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment. [¶] Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection. [¶] In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time. [¶] It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment. [¶] If enough time passed between the provocation and the killing for a person of average disposition to "cool off" and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder." (CALCRIM No. 570.)

CALCRIM Nos. 521 and 522, taken together, informed jurors that 'provocation (the arousal of emotions) can give rise to a rash, impulsive decision, and this in turn shows no premeditation and deliberation.' ([*People v.*] *Hernandez, supra*, 183 Cal.App.4th at p. 1334.) As the jury also was instructed, a reduction of murder to voluntary manslaughter requires more. It is here, and only here, that the jury is instructed that provocation alone is not enough for the reduction; the provocation must be sufficient to cause a person of average disposition in the same situation, knowing the same facts, to have reacted from passion rather than judgment." (*People v. Jones, supra*, 223 Cal.App.4th at p. 1001.) Considering the instructions as a whole, it is not reasonably likely the jurors thought they should apply an objective rather than a subjective standard of reasonableness in assessing provocation as a basis to reduce murder from first to second degree. The trial court did not err in instructing the jury pursuant to CALCRIM Nos. 520, 521, 522 and 570.

3. Defendant has not established ineffective assistance of counsel

Third, defendant cannot show his trial attorney was ineffective. "A criminal defendant's federal and state constitutional rights to counsel (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15) include the right to *effective* legal assistance. When challenging a conviction on grounds of ineffective assistance, the defendant must demonstrate counsel's inadequacy. To satisfy this burden, the defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing

professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance. It is particularly difficult to prevail on an *appellate* claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding. [Citations.]" (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

Defense counsel could reasonably have concluded that under *Jones*, the instructions given were correct. Moreover, because defendant's principle defense was mistaken identity, not provocation, defense counsel could reasonably have concluded pinpoint instructions on provocation were unnecessary. (See *People v. Jones, supra*, 223 Cal.App.4th at p. 1002 ["It would have been difficult to present both [provocation and mistaken identity theories] while retaining credibility with the jury"].) And, to the extent defense counsel relied on provocation, his argument was consistent with the jury instructions given. Defense counsel argued briefly that the crime committed was sudden quarrel voluntary manslaughter not premeditated murder. (*Id.* at pp. 1001-1002.)

B. *The Firearm Enhancement*

1. There was no violation of the rule against multiple convictions or double jeopardy principles

The trial court imposed a consecutive 25-years-to-life sentence for personal and intentional discharge of a firearm proximately causing death pursuant to section 12022.53, subdivision (d).[6] Defendant asserts imposing the firearm enhancement violated California's rule against multiple convictions based on necessarily included offenses as well as constitutional double jeopardy principles because both the first degree murder conviction and the firearm enhancement were based on the victim's death. Defendant concedes, however, that those issues have been decided adversely to him in *People v. Sloan* (2007) 42 Cal.4th 110, 115-124 and *People v. Izaguirre* (2007) 42 Cal.4th 126, 130-134. He raises the arguments to preserve them for subsequent review. We are bound by *Sloan* and *Izaguirre*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

2. The recent amendment to section 12022.53, subdivision (h) applies to defendant

In supplemental briefing, defendant seeks a remand for resentencing under a recent amendment to section 12022.53.

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[6] The trial court also imposed and stayed (§ 654) the mandated sentences under subdivisions (b) and (c) of section 12022.53. (*People v. Gonzales* (2008) 43 Cal.4th 1118, 1130.)

The People have not responded to defendant's request for remand. On October 26, 2016, when defendant was sentenced, the trial court was obligated by statute to impose 25 years to life for first degree murder and a consecutive 25 years to life for the section 12022.53, subdivision (d) firearm enhancement. (*People v. Franklin* (2016) 63 Cal.4th 261, 263.) Section 12022.53, subdivision (h) then prohibited the trial court from striking or dismissing the firearm enhancement. Effective January 1, 2018, however, section 12022.53, subdivision (h) was amended by Senate Bill No. 620 to allow a trial court to exercise discretion under section 1385 to strike or dismiss a section 12022.53 firearm enhancement at the time of sentencing or resentencing. Subdivision (h) now reads: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 2.)

We agree with defendant that subdivision (h) of section 12022.53 as amended by Senate Bill No. 620 applies to him. (*People v. Brown* (2012) 54 Cal.4th 314, 324; *People v. Francis* (1969) 71 Cal.2d 66, 76; *In re Estrada* (1965) 63 Cal.2d 740, 745, 747-748; *People v. Robbins* (2018) 19 Cal.App.5th 660, 678-679.) We therefore remand this matter for the trial court to determine whether it wishes to resentence defendant.

C. *Presentence Custody Credit*

Defendant asserts and the People concede error in the presentence custody credit calculation. The trial court gave

defendant credit for 565 days. Defendant was arrested on February 8, 2015 and sentenced 627 days later on October 26, 2016. Therefore, the judgment must be modified and the abstract of judgment amended to reflect 627 days of presentence custody credit.

DISPOSITION

We remand the matter to permit the trial court, if it so chooses and within the confines of section 1385, to exercise its discretion to strike or dismiss defendant's section 12022.53 firearm enhancement. The judgment is modified to reflect 627 days of presentence custody credit. The judgment is affirmed in all other respects.

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KIM, J.*

We concur:

KRIEGLER, Acting P.J. BAKER, J.

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