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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JOE FIDEL FLORES,

Defendant and Appellant.

2d Crim. No. B241833
(Super. Ct. No. 2009013438)
(Ventura County)

Joe Fidel Flores appeals his conviction, by jury, of the first degree murder of Samuel Reeves in October 2003. (Pen. Code, §§ 187, subd. (a), 189.)¹ The jury found true the special circumstance allegation that appellant committed the murder for the benefit of a criminal street gang (§ 190.2, subd. (a)(22), and a sentence enhancement allegation to the same effect. (§ 186.22, subd. (b)(1)(C).) It also found that he personally used a firearm in committing the offense. (§ 12022.53, subd. (c), (d).) The trial court sentenced appellant to life in prison without the possibility of parole, plus a consecutive indeterminate sentence of 25 years to life for the firearm use. Appellant contends the prosecutor committed misconduct by misstating, in closing arguments, the provocation required to reduce murder to voluntary manslaughter. He also contends the trial court erred when it denied his request to be represented by retained counsel at sentencing, that there was insufficient evidence to support the criminal street gang special circumstance and sentence enhancement findings,

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

and that the abstract of judgment should be corrected to reflect that no parole revocation fine was imposed or stayed. We correct the abstract of judgment and affirm.

Facts

The victim, Samuel Reeves, was 15 years old when he accompanied his older brothers Jesse and David, and Jesse's friend, Geno Roderick, to a large outdoor birthday party held at a ranch house on the outskirts of Santa Paula. Between 100 and 350 people attended the party, which featured kegs of beer, other alcohol and loud music. Most of the guests were college-aged, although some were older and others were high-school aged. The person whose birthday was being celebrated is not associated with any of the Santa Paula gangs, but some local gang members attended. Sam and his brothers were not affiliated with any gang, nor was Roderick.

Appellant, Nathan Maloney, and Michael and Peter Carrillo were members of Bad Boyz, a Santa Paula gang, who also attended the party. Appellant, Maloney, and Michael Carrillo were each armed with a handgun. Maloney testified that he brought a gun to the party because he was a gang member and expected someone might confront him or his fellow gang members for that reason.

At some point during the party, a fist fight broke out between Roderick, the Reeves brothers and five to 10 other party guests. Corey Nicholson, who was involved at the beginning of the fight, testified that he was knocked to the ground; others were standing and throwing punches.

Appellant entered the fray, attempting to stop the fight. David Reeves punched appellant and was choking him. Another blow struck appellant and he was "knocked out." Someone, possibly Sam Reeves, kicked appellant in the face as he lay on the ground. Appellant's nose was bloodied, but not broken. When appellant came to, he was on the ground. He later told a friend and fellow gang member that he was being "jumped." Someone was choking him and he could not breathe because his nose was bleeding. Appellant fired his gun at one of the people surrounding him.

Sam Reeves sustained a fatal gunshot wound to the chest at point blank range. Appellant's blood was found on Reeves' shirt and shoes. There were no grass stains on his

clothing, or recent injuries to his body that would indicate he had been fighting or wrestling before he was shot.

Meanwhile, Nathan Maloney was standing nearby with his own handgun in his hand. David Reeves was running toward him, so Maloney pointed the gun at him. David put his hands up. Maloney was shouting to the crowd to keep away. He put his gun to David Reeves' head to stop him from attacking appellant. Maloney waited for appellant to collect himself and get up off of the ground. Then, they ran away from the scene together.²

When the shooting occurred, Mauricio Reyes was a leader of and "shot caller" for the Bad Boyz. He did not attend the birthday party because he was in custody that night. Six years after the shooting, Reyes agreed to provide information about it to law enforcement, in exchange for the dismissal of an ammunition possession charge and relocation assistance. Reyes secretly recorded conversations with both Maloney and appellant in which both men acknowledged that appellant was the person who shot Reeves.

The trial court instructed the jury on murder, the lesser included offense of voluntary manslaughter on a heat of passion theory and on an imperfect self-defense theory, justifiable self-defense and the role of self defense in a mutual combat situation. The jury found appellant guilty of first degree murder and found true the special circumstance allegation that he intentionally killed the victim while he was a participant in a criminal street gang, the sentence enhancement allegation that he committed the murder for the benefit of the gang and the sentence enhancement allegation that he personally used a firearm in committing the murder.

Discussion

Prosecutorial Misconduct

In his opening and closing arguments, the prosecutor argued the crime was first degree murder, not voluntary manslaughter, because appellant did not shoot on adequate provocation in the heat of passion. The evidence that appellant brought a gun with

² Maloney was prosecuted for Sam Reeves' murder and for assault with a deadly weapon on David Reeves. He was acquitted of the murder but convicted on the assault charge. Maloney was on parole at the time of appellant's trial.

him to the party negated voluntary manslaughter on a heat of passion theory because, the prosecutor argued, "a gang member who brings a loaded gun to a party in preparation for something going down is not somebody who is dealing with a sudden heat of passion. That's somebody who is prepared for war." The prosecutor made a similar point in rebuttal: "Heat of passion doesn't mean I'm in a fight and you hit me and then I get angry. Heat of passion is I'm walking by and somebody clocks me and I don't expect it and then I overreact. ¶ . . . It's such an outrageous thing it overcomes your ability to think. Think about how many justified shootings we'd have, you know. I get in a fight, we are punching away, you get a good shot. Okay. I got my gun and I kill you. That's not what the law provides. That's not heat of passion. When he entered that fight he was expecting a fight and the fact that somebody licked out and hit him is not a heat of passion."

The defense theory of the case was that appellant acted in the heat of passion or in the unreasonable belief that he needed to shoot Reeves in self defense, so the crime was voluntary manslaughter rather than murder. Defense counsel described the scene this way: "Now, the unfortunate circumstance is that [appellant] does shoot. Why? Because he's scared that he's going to be injured by the choking primarily or he's going to be either further beaten or injured. He should not have had a gun. I'm never going to argue anything about that. But even if you determine that [appellant] didn't have the right of self-defense, he would have reasonably believed he was in imminent danger of injury from the choking and/or other deadly force and the deadly force would be necessary. ¶ Additionally, the events clearly point to this heat of passion since and it had to happen so, so very quickly and in the midst of this melee. And what happened is essentially voluntary manslaughter."

Our Supreme Court recently summarized the standards governing review of prosecutorial misconduct claims. " ' A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such " ' unfairness as to make the resulting conviction a denial of due process.' " (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 . . .; see *People v. Cash* (2002) 28 Cal.4th 703, 733 . . .) 'Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a

fundamentally unfair trial.' (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1328) 'In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review.' (*Ibid.*) When a claim of misconduct is based on the prosecutor's comments before the jury, ' "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." ' (*People v. Smithey* (1999) 20 Cal.4th 936, 960, quoting *People v. Samayoa* (1997) 15 Cal.4th 795, 841)" (*People v. Williams* (2013) 56 Cal.4th 630, 671.)

Prosecutorial misconduct is subject to harmless error analysis. Misconduct is prejudicial as a matter of federal law only where it so infects a trial with unfairness as to make the defendant's resulting conviction a denial of due process. (*People v. Prieto* (2003) 30 Cal.4th 226, 260.) Where the misconduct does not rise to the level of federal constitutional error, it is harmless unless there is a reasonable probability that a result more favorable to the defendant would have been obtained had the prosecutor not engaged in the misconduct at issue. (*People v. Castillo* (2008) 168 Cal.App.4th 364, 386.)

Appellant contends the prosecutor committed misconduct because he misstated the provocation needed to prove voluntary manslaughter on a heat of passion theory. We conclude appellant has forfeited appellate review of this issue because he failed to object to the prosecutor's statement in the trial court. (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590.) Had the contention not been forfeited, we would reject it because the prosecutor's statement did not amount to prejudicial misconduct.³

Voluntary manslaughter has both an objective and a subjective component. The defendant must actually , subjectively act in the heat of passion. (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.) Objectively, the circumstances that create the heat of

³ Appellant also contends trial counsel's failure to object to this argument constituted ineffective assistance of counsel. Because we conclude the prosecutor did not engage in prejudicial misconduct, the failure to object did not render defense counsel ineffective. (*People v. Espiritu* (2011) 199 Cal.App.4th 718, 726 [failure to object may constitute prejudicial ineffective assistance of counsel only where objection should properly have been sustained].)

passion must be sufficient to cause an ordinary, reasonable person to react " 'rashly or without due deliberation and reflection, and from this passion rather than from judgment.' " (*People v. Beltran* (June 3, 2013, S192644) ___ Cal.4th ___ [2013 WL 2372307 at p. 7.], quoting *People v. Logan* (1917) 175 Cal. 45, 49.) As our Supreme Court recently explained, "Heat of passion, then, is a state of mind caused by legally sufficient provocation that causes a person to act, not out of rational thought but out of unconsidered reaction to the provocation. While some measure of thought is required to form either an intent to kill or a conscious disregard for human life, a person who acts without reflection in response to adequate provocation does not act with malice." (*People v. Beltran* (June 3, 2013, S192644) ___ Cal.4th ___ [2013 WL 2372307 at p. 3].) This provocation must be sufficient to "cause an emotion so intense that an ordinary person would simply *react*, without reflection [T]he anger or other passion must be so strong that the defendant's reaction bypassed his though process to such an extent that judgment could not and did not intervene. Framed another way, provocation is not evaluated by whether the average person would *act* in a certain way: to kill. Instead, the question is whether the average person would *react* in a certain way: with his reason and judgment obscured." (*Id.* [2013 WL 2372307 at p. 8].)

This objective standard is based on the reaction of an ordinarily reasonable person, not "the reaction of a 'reasonable gang member.' " (*People v. Enraca* (2012) 53 Cal.4th 735, 759.) " '[N]o defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.' " (*People v. Steele* (2002) 27 Cal.4th 1230, 1252-1253, quoting *People v. Logan* (1917) 175 Cal.45, 49.)

It is certainly possible for a person who is carrying a firearm to be presented with circumstances that would cause an ordinarily reasonable person to react without reflection and with his or her reason and judgment obscured. Thus, the prosecutor would have misstated the applicable legal standard if he had argued that an armed person like appellant can never experience sufficient provocation to act in the heat of passion. That is not, however, a fair reading of the argument. We understand the prosecutor's argument to

have been that appellant did not actually shoot in the heat of passion because he was mentally and physically prepared for a fight. The jury could infer that appellant was not shocked or surprised when he became involved in a fight because he arrived at the party with a gun, expecting to become involved in a violent confrontation, and voluntarily entered the fight after others had started it. As a consequence, the jury could infer that his reason and judgment were not in fact overcome by passion and the shooting therefore constituted murder rather than voluntary manslaughter. (*People v. Lee* (1999) 20 Cal.4th 47, 60, fn. 6 [mutual combat form of voluntary manslaughter inapplicable where defendant takes undue advantage or uses a dangerous weapon].) This is a fair comment on the evidence that does not misstate the legal standard of provocation needed to reduce a murder to voluntary manslaughter. There is no reasonable likelihood the jury understood or applied the comments in an improper or erroneous manner. (*People v. Dykes* (2009) 46 Cal.4th 731, 771-772.)

Denial of Request to Substitute Counsel at Sentencing Hearing

After the jury returned its guilty verdict on March 13, 2012, the trial court scheduled appellant's sentencing hearing for May 18, 2012. On May 16, at appellant's request, the sentencing date was continued to June 6. Appellant and his trial counsel appeared at the June 6 hearing. Another attorney, Robin Bramson, informed the trial court that she had been approached by a third party about representing appellant for a new trial motion and for sentencing. It was her "understanding" that appellant also wanted her to substitute in as his counsel, although she had not spoken directly to him. Ms. Bramson requested "a continuance of two to three days so that we may be retained and paid by the third party" The trial court declined to grant the continuance. It reasoned that appellant's right to be represented by counsel of his choosing is not "absolute, particularly when a substitution would delay the proceedings or interfere with the process of justice. And I think that's exactly what would happen today should I allow Ms. Bramson to substitute in for Mr. Cassy on the date of sentencing." The trial court also noted that neither the parties nor the court received prior notice of Ms. Bramson's appearance or her request for a continuance. In addition, "it has been three months since [appellant's] conviction in

this matter and certainly almost a decade since the crime. So for those reasons I do find an attempted substitution . . . would delay the proceedings and interfere with the process of justice. So the request is denied."

Appellant contends the trial court's refusal to grant a continuance to allow him to retain Ms. Bramson as his counsel deprived him of his right to counsel in violation of the Sixth Amendment to the federal Constitution. We review the trial court's decision to deny a continuance of the sentencing hearing for abuse of discretion. (*People v. Snow* (2003) 30 Cal.4th 43, 77.) " [B]road discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay" violates the right to the assistance of counsel.' " (*People v. Alexander* (2010) 49 Cal.4th 846, 934-935, quoting *Morris v. Slappy* (1983) 461 U.S. 1, 11-12.)

There was no abuse. Appellant's sentencing hearing was continued once, at his request, and ultimately held nearly three months after the jury returned its verdict. Ms. Bramson first came to the trial court's attention at the hearing itself. Neither the parties nor the trial court had any prior notice of her appearance and she had not yet met with or been retained by appellant. Appellant's trial counsel had filed a motion to reduce the level of his offense from murder to voluntary manslaughter. Ms. Bramson offered no indication of whether she would withdraw that motion and file something else or how long she would need to decide on her approach to the sentencing hearing. There was no explanation for the untimely requests to continue the hearing and to substitute counsel, nor did appellant establish good cause for either request. In light of all these circumstances, the trial court acted within its discretion when it declined to continue the hearing or allow appellant to substitute new counsel. (*People v. Courts* (1985) 37 Cal.3d 784, 790-791; *People v. Jeffers* (1987) 188 Cal.App.3d 840, 850-851 [request for continuance made on day of trial properly denied where defendant failed to present trial court with "compelling circumstances" justifying request].)

*Criminal Street Gang Special Circumstance
and Sentence Enhancement*

The jury found true the special circumstance allegation that appellant committed the murder while he was an active member of Bad Boyz, a criminal street gang, and that he did so to further the gang's activities. (§ 190.2, subd. (a)(22).) It also found true the sentence enhancement allegation that appellant committed the murder for the benefit of, at the direction of, or in association with a criminal street gang. (§ 186.22, subd. (b)(1)(C).) Appellant contends these findings are not supported by substantial evidence.

Our role in evaluating a substantial evidence claim on appeal is a limited one. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We review the whole record to determine whether any rational trier of fact could have found the essential elements of the special circumstance or sentence enhancement allegation true beyond a reasonable doubt. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "The record must disclose substantial evidence to support the verdict—i.e., 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. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence." (*Id.*) We do not resolve credibility issues or conflicts in the evidence because these are matters for the jury. (*People v. Maury* (2003) 30 Cal.4th 342, 403.) "Even when there is a significant amount of countervailing evidence, the testimony of a single witness that satisfies the standard is sufficient to uphold the finding." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)" (*People v. Zamudio, supra*, 43 Cal.4th at p. 357.)

The prosecution alleged as a special circumstance that appellant "intentionally killed" Samuel Reeves while appellant "was an active participant in a criminal street gang," and "the murder was carried out to further the activities of the gang." (§ 190.2, subd. (a)(22).) To establish this special circumstance, the prosecution was required to prove: "1.

The defendant intentionally killed Samuel Reeves; [¶] 2. At the time of the killing, the defendant was an active participant in a criminal street gang; [¶] 3. The defendant knew that members of the gang engage in or have engaged in a pattern of criminal gang activity; and [¶] 4. The murder was carried out to further the activities of the criminal street gang." (Cal Crim. No. 736.)

Appellant does not challenge the evidence establishing his own active membership in Bad Boyz or Bad Boyz's status as a criminal street gang. He does, however, contend the evidence is insufficient to establish that he committed a murder "to further the activities of the gang." Appellant relies on the evidence that neither the victim nor the other participants in the fight were gang members. No gang signs were thrown prior to the shooting and appellant did not "claim" his gang or make any other statements related to gang membership either before or after the shooting. There was no evidence that anyone at the party knew who the shooter was or whether the shooter belonged to a gang.

There was, however, other evidence from which a reasonable jury could have found that appellant committed the murder to further the activities of the gang. Tom Mendez, a former Santa Paula police officer now employed as an investigator by the Ventura County District Attorney's office, testified as the prosecution's expert witness on criminal street gangs in Santa Paula. He opined that the idea of respect was very important to gang members, including members of the Bad Boyz. They equated respect with fear, and used fear to intimidate members of other gangs and members of the community. If the community did not respect and fear the Bad Boyz, they might be more willing to cooperate with law enforcement, thereby disrupting the gang's criminal activity. As a consequence, gang members could not tolerate disrespect from the community.

Investigator Mendez opined that, if a gang member intervened in a large fight involving non-gang members at a party, he would be putting the reputation of his gang at risk. If the community members did not respect the gang member by following his instruction to stop fighting, for example, they would be disrespecting both the gang and that specific member. The gang member would feel obligated to enforce respect for himself and the gang by retaliating, particularly with violence. Thus, a shooting carried out under these

circumstances would benefit or further the activities of the gang because the shooting would enforced "respect" for both the shooter and his gang.

According to the expert, "When the gang member goes into the situation and gives an order [to stop fighting], the first sign of disrespect is that that order is not followed. . . . A higher level of disrespect is if that gang member is punched or physically assaulted by a non-gang member." The gang member would be expected to "immediately deal" with this disrespect, both to preserve his status within the gang and to enhance others' "respect" for the gang. The gang member would also know that his "homeboys" would come to his rescue, if he is being punched or choked during the fight. "So at some point he's going to get the help that he needs and it's my opinion that shooting somebody in that situation is more to prove a point you disrespected me than to get himself out of that situation, because he knows help is on the way."

Mauricio Reyes, the former Bad Boyz member and "shot caller" who secretly recorded a conversation with appellant, corroborated Mendez' testimony in this regard. He testified as follows: "Q: . . . [I]f you are at a party, a large party, with members of your street gang and something happens and one of the members of the street gang moves in to sort of stop something, is that taking the impact of the gang to whatever that event is? [¶] A: Yes. [¶] Q: And so would that, in essence, be acting for the benefit or furtherance of the street gang? [¶] A: You could say that." Reyes confirmed that respect is a "very important concept" for Bad Boyz members. It is, he testified, the same thing as power or fear. According to Reyes, "Fear is probably the biggest factor in the Bad Boyz. Respect comes out of fear. That's how you establish your respect on the streets, through fear and intimidation."

Expert opinion that particular conduct benefited a gang by enhancing its reputation for violence can be sufficient to support the inference that the conduct "was carried out to further the activities of the gang[.]" within the meaning of section 190.2, subdivision (a)(22). (See, e.g., *People v. Albillar* (2010) 51 Cal.4th 47, 62; *People v. Carr* (2010) 190 Cal.App.4th 475, 489-490.) The jury could reasonably have relied on the testimony of Mendez and Reyes to find that appellant committed the murder to further the

activities of his criminal street gang because he believed his actions would enhance respect for (or fear of) his gang in the community and among other gang members.

For similar reasons, we conclude the sentence enhancement finding is supported by substantial evidence. Section 186.22, subdivision (b)(1) mandates an enhanced sentence for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further or assist in any criminal conduct by gang members" A reasonable jury could infer from the testimony of Mendez and Reyes that appellant committed the murder "for the benefit of" a criminal street gang because doing so would enhance his status within the Bad Boyz and "respect" for (or fear of) the gang in the community. (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.)

In addition, the evidence established that appellant attended the party with fellow gang members, at least one of whom came to his aid when his first efforts to stop the fight failed. Mendez testified that a gang member "knows that his fellow gang members have his back, that they are going to assist him in anything that he gets involved in. So the second he makes that decision to go into that crowd or that situation, he knows that he's not only making that decision for himself, he's making it for his entire gang. [¶] Because regardless of what goes down after he decides to get into that situation, his fellow gang members, his expectation of them is that they have his back. So no matter what happens he's gonna have their assistance." The jury could reasonably have relied on this testimony to infer that appellant committed the shooting "in association with" those other gang members. (*People v. Albillar, supra*, 51 Cal.4th at pp. 61-62; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1197-1198.)

Abstract of Judgment

The abstract of judgment in this matter reflects a parole revocation fine that is both inconsistent with the trial court's oral pronouncement of sentence and with appellant's sentence of life in prison without the possibility of parole. As a consequence, we will order the abstract of judgment to reflect the correct sentence. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.)

Disposition

The clerk of the superior court is directed to prepare and forward to the Department of Corrections a corrected abstract of judgment that omits the parole revocation fine. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Patricia Murphy, Judge
Superior Court County of Ventura

Mark D. Lenenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

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