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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JOHNL DVON REYNOLDS, Defendant and Appellant.	B238018 (Los Angeles County Super. Ct. No. GA070749)

APPEAL from a judgment of the Superior Court of Los Angeles County, Candace J. Beason, Judge. Affirmed.

Landra E. Rosenthal, 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, Senior Assistant Attorney General, Theresa A. Patterson and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

Johnl Dvon Reynolds appeals from the judgment entered after his conviction of first degree murder and attempted murder with true findings on related gang and firearm-use enhancements. Reynolds contends dog-scent identification evidence was improperly admitted at trial and one of the firearm-use enhancements should not have been imposed. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Charges*

Reynolds was charged by amended information with the first degree murder of Ebony Huel (Pen. Code, § 187, subd. (a)),[1] the attempted willful, deliberate and premeditated murder of Sean Quintero (§§ 187, subd. (a); 664) and the unlawful possession of a firearm by a felon (§ 12021, subd. (a)(1)). The information specially alleged Reynolds had personally used a firearm (§ 12022.53, subds. (b), (c), & (d)) and had committed the crimes for the benefit of, at the direction of or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)). It was also alleged Reynolds had suffered one prior serious or violent felony conviction within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)).

2. *The Crimes*

On the night of August 17, 2007 Huel was shot and killed while standing in a crowd outside the Underground Club in Pasadena. The prosecution's theory was that Reynolds intended to kill Quintero, who was also outside the club and had previously implicated Reynolds in a crime, but accidentally hit Huel instead. According to the defense, there was insufficient evidence Reynolds had shot Huel and, even if he did, he was suffering from post-traumatic stress disorder (PTSD) when he pulled the trigger, negating premeditation and deliberation.

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[1] Statutory references are to the Penal Code unless otherwise indicated.

3. *The Evidence at Trial*

a. *Testimony*

Reynolds, a member of a Blood gang known as the Pasadena Denver Lanes, was convicted of robbery in 2005 and sentenced to state prison. Quintero, a confederate, had implicated him in the crime, and was sentenced to time served and released on probation after pleading guilty to a lesser offense. Reynolds was on parole at the time of the murder.

On the morning of August 17, 2007 Reynolds showed his friend Vanessa Calderon a handgun with a yellow or tan barrel that appeared to be capable of firing four bullets. At the time Reynolds was wearing a beanie and a red Chicago Bulls jersey with Michael Jordan's name and number (23) (Jordan Chicago Bulls jersey).

Later that day Leeban Adan, another friend, drove Calderon and Reynolds to the Underground Club. About an hour later Calderon left to go to the car, which was parked around the corner. Reynolds and Adan walked past her, reaching the car first, but then headed back to the club a few minutes later. Calderon stopped walking to wait for them on the street. Calderon heard a single gunshot, and Reynolds and Adan ran back toward her. She followed them to the car and got into the backseat. From the front seat, either Reynolds or Adan tossed a handgun into Calderon's lap, the same gun Reynolds had shown her that morning. At Adan's urging, Calderon threw the gun out the window. Reynolds told her to retrieve it, and Calderon left the car to look for the gun. Calderon gave up the search and got back into the car when Adan started to drive away. Shortly thereafter Adan dropped off Reynolds and Calderon near her house.

Huel died as a result of a gunshot wound to her head. Following the shooting Los Angeles County Sheriff's deputies and Pasadena police officers searched the area and recovered a yellow, four-barreled handgun and a red beanie.

Reynolds was arrested the day after the shooting. He was wearing a Jordan Chicago Bulls jersey. At the Pasadena police station Reynolds was placed with Calderon in an interview room that was electronically monitored. Detective Max Dahlstein testified he overheard Reynolds instructing Calderon to tell the police the handgun had

accidentally discharged when Reynolds attempted to grab it away to prevent her from shooting "Shady Stupid" (Quintero)[2] for snitching on Reynolds. Reynolds explained to Calderon that, unlike her, he could be imprisoned for life. Calderon agreed to "take the rap" for Reynolds. She subsequently told police that she had been playing with the handgun when it had accidentally went off. Calderon later recanted this admission.

Adan's preliminary hearing testimony was read to the jury;[3] and Ricci Bonwell, an Underground Club employee who had witnessed the shooting, testified at trial.[4] According to Adan, on the night of the shooting Reynolds was wearing a Chicago Bulls jersey and possibly a red beanie. At one point outside the Underground Club Reynolds grabbed the neck or shoulder of another man who had light skin and a pony tail.[5] As the man was squirming in Reynolds's grasp, Reynolds extended his other hand above the man's neck. Adan then heard a bang and saw a bright light.

When the shooting occurred Bonwell was standing outside with about 30 people, including Huel and a man wearing a red beanie and a Jordan Chicago Bulls jersey. At the preliminary hearing Bonwell had testified he saw "[Reynolds's] arm reached out, and that's when I saw–heard the gunshot." Bonwell identified Reynolds as the person who had shot Huel. At trial Bonwell testified to "see[ing] the person he [had previously] identified as the shooter" in court. He then identified Reynolds as that person, "who looked to be shooting" in the crowd of people outside the Underground Club that night.[6]

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[2] Detective Dahlstein testified that Shady Stupid was Quintero.

[3] Leeban Adan was unavailable as a witness at trial. His preliminary hearing testimony was read over defense objection. Out of the jury's presence the prosecutor revealed that Adan had been killed.

[4] At the time of trial Ricci Bonwell was in custody. The jury was informed Bonwell had prior convictions for lewd conduct, forgery, burglary and failure to register as a sex offender and was testifying under a grant of immunity.

[5] Quintero had long hair in his photograph.

[6] At trial Bonwell acknowledged he had received threatening telephone calls and letters concerning his pending testimony and was afraid to testify and be labeled a snitch.

Bonwell also testified that Reynolds's arm was outstretched at a 90-degree angle from his body. Bonwell denied he saw a gun.

b. *Dog-scent evidence*

Michael Wooldridge, a canine handler for the Long Beach Police Department, went to the shooting scene the night of the murder. Using a special device called a scent transfer unit, which is similar to a small, portable vacuum cleaner, Wooldridge transferred scent from a beanie and a handgun he was given to separate sterile gauze pads, making three scent pads for each item.

Three days after the shooting Edward (Ted) Hamm, a scent hound handler for the Los Angeles County Sheriff's Department, and his dog Bojangles, a trained scent hound, went to the police station where Reynolds was being held. Hamm had Bojangles sniff one of the handgun scent pads prepared by Officer Wooldridge. Bojangles then led Hamm through the first floor of the station to the room in which Reynolds was being held and "alerted" to Reynolds by walking up to him. Officers moved Reynolds to a room on the second floor of the police station, while Hamm had Bojangles sniff one of the beanie scent pads prepared by Wooldridge. Bojangles again led officers to the room where Reynolds was being held and alerted to Reynolds.

Detective Keith Gomez of the Pasadena Police Department testified as a gang expert. In response to a hypothetical question Gomez opined a gang member who shoots a person labeled a snitch for cooperating with police benefits the gang by upholding its rule that a snitch must "pay with his or her life."

c. *Defense expert testimony regarding PTSD*

Reynolds did not testify. Dr. Nancy Kaser-Boyd, a clinical and forensic psychologist, testified, after reviewing Reynolds's medical records and personal background, interviewing him at length and administering a series of psychological tests, it was her opinion Reynolds was suffering from PTSD. According to Dr. Kaser-Boyd, individuals who suffer from PTSD may experience sudden explosive anger that is difficult to control. Given a hypothetical based on this case, she opined someone with

PTSD who has been involved in an argument that escalated to a physical altercation would likely become overwhelmed with anger to the point of acting irrationally.

Dr. Kaser-Boyd also testified she had asked Reynolds about the night of the shooting. Reynolds told her Calderon had the handgun and was attempting to shoot Quintero for having sent Reynolds to prison. When Reynolds raised his hand to stop Calderon, the gun discharged accidentally. After Dr. Kaser-Boyd replied no one had reported seeing a girl with a gun, Reynolds said, "Okay, I was the one with the gun." He also told Dr. Kaser-Boyd, "I was so angry that I went to jail and [Quintero] went home. That me and my other homie went and he didn't, and we were supposed to be together all the way."

4. *Verdict and Sentencing*

The jury convicted Reynolds of first degree murder and attempted willful, deliberate and premeditated murder and found true the special gang and firearm-use allegations. In a bifurcated proceeding Reynolds pleaded no contest to possession of a firearm by a felon and admitted the prior conviction allegation.

Reynolds was sentenced to an aggregate state prison term of 75 years to life for first degree murder.[7] His sentences on the remaining two counts were stayed pursuant to section 654.

DISCUSSION

1. *Dog-scent Identification Evidence*

Admission of evidence that a dog trailed or tracked a suspect from a crime scene has been held upheld by California appellate courts if an adequate foundation for the evidence has been provided (that is, that the dog was properly trained in tracking humans and the dog's handler was qualified to use the dog). (See, e.g., *People v. Craig* (1978) 86 Cal.App.3d 905, 916-917; *People v. Malgren* (1983) 139 Cal.App.3d 234, 237.)

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[7] Reynolds was sentenced to 25 years to life for first degree murder, doubled under the Three Strikes law, plus 25 years to life for the firearm-use enhancement under section 12022.53, subdivision (d). The abstract of judgment does not accurately reflect this aggregate sentence, and we order it corrected.

However, because no published decision has yet affirmed under *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*)[8] that the scientific community has generally accepted the use of a scent transfer unit (or STU) to prepare scent pads as part of the tracking or identification procedure, the trial court here properly held a pretrial hearing under Evidence Code section 402 to determine the admissibility of the dog-scent identification testimony proffered by the People. (See *People v. Mitchell* (2003) 110 Cal.App.4th 772, 784-790 [error for trial court not to hold a *Kelly* hearing regarding scent transfer device]; *People v. Willis* (2004) 115 Cal.App.4th 379, 384-386.) Reynolds contends the court erred in concluding following the hearing that the evidence was admissible and asserts its use at trial violated his due process right to a fair trial and his Sixth Amendment right to confront and cross-examine witnesses.[9]

a. *The Evidence Code section 402 hearing*

Prior to trial Reynolds moved to exclude the dog-scent identification evidence. The People filed a lengthy motion with extensive exhibits to admit it. Neither motion is part of the record on appeal.

At the outset of the Evidence Code section 402 hearing, the parties stipulated, with respect to the reliability of the scent transfer unit in collecting a scent from an article, the trial court could take judicial notice of transcripts and other pertinent documents of *Kelly*

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[8] In *Kelly, supra*, 17 Cal.3d 24 the Supreme Court recognized a "general acceptance" test for admissibility of expert testimony based on new scientific techniques. Under *Kelly* a new technique is subject to a three-part test of reliability: Is the technique considered reliable in the scientific community; is the witness testifying about the technique a qualified expert on the subject; did the person performing the test use correct scientific procedures? (See *People v. Bolden* (2002) 29 Cal.4th 515, 544-545.) In *People v. Leahy* (1994) 8 Cal.4th 587, 594, the Court confirmed the *Kelly* test still applies in California's courts despite the United States Supreme Court rejection in *Daubert v. Merrill Dow Pharmaceuticals, Inc*. (1993) 509 U.S. 579 [113 S.Ct. 2786, 125 L.Ed.2d 469] of a similar test in federal courts. The California Supreme Court recently reaffirmed the continued viability of *Kelly* in *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 772, footnote 6.

[9] With some apparent self-consciousness, Reynolds's appellate counsel asserts, "[I]t goes without saying—yet, it must be said—that appellant could not cross-examine the dog."

hearings in two earlier cases involving the admissibility of dog-scent identification evidence: *People v. Salcedo* (Super. Ct. L.A. County, 2005, No. GA052057) and *People v. Elias et al*. (Super. Ct. L.A. County, 2010. No. GA069722). In both cases Hamm was the scent-dog handler and the dog used was Bojangles. The parties further agreed that, depending on the trial court's tentative ruling on the reliability of the STU under *Kelly*, the remainder of the hearing would concern whether there was an adequate foundation to admit the dog-scent identification evidence in this case.

After reviewing the transcripts and other documents, the trial court tentatively ruled that dog-scent identification evidence obtained through the use of an STU was generally accepted by the scientific community. Defense counsel stipulated for purposes of the hearing that Hamm was an expert in dog-scent discrimination and trailing. The prosecutor then had Hamm testify to provide a foundation as to Bojangles's training, skills and experience in the area.

Hamm initially explained his general approach to training dogs to trail or follow scents. He then described the training Bojangles had received, specifically focusing on the dog's training in different environments including police stations (station identifications). Hamm testified, at the time of this proceeding, five of Bojangles's station identifications for the Pasadena Police Department had been confirmed. Hamm then described the station identifications conducted at the Pasadena police station on August 20, 2007 in which, Bojangles twice followed a trail that led to Reynolds, who had been placed in different parts of the station, each time after the dog had sniffed a different scent pad.

Following Hamm's testimony defense counsel argued the *Salcedo* and *Elias* trial transcripts failed to establish the STU is generally accepted in the scientific community under *Kelly*. Counsel also argued the results of Bojangles's scent discrimination and trailing were ambiguous. Rather than place his paw on the person he has trailed, the dog was trained to stand by the person, which could mean the dog was simply waiting for the next command rather than signaling he had matched the scent to the person. Counsel additionally argued it had not been shown that Bojangles's initial scent identification of

Reynolds had not influenced the dog's second scent identification of him. In this regard counsel asserted, "But it seems to me that we would have to rule out the dog's ability to remember the scent he had just done a trail on when he gets a new one and trails my client again."

The trial court ruled the dog-scent identification evidence was admissible. It found the STU was generally accepted within the scientific community within the meaning of *Kelly* and an adequate foundation had been laid for the handler and the scent dog.

b. *Reynolds has provided an inadequate record on appeal*

Reynolds has forfeited his various challenges to the admission of the dog-scent identification evidence, including whether use of the STU is generally accepted by the scientific community within the meaning of *Kelly* and whether the People established an adequate foundation that Hamm was qualified and Bojangles properly trained and reliable, by failing to provide an adequate record on appeal. Evaluation of Reynold's various arguments requires a review of the *Salcedo* and *Elias* trial transcripts, as well as the motion papers and other documents the parties submitted at the Evidence Code section 402 hearing on the admissibility of the dog-scent identification evidence. Yet the record on appeal does not include this necessary material; it is not part of the clerk's transcript. Without it we cannot review the evidentiary basis for the trial court's decision under *Kelly* and determine Reynolds's state law and constitutional claims, many of which appear to have been raised for the first time on appeal. (See generally *People v. Neilson* (2007) 154 Cal.App.4th 1529, 1534 [appellant's burden to provide adequate record on appeal; failure to do so requires resolution of issues against appellant]; *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 366.)

c. *Any error in admitting the dog-scent identification evidence was harmless*

. Although the appellate record is inadequate to review Reynolds's challenges to the dog-scent identification evidence, a thorough examination of the trial transcript clearly establishes any error in admitting that evidence was harmless under either the *Chapman* or *Watson* standard. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct., 824

17 L.Ed.2d 705] [conviction should be reversed unless the People prove federal constitutional error harmless beyond a reasonable doubt];[10] *People v. Watson* (1956) 46 Cal.2d 818, 836 [reversal not required for state law error unless "it is reasonably probable that a result more favorable to the appealing party would have been reached in absence of the error"].)

There was overwhelming evidence Reynolds was the individual who fired the shot outside the Underground Club, killing Huel. The evidence at trial established a clear motive for the murder: Reynolds, an admitted gang member, was angry with Quintero for having informed the police about Reynolds's involvement in a robbery, which targeted Quintero for retaliation by Reynolds. Two eye witnesses, Adan and Bonwell, identified Reynolds as the man they saw extend his arm towards Quintero, followed by a gunshot. Before the shooting Calderon saw Reynolds in possession of a distinctive handgun, which Reynolds demanded she retrieve after she had thrown it out the car window following the shooting. Reynolds also made highly damaging, incriminating statements: In urging Calderon to claim responsibility for the shooting, Reynolds said he was facing a life sentence. He also admitted to Dr. Kaser-Boyd that he, not Calderon, held the gun; and he conceded he was angry with Quintero for having betrayed him to the police. Based on this largely undisputed evidence, admission of the dog-scent identification evidence could not have prejudiced Reynolds.

2. *The Firearm-use Enhancement for the Attempted Murder of Quintero*

Reynolds was convicted of both the first degree murder of Huel and the attempted premeditated murder of Quintero based on firing a single shot outside the Underground Club on August 17, 2007. The trial court properly stayed execution of the sentence imposed on the attempted murder charge pursuant to section 654. Nonetheless, Reynolds

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[10] Federal constitutional error is properly found harmless under the *Chapman* standard if a thorough examination of the record demonstrates beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. (See *Neder v. United States* (1999) 527 U.S. 1, 15 [119 S.Ct. 1827, 144 L.Ed.2d 35]; *People v. Gonzalez* (2012) 54 Cal.4th 643, 663.)

contends that the stayed sentence for that crime (a life term doubled under the Three Strikes law, or 14 years to life, plus 25 years to life for personally and intentionally discharging a firearm causing death under section 12022.53, subdivision (d)) improperly includes the section 12022.53, subdivision (d), enhancement, rather than a section 12022.5 firearm enhancement (three, four or 10 years) and that, although no objection was made in the trial court, the sentence as imposed is unauthorized.

As discussed, the amended information (as well as the original information), specially alleged Reynolds had personally and intentionally discharged a firearm in the commission of both crimes, causing great bodily injury or death to Huel pursuant to section 12022.53, subdivision (d).[11] There was no allegation of personal use of a firearm in the commission of a felony under section 12022.5.[12] The jury was instructed on the elements of personal use of a firearm (CALCRIM No. 3146), personal and intentional discharge of a firearm (CALCRIM No. 3148), and personal use and intentional discharge of a firearm causing great bodily injury or death (CALCRIM No. 3148). There was no instruction regarding the use of a firearm by a principal. On count 1, murder, the jury found Reynolds guilty and found the section 12022.53, subdivision (d), firearm-use enhancement true. On count 2, attempted murder, however, the verdict form incorrectly provided, with respect to the firearm-use enhancement, "We further find the allegation that in the commission and attempted commission of the above offense, a principal personally and intentionally discharged a firearm, a handgun, within the meaning of Penal Code Section 12022.5 to be: ____." The jury inserted the word "True."

The verdict form was plainly incorrect. Reynolds was charged, the case was tried and the jury was properly instructed under the theory that Reynolds had fired the handgun

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[11] The amended information, but not the original information, also included allegations of personal use of a firearm under section 12022.53, subdivision (b), and personal and intentional discharge of a firearm under section 12022.53, subdivision (c).

[12] Section 12022.5, subdivision (a), provides, "Except as provided in subdivision (b), 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 a firearm is an element of that offense."

and in so doing had caused Huel's death within the meaning of section 12022.53, subdivision (d). Indeed, section 12022, not section 12022.5, provides the principal-used-a-firearm enhancement; and neither section 12022 nor section 12022.5 mentions "intentionally discharged." Reference to section 12022.5 was an unfortunate clerical mistake. But any error in this regard was harmless.

Immediately after the jury returned its verdict, the prosecutor brought the error in the verdict form to the court's attention. After dealing with other matters, the court explained to the jurors it had instructed them, with respect to both counts 1 and 2, they needed to decide whether Reynolds had personally used a firearm, had intentionally discharged the firearm and, finally, whether Reynolds had caused great bodily injury or death as a result of personally and intentionally discharging a firearm. The court then asked, with respect to the verdict on count 1, which found the section 12022.53, subdivision (d), allegation to be true, "did the jury follow all three of the gun instructions that the court just read to you?" All 12 jurors answered yes. The court continued, "Okay. And as to count 2, did you make the same or similar finding as to count 2 . . . ?" Again, all 12 jurors answered yes, and the court stated, "I just wanted to clarify that for the record."

From the record as a whole, it is clear the jury was properly instructed and unanimously found Reynolds had personally and intentionally discharged a firearm causing Huel's death while attempting to murder Quintero. Accordingly, the jury's unmistakable intent was to find the section 12022.53, subdivision (d), allegation as to count 2 to be true. The clerical error in the verdict form was properly disregarded. (*People v. Escarcega* (1969) 273 Cal.App.2d 853, 858 ["[i]n giving effect to the manifest intention of the jury, the clerical error will be disregarded"]; *People v. Trotter* (1992) 7 Cal.App.4th 363, 370 [error in recording the judgment, not in rendering the judgment, may be disregarded or corrected.]; accord, *People v. Camacho* (2009) 171 Cal.App.4th 1269, 1273.)

DISPOSITION

The judgment is affirmed. The superior court is directed to prepare a corrected abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.